ORIGINAL

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

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

MERIT BRIEF OF PLAINTIFF-APPELLANT OSNABURG TOWNSHIP ZONING INSPECTOR AND THIRD-PARTY DEFENDANT-APPELLANT OSNABURG TOWNSHIP

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STATEMENT OF FACTS

This case arose when Appellant, the Osnaburg Township Zoning Inspector, sought injunctive relief to prohibit expansion of Appellee Eslich Environmental, Incorporated's nonconforming use, a construction and demolition debris landfill located within a single-family residential district.

The Property and the Nonconforming Use

Eslich owns approximately 175 acres of property at 7280 Lisbon Street Southeast, Osnaburg Township, Stark County, Ohio. This property is controlled by Osnaburg Township's Zoning Resolutions, first adopted in 1961; the property is within an area zoned R-1 single-family residential pursuant to Osnaburg Township Zoning Resolution §702.[1]

Eslich purchased the property in 1989 for the purpose of operating a construction and demolition debris disposal (C & DD) facility on the property. The operation of a C & DD landfill is not a permitted use in an R-1 single family residential district, but the Osnaburg Township Board of Zoning Appeals issued a Certificate of Nonconforming Use to Eslich on March 26, 1990, pursuant to Article X of the Osnaburg Township Zoning Ordinances.[2]

Eslich operated a C & DD landfill on the property from 1989 until 1996. In 1996, non-party Stark C & D leased the property from Eslich and took over the C & DD landfill operation. Stark C & D has continuously operated the landfill from 1996 to the present.[3]

The C & DD landfill is licensed through the Stark County Board of Health; 20.2 acres are

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[1]Stipulated Facts, ¶¶2-5 (Appx. 42).

[2]Stipulated Facts, ¶¶6-9 (Appx. 42-43), Board of Zoning Appeals Certificate of Nonconforming Use (Appx. 45).

[3]Stipulated facts, ¶¶11-13 (Appx. 43).

licensed for active disposal, and another 8.5 acres are described as "inactive licensed disposed area." The Stark County Board of Health has approved and renewed Stark C & D's license every year from 1996 until the present.[4]

The Township Becomes Aware of a Plan to Expand

In 2006, Stark C & D applied to the Stark County Board of Health to increase the inactive licensed disposal area from 8.5 acres to 95.5 acres. 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.[5]

On November 28, 2007, the Stark County Board of Health denied the application for expansion.[6]

The Litigation

This litigation arose on May 30, 2007, when Appellant, the Osnaburg Township Zoning Inspector, filed a Complaint and Motion for Temporary Restraining Order to prevent the unapproved expansion.[7]

This appeal arises from Eslich's 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)

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[4]Stipulated Facts, ¶¶14-17 (Appx. 43).

[5]Stipulated Facts, ¶16 (Appx. 43), Osnaburg Township Zoning Ordinances Article X, Section 1001.1(A) (Appx. 33).

[6]Stipulated Facts, ¶16.

[7]The parties agreed that the preparation activities on the property did not yet constitute a zoning violation and, therefore, no restraining order was necessary.

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 alone, thereby disposing of the entire case.[8]

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*[9] because Osnaburg township zoning does not absolutely prohibit C & DD landfills: C & DD disposal facilities are permitted in industrial districts. The Fifth District Court of Appeals affirmed the decision of the trial court, however, holding that Osnaburg Township's single-family residential zoning classification is preempted by Revised Code Chapter 3714 as to the acreage that is licensed by the Stark County Board of Health for active disposal.[10]

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

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[8]Stark County Court of Common Pleas Case No. 2007CV02262, Judgment Entry (Nunc Pro Tunc), 6 (Appx. 23).

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

[10]*Osnaburg Twp. Zoning Inspector v. Eslich Environmental, Inc.*, Stark App. No. 2008-CA-00026, 2008-Ohio-6671, ¶57 (Appx. 16).

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.

ARGUMENT

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 & DD 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.]

I. Introduction

The legal issue presented by this case is straightforward. The question that this Court's 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. This Court's preemption jurisprudence does however implicitly and explicitly consider 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, a nonexistent "conflict" is found and the result may effectively eliminate local zoning and land use controls.

The challenged decision of the Fifth District Court of Appeals compels the 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 & DD 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, and why those

controls have been protected by decisions of this Court and lower courts.

II. C & DD Landfills and Ohio Revised Code Chapter 3714

On July 24, 1990, the Ohio General Assembly enacted Am.Sub.H.B. No. 366, comprehensive legislation designed to regulate construction and demolition debris facilities, codified as R.C. Chapter 3714. This legislation granted jurisdiction to regulate the licensing and operation of C & DD facilities to the Ohio Environmental Protection Agency and to boards of health that are on an approved list.[11] The Director of the Ohio E.P.A. adopted rules codified at Ohio Adm.Code 3745-400 *et seq.* These regulations require owners and operators of C & DD facilities to obtain operation licenses.

"Construction and demolition debris" means "those materials resulting from the alteration, construction, destruction, rehabilitation, or repair of any manmade physical structure, including, without limitation, houses, buildings, industrial or commercial facilities, or roadways;" examples include, e.g., brick, concrete, plumbing fixtures, heating equipment, electrical wiring, and wall-to-wall carpet.[12] "Construction and demolition debris" does not include any material identified as solid wastes, hazardous wastes, or infectious wastes pursuant to R.C. Chapter 3734.[13]

III. Township Zoning Authority

Township zoning authority arises from a different source than that of municipalities. Municipalities receive a grant of legislative zoning authority directly from the Ohio Constitution's Home Rule Amendment. Townships, though, "have no inherent or constitutionally granted police

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[11]R.C. 3714.02, 3714.05.

[12]R.C. 3714.01(C); Ohio Adm.Code 3745-400-01(F).

[13]Id.

power, the power upon which zoning legislation is based. Whatever police or zoning power townships of Ohio have is that delegated by the General Assembly, and it follows that such power is limited to that which is expressly delegated to them by statute."[14]

With R.C. Chapter 519, the General Assembly delegated to townships the ability to regulate land use within the townships' unincorporated areas. R.C. 519.02(A) states in pertinent part:

> ...[I]n the interest of public health and safety, the board of township trustees may regulate by resolution, in according with a comprehensive plan...the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated areas of the township....For all these purposes, the board may divide any and all part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones....

Township zoning power is not any less powerful than municipal zoning simply because its source is statutory rather than constitutional. This Court has noted that "[t]his clear statutory authority has the same force and effect as the constitutional authority of home rule municipalities to regulate local land use."[15] The legal principles applied to municipal zoning cases therefore may be extended to township zoning cases.[16]

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[14]*Yorkavitz v. Township Trustees* (1957), 166 Ohio St. 349, 351, 2 O.O.2d 255, 142 N.E.2d 655. See, *Torok v. Jones* (1983), 5 Ohio St.3d 31, 32, 448 N.E.2d 819.

[15]*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.

[16]The conflict analyses enunciated in *Sheffield* and *Fondessy* have been applied to township zoning cases and should be in this case as well, as discussed infra. *Aluminum Smelting & Refining Co., Inc. v. Denmark Tp. Zoning Bd. of Zoning Appeals*, Ashtabula No. 2001-A-0050, 2002-Ohio-6690, ¶24, appeal not allowed, 98 Ohio St.3d 1538, 2003-Ohio-1946, 786 N.E.2d 901.

IV. The Coexistence of State Regulation and Local Zoning Authority

Zoning power is not without its limits, but its importance in promoting the "public health and safety" cannot be underestimated.[17] "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life..."[18]

Zoning is a tool that allows local governments to plan their communities, especially the location, size, and extent of uses that are not necessarily compatible side-by-side with other types of uses, such as, e.g., medical waste disposal facilities,[19] strip mines,[20] oil and gas wells,[21] campgrounds,[22] and mobile home parks,[23] even though these uses are also subject to state and federal regulation.

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[17]*Ketchel v. Bainbridge Tp.* (1990), 52 Ohio St.3d 239, 557 N.E.2d 779, 782-783, cert. denied (1991), 498 U.S. 1120, 111 S.Ct.1073, 112 L.Ed.2d 1178, citing R.C. 519.02 ["The purpose of zoning is, in part, to protect public health and safety....An adequate supply of safe water for domestic use is vital to public health. Bainbridge Township has a legitimate interest in assuring that its residents are not faced with a shortage of pollution-free water. This is a proper objective of zoning."]

[18]*Schenck v. City of Hudson* (C.A. 6, 1996), 114 F.3d 590, 593-594, quoting *Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61, 68, 101 S.Ct. 2176, 68 L.Ed.2d 671.

[19]See, *Health Mgt., Inc. v. Union Twp. Bd. Of Zoning Appeals* (1997), 118 Ohio App.3d 281, 692 N.E.2d 667.

[20]See, *East Fairfield Coal Co. v. Miller Zoning Inspector* (1955), 71 Ohio Law Abs. 490; 1981 Ohio Atty.Gen.Ops. No. 81-065.

[21]See, *Northampton Bldg. Co. v. Sharon Twp. Bd. of Zoning Appeals* (1996), 109 Ohio App.3d 193, 671 N.E.2d 1309.

[22]See, *Painesville Tp. v. Buss* (May 17, 1996), Trumbull App. No. 94-L-101, unreported, cert. denied, *Buss v. Painesville Tp.* (1997), 520 U.S. 1240, 117 S.Ct. 1843, 137 L.Ed.2d 1047.

[23]See, *Moscow v. Skeene* (1989), 65 Ohio App.3d 785, 585 N.E.2d 493.

Courts have recognized the distinct purposes, yet harmonious coexistence, of local zoning and state regulation.[24] E.P.A. regulation of solid waste disposal sites, as described in Chapter 3734, coexists with local zoning.[25] 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.[26] 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."[27] Nuisance litigation co-exists with solid waste disposal regulation.[28]

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[24]See, *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.")

[25]*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"].

[26]*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.

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

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

In short, the existence of statutory regulation for C & DD landfills does not mean that townships lose their ability to determine the most appropriate uses of land through zoning.[29]

Zoning is particularly significant to local communities when dealing with siting and other issues related to landfill regulation. As one author noted:

> At times, the state's interest in expanding landfill capacity may contradict the interests of local government. [Citation omitted.] In addressing this potential conflict, the General Assembly, rather than preempting all local regulations, instead yielded to local control of landfill siting and operation by allowing political subdivisions to enforce their zoning and nuisance abatement restrictions against properly licensed solid waste disposal facilities. [Citations omitted.] Consequently, the number of solid waste landfills in Ohio has continued to decline, while demand for alternative methods of solid waste disposal has flourished.
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> Krier, Ohio's Sanitary Landfills: State and Local Regulation of Solid Waste Disposal Facilities (1995), 63 U. Cin.L.Rev. 817, 821.

Chapter 3714 of the Ohio Revised Code addresses inspection, permits, and licensing of C & DD facilities.[30] Throughout Chapter 3714, there is an emphasis on the dual roles of the board of health of the local health district (local authority) and the director of the Environmental Protection Agency (state authority) in regulating the facilities.[31]

R.C. Chapter 3714 contains no attempt by the General Assembly to preempt reasonable local regulation that does not completely prohibit the disposal of construction and demolition debris. The necessary conclusion is that reasonable regulation by local government is allowed. If the General Assembly had intended a different result, it could have said so in express terms, just as it did in R.C.

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

[30]See, R.C. 3714.02(A).

[31]See, R.C. 3714.021(C).

3734.05(E), which addresses solid and hazardous waste regulations:

> No political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or condition for the construction or operation of a hazardous waste facility authorized by a hazardous waste facility installation and operation permit issued pursuant to this chapter, nor shall any political subdivision adopt or enforce any law, ordinance, or rule that in any way alters, impairs, or limits the authority granted in the permit.

Instead, in the case of C & DD facilities, there is no express or implied legislative intent that may be read to prohibit appropriate zoning.

V. The Osnaburg Township Zoning Resolutions: Permitting a C & DD Landfill in a Residential District as a Nonconforming Use but Requiring a Permit for Expansion

The Osnaburg Township Zoning Resolutions were first adopted in 1961. From initiation of zoning, the area containing Eslich's property has been designated as an R-1 Single Family Residential District.[32] When this litigation was initiated, the present version of the Osnaburg Township Zoning Resolution (*sic*), adopted in October 2000, was in effect.[33]

It is undisputed that a C & DD landfill is not a permitted use within an R-1 Single Family Residential District.[34] It is also undisputed that a C & DD landfill is a conditionally-permitted use within the Township's I-2 General Industrial District.[35]

Nevertheless, the C & DD landfill at issue in this case has been permitted to operate since

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[32]Stipulated Facts, ¶5 (Appx. 42).

[33]Appx. 27.

[34]Stipulated Facts, ¶6 (Appx. 42); Osnaburg Township Zoning Resolution Section 702, (Appx. 29).

[35]Stipulated Facts, ¶7 (Appx. 43); Osnaburg Township Zoning Resolution Section 722.2(B) (Appx. 32).

March 26, 1990 as a nonconforming use in the R-1 Residential District.[36] No problem arose until the township became aware that Eslich planned to expand without evincing any intent to seek permission from the Board of Zoning Appeals. Pursuant to Osnaburg Township Zoning Resolution Section 1001.1(A), enlargement of a nonconforming use requires a permit from the Board of Zoning Appeals:

> A. Alterations and Enlargement
>
> 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.

This case originated when Eslich sought to expand its licensed area through the Stark County Board of Health without seeking approval for expansion of its nonconforming use. By granting summary judgment on Eslich's preemption counterclaim, the trial court, and subsequently the Court of Appeals, turned an error of law into a strike to the heart of township zoning.

VI. The Court of Appeals Erred in Holding that the Local Zoning Ordinances are Preempted by R.C. Chapter 3714.

Eslich argued, and the trial court and Fifth District Court of Appeals agreed, that Osnaburg Township Zoning Resolution Section 702 (R-1 Single Family Residential District) is preempted by R.C. Chapter 3714 because C & DD facilities are not a permitted use within an R-1 district. This conclusion ignores the weight of this Court's preemption jurisprudence and ignores the key facts of the case, to wit, that C & DD facilities are permitted within I-2 Industrial Districts pursuant to the

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[36]Osnaburg Township Zoning Resolution Section 1001 (Appx. 33), Board of Zoning Appeals Certificate of Nonconforming Use (Appx. 45).

Zoning Resolutions and in fact this facility has been in continuous operation for twenty years as a nonconforming use.

A. The test for preemption.

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.[37] The parties agree that the Osnaburg Township Zoning Ordinances are an exercise of the police power, rather than of local self-government.[38] The parties also agree that the state regulations at issue, Revised Code Chapter 3714, are "general laws."[39] Pursuant to the line of authority culminating in and flowing from *Sheffield v. Rowland*, however, there is no conflict between the pertinent Osnaburg Township zoning resolutions and Chapter 3714.

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, and vice versa."[40] In other words, does the local law penalize an act which the state law authorizes?

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[37]*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.

[38]*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."]

[39]*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..."]

[40]*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.

To answer this question, this Court has endorsed "look[ing] at a comprehensive regulatory enactment as a whole;"[41] *a fortiori,* the local regulatory enactment must be evaluated as a whole as well. The Fifth District Court of Appeals erred 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.* When read *in pari materia,* the Osnaburg Township Zoning Resolutions do not prohibit anything R.C. Chapter 3714 allows. C & DD landfills are permitted in I-2 Industrial Districts[42] and may even be found in other districts as nonconforming uses,[43] just as the Eslich property landfill operated in a single-family residential district.

B. The importance of *Sheffield v. Rowland*[44] and the *Fondessy*[45] test in determining whether local ordinances conflict with state laws.

In the instant case, the appellate court viewed the Single Family Residential classification in isolation, summarily found that C & DD 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.*[46]

In *Sheffield,* the village brought a declaratory judgment action against a developer who

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

[42]Osnaburg Township Zoning Resolution Section 722.2(B)(3) (Appx. 52).

[43]Osnaburg Township Zoning Ordinance Article X (Appx. 33).

[44]*Sheffield*, supra, 87 Ohio St.3d at 9.

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

[46]Id.

proposed construction of a C & DD facility in an industrial district on the basis that the facility would violate a number of the village zoning ordinances. The developer counterclaimed, arguing in part that Chapter 3714 preempted the local ordinances. As in the instant case, the trial court granted summary judgment to the developer on the preemption issue.

The case made its way to this Court, where a number of definitive principles of preemption were applied in the context of C & DD facilities. First, the Court determined that zoning ordinances are an exercise of the police power.[47] Second, the Court held that R.C. Chapter 3714 is a general law.[48] Finally, the Court compared the Sheffield ordinances with the regulations contained in R.C. Chapter 3714 and found that even upon compliance with the state regulations and the issuance of a license, C & DD facilities are still completely prohibited under the terms of the local zoning ordinances. The unavoidable conclusion reached is that "the ordinances prohibit what the statute permits and are therefore in conflict with R.C. Chapter 3714."[49]

Reading the Sheffield ordinances *in pari materia,* C & DD landfills were completely prohibited anywhere in the township. It is 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.)

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[47]*Sheffield,* supra, 87 Ohio St.3d at 10-11, citing *Fondessy*, supra, 23 Ohio St.3d 213 at paragraph one of the syllabus.

[48]*Sheffield*, supra, 87 Ohio St.3d at 11.

[49]Id., 87 Ohio St.3d at 12.

> *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. (Emphasis added.)

While acknowledging the conflict, this Court stressed the surviving importance of zoning in terms of determining where state-regulated facilities are located.

Sheffield is, therefore, distinguishable from the instant case because no complete prohibition exists; C & DD landfills are permitted in industrial districts, thereby eliminating the direct conflict at issue in *Sheffield.*

The decision of the Fifth District Court of Appeals must be reversed because the court overlooked the rationale of *Sheffield* and ruled that because C & DD landfills are prohibited in Single Family Residential districts, zoning must yield altogether to R.C. Chapter 3714.[50] (Eslich has never argued that the ordinances otherwise "alter, impair, or limit" the operations of the C & DD facility.)[51] This conclusion is in error because it disregards this Court's cautionary instruction in *Sheffield* and thereby renders township zoning meaningless in the context of C & DD 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.

C. The progeny of *Sheffield.*

The Twelfth District Court of Appeals agreed that *Sheffield's* finding of preemption is premised upon the complete prohibition of C & DD landfills. In a similar case, the Twelfth District

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[50]Eslich'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.

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

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.[52]

In its conflict analysis, the court looked at the Warren County ordinances *in pari materia* and 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.[53] Significantly, the court held that the township could control the location of the landfill at issue but could not prohibit its existence altogether.[54]

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.[55] The C & DD 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.

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[52]*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.

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

[54]Id., at *2.

[55]*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.

CONCLUSION

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."[56] 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, decisions such as that of the Fifth District Court of Appeals may be used to effectively 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 reverse the decision of the Fifth District Court of Appeals.

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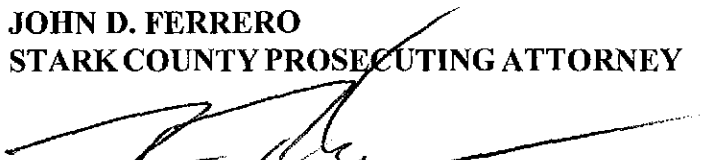
[56]*Canton v. State*, 95 Ohio St.3d 149, 152-153, 2002-Ohio-2005, 766 N.E.2d 963, citing *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St.3d 44, 442 N.E.2d 1278, and *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted* (1992), 65 Ohio St.3d 242, 602 N.E.2d 1147, and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

Respectfully submitted,

JOHN D. FERRERO
STARK COUNTY PROSECUTING ATTORNEY



BY:_____

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PROOF OF SERVICE

A copy of the foregoing MERIT BRIEF OF PLAINTIFF-APPELLANT OSNABURG TOWNSHIP ZONING INSPECTOR AND THIRD-PARTY DEFENDANT-APPELLANT OSNABURG TOWNSHIP was sent to the following by regular mail this 14th day of July, 2009:

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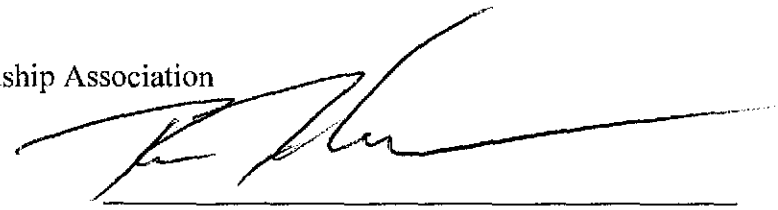

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ROSS RHODES

Counsel for Plaintiff-Appellant and Third-Party Defendant-Appellant.

APPENDIX

OSNABURG TOWNSHIP ZONING INSPECTOR,
Plaintiff-Appellant,

v.

ESLICH ENVIRONMENTAL, INC.,
Defendant-Appellee,

v.

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

Notice of Appeal 1

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IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

OSNABURG TOWNSHIP ZONING INSPECTOR, **Plaintiff-Appellant,**	)	**CASE NO. 09-0228**
v.	)	
ESLICH ENVIRONMENTAL, INC., **Defendant/ Third-Party Plaintiff-Appellee,**	)	**ON MOTION FOR LEAVE TO APPEAL FROM THE OHIO COURT OF APPEALS FOR STARK COUNTY, FIFTH APPELLATE DISTRICT, CASE NO. 2008-CA-00026**
v.	)	
OSNABURG TOWNSHIP, et al., **Third-Party Defendant-Appellant.**	)	

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT OSNABURG TOWNSHIP ZONING INSPECTOR AND THIRD-PARTY DEFENDANT-APPELLANT OSNABURG TOWNSHIP

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FILED
JAN 30 2009
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT OSNABURG TOWNSHIP ZONING INSPECTOR AND THIRD-PARTY DEFENDANT-APPELLANT OSNABURG TOWNSHIP

The Osnaburg Township Zoning Inspector, and Osnaburg Township, through the undersigned Prosecuting Attorney, hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals for Stark County, Fifth Appellate District, entered in the Court of Appeal Case Number 2008-CA-00026 entered on December 16, 2008.

The case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

JOHN D. FERRERO, JR.
STARK COUNTY PROSECUTING ATTORNEY

BY: Amy A. Sabino

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PROOF OF SERVICE

A copy of the foregoing NOTICE OF APPEAL 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.

AMY A. SABINO

Counsel for Plaintiff-Appellant and
Third-Party Defendant-Appellant.

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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MARCIA S. FEINGOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

OSNABURG TOWNSHIP ZONING INSPECTOR,	:	
	:	JUDGMENT ENTRY
Plaintiff-Appellant	:	
ESLICH ENVIRONMENTAL INC.,	:	
	:	Case No. 2008CA00026
Defendant/ Third-Party Plaintiff-Appellee,	:	

-vs-

OSNABURG TOWNSHIP, et al.,

Third-Party Defendants-Appellants.

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed in part, reversed in part and cause remanded for proceedings consistent with the Memorandum-Opinion. Costs assessed equally to the parties.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
08 DEC 15 AM 10: 10

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

OSNABURG TOWNSHIP ZONING INSPECTOR,	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008CA00026
ESLICH ENVIRONMENTAL INC.,	:	
	:	
	:	
Defendant/ Third-Party Plaintiff-Appellee,	:	O P I N I O N

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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STANLEY P. RUBIN
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Canton, Ohio 44702

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A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By ..... 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.

{¶8} 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.

{¶9} 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-I 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.

{¶56} 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.

{¶57} 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.

{¶58} 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

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

2008 JAN 17 AM 11: 32

OSNABURG TOWNSHIP ZONING INSPECTOR,	)	CASE NO. 2007CV02262
Plaintiff,	)	JUDGE TARYN L. HEATH,
vs.	)	
ESLICH ENVIRONMENTAL, INC.	)	JUDGMENT ENTRY (Nunc Pro Tunc)
Defendant.	)	

This matter came before the Court upon Defendant's Motion for Partial Summary Judgment, Plaintiff's Response and Defendant's Reply as well as Plaintiff's Motion for Summary Judgment, Defendant's Response and Plaintiff's Reply.

I. Procedural Background & Review of Operative Facts

Defendant, Eslich Environmental, Inc. ("Eslich") is the owner of a 175-acre parcel of real property located at 7280 Lisbon St., S.E. Osnaburg Township, Stark County, Ohio (the "Property"). Eslich purchased the property in 1989 and has since permitted the operation of a construction and demolition debris landfill ("C&DD disposal facility") on the Property. The Property is an area that has been designated as an R-1 Single Family Residential District pursuant to Osnaburg Township Zoning Resolution § 702. The Property has been designated as a Single Family Residential District since the establishment of zoning regulations in 1961. After the defendant's purchase of the Property a nonconforming use certificate was issued to the defendant in 1990.

Eslich leases the Property to Stark C&D Disposal, Inc. ("Stark C&D"), which, since 1996, has operated the C&DD disposal facility on the Property. In 1996, state regulations were adopted by the Ohio EPA to regulate such disposal sites through the local health departments. In 2004, the health department approved an additional 8.5 acres for preparation as a disposal area. The Stark County Board of Health has approved and renewed Stark C&D's license every year from 1996 to the present. Stark C&D is presently licensed by the Stark County Health Department for twenty and two/tenths (20.2) acres of "active licensed disposal area" and an additional 8.5 acres of "inactive licensed disposal area." 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. The Stark County Board of Health denied this application on November 28, 2007.

On May 30, 2007, Plaintiff, the township zoning inspector, authorized to enforce the township zoning resolution, filed a complaint for injunctive relief to prevent any expansion of the nonconforming use. Upon consultation with the Court on June 1, 2007, the parties agreed that no imminent use of the area outside the twenty-acre active licensed disposal area would occur and the matter was submitted to the Court for determination. Defendant filed its Answer, Affirmative Defenses, and Counterclaims on June 27, 2007. A Third-Party Complaint was filed with leave of this Court on September 19, 2007 restating Defendant's counterclaim allegations.

Defendant alleges 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 zoning regulations adopted by Osnaburg Township are pre-empted 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). It is upon Count II of Defendant's Counterclaim and Third-Party Complaint that Defendant seeks summary judgment. Both 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" and, therefore, is invalid, as applied, to the defendant's licensed C&DD disposal facility.

II. Summary Judgment Standard

Summary judgment is appropriate where no genuine issues of material fact exist and the undisputed facts entitle the moving party to judgment as a matter of law. *Ohio Civil Rule 56(C); Harless v. Willis Day Warehousing, Co., Inc. (1978)*, 54 Ohio St.2d 64, 375 N.E.2d 46. The Ohio Supreme Court, in *Dresher v. Burt (1996)*, 75 Ohio St.3d 280, 662 N.E.2d 264, more specifically outlined the duties of the parties in summary judgment proceedings as follows:

> Accordingly, we hold that a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. *The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.* If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary

judgment, if appropriate, shall be entered against the nonmoving party. (Emphasis added.)

See also, Vahila v. Hall (1977), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (citing *Dresher v. Burt* (1966) 75 Ohio St.3d 280, 662 N.E.2d 264).

III. Law and Argument

Defendants allege in Count II of their Counterclaim and Third-Party Complaint that the zoning regulations adopted by Osnaburg Township are pre-empted by Ohio law applicable to the licensing of C&DD disposal facilities. It is established law in Ohio that "zoning ordinances 'are subject to the constitutional provision that they are not to be in conflict with general law.'" *Sheffield v. Rowland*, 87 Ohio St.3d 10, 11 (1999); *quoting Garcia v. Siffrin Residential Assn.*, 63 Ohio St.2d 270, 271 (1980); *citing State ex. rel. Klapp v. Dayton Power and Light Co.*, 10 Ohio St.2d 14 (1967). If a zoning ordinance is in conflict with general state law, the state regulation will prevail, and that zoning ordinance will be struck down. *Sheffield*, 87 Ohio St.3d at 13. "General laws are defined as those 'operating uniformly throughout the state...which prescribe a rule of conduct upon citizens generally, and which operate with general uniform application throughout the state under the same circumstances and conditions.'" *Sheffield*, 87 Ohio St.3d at 11 (1999); *quoting Garcia v. Siffrin Residential Assn.*, 63 Ohio St.2d 259, 271 (1980). Chapter 3714 of the Ohio Revised Code is a general law that governs the licensing and regulation of C&DD disposal facilities in the State of Ohio. *Sheffield*, 87 Ohio St.3d at 11 (1999). C&DD facilities that are governed by Chapter 3714 of the Ohio Revised Code include proposed or "new construction and demolition debris facility" as well as existing facilities that are "proposing to expand the facility beyond the limits of construction and

demolition debris placement approved by a board of health..." OHIO REV. CODE § 3714.01 (G) (Anderson 2007).

The test to determine when a conflict exists between a municipal ordinance and a general law of the state is "whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Struthers v. Sokol*, 108 Ohio St. 263 (1923). In the context of a zoning resolution and a C&DD disposal facility, the crucial "conflict test" is explained by the Ohio Supreme Court in *Sheffield*:

> Upon compliance with the requirements of R.C. Chapter 3714 and the issuance of a license, the operator of a proposed construction and demolition debris facility is authorized to establish such a facility. R.C. 3714.06(A). However, it is readily apparent that the Sheffield Village 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. In *Sheffield*, because the local zoning ordinances were in conflict with Chapter 3714 of the Revised Code, the Supreme Court of Ohio held that the local ordinances were preempted by State law and struck down the local zoning ordinances as they applied to the C&DD operator. *Id.* at 12-13. Further, in *Aluminum Smelting*, the Court found that a township's zoning ordinance, which prohibited the operation of an already in existence captive industrial waste landfill licensed by Ohio EPA, was in conflict with the state's general solid waste disposal law in R.C. Chapter 3734 and, therefore, under *Sheffield*, was invalid. *Aluminum Smelting & Refining Co. v. Denmark Twp. Board of Zoning Appeals*, 2002 Ohio 6690 (Ashtabula Cty. 2002). The Court in *Aluminum* held that "municipal requirements which alter, impair or limit the operation of state-licensed waste facilities are not valid."*Id.* at 5; *citing Fondessy Enterprises Inc. v. Oregon*, 23 Ohio St.3d 213 (1986).

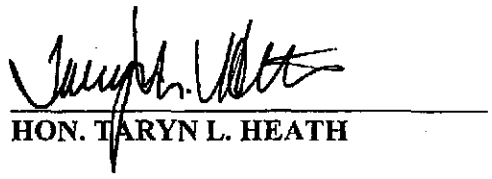
In *Sheffield*, the defendant *proposed* to construct and operate a C&DD debris facility in the village of Sheffield and the Ohio Supreme Court held that preemption invalidated the ordinance that prevented the construction of the facility. In the present action the C&DD debris facility is *already in existence* on the Property and is attempting to expand the facility. Thus, pursuant to R.C. § 3714.01(G) the Stark C&D facility is governed by Chapter 3714. Further, the Stark C&D facility and the expansion are and have been in compliance with the requirements of R.C. Chapter 3714 for the length of its existence and the facility and the expansion have been issued a license to operate at the Property.

Pursuant to Ohio case law as well as governing Ohio statutory law, this Court finds it only logical to conclude that when preemption applies to invalidate an ordinance that prevents a C&DD facility from being constructed, preemption clearly applies to invalidate an ordinance that arguably prevents the continued operation of a state-licensed C&DD facility. Therefore, pursuant to Ohio law, this Court finds that Article X of the Zoning Resolution of Osnaburg Township as applied to the Property is invalid 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. In finding that there is a conflict, the state regulation prevails and R.C. Chapter 3714 preempts Article X of the Zoning Resolution of Osnaburg Township.

IV. Conclusion

Accordingly, Defendant, Eslich Environmental, Inc.'s, Motion for Partial Summary Judgment is hereby **GRANTED** and Plaintiff, Osnaburg Township Zoning Inspector's, Motion for Summary Judgment is hereby **OVERRULED.**

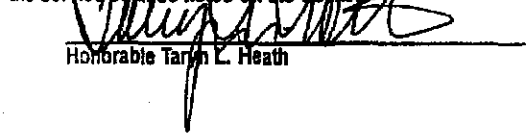
IT IS SO ORDERED.



HON. TARYN L. HEATH

c: Michael A. Cyphert/Bonnie S. Finley/Leslie G. Wolfe
Stanley R. Rubin
Sharon D. Miller/Lisa Barr

NOTICE TO CLERK:
FINAL APPEALABLE ORDER
IT IS HEREBY ORDERED that notice and a copy of the foregoing Judgment Entry shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket.



Honorable Taryn L. Heath

Baldwin's Ohio Revised Code Annotated Currentness
Title V. Townships
Chapter 519. Township Zoning (Refs & Annos)
Adoption of Zoning Plan
519.02 Township trustees may regulate building and land use in unincorporated territory for public purpose and zoning procedures relating to adult entertainment establishments

(A) Except as otherwise provided in this section, in the interest of the public health and safety, the board of township trustees may regulate by resolution, in accordance with a comprehensive plan, the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures, including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township. Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board by resolution, in accordance with a comprehensive plan, may regulate the location of, set back lines for, and the uses of buildings and other structures, including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township, and may establish reasonable landscaping standards and architectural standards excluding exterior building materials in the unincorporated territory of the township. Except as otherwise provided in this section, in the interest of the public convenience, comfort, prosperity, or general welfare, the board may regulate by resolution, in accordance with a comprehensive plan, for nonresidential property only, the height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, sizes of yards, courts, and other open spaces, and the density of population in the unincorporated territory of the township. For all these purposes, the board may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones.

For any activities permitted and regulated under Chapter 1513. or 1514. of the Revised Code and any related processing activities, the board of township trustees may regulate under the authority conferred by this section only in the interest of public health or safety.

(B) A board of township trustees that pursuant to this chapter regulates adult entertainment establishments, as defined in section 2907.39 of the Revised Code, may modify its administrative zoning procedures with regard to adult entertainment establishments as the board determines necessary to ensure that the procedures comply with all applicable constitutional requirements.

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CREDIT(S)

(2006 H 23, eff. 8-17-06; 2004 H 411, eff. 5-6-05; 2004 S 18, eff. 5-27-05; 2004 H 148, eff. 11-5-04; 127 v 363, eff. 9-17-57; 1953 H 1; GC 3180-26)

Current through 2009 File 1 of the 128th GA (2009-2010), apv. by 6/16/09 and filed with the Secretary of State by 6/16/09.

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INTRODUCTION

ZONING RESOLUTION FOR OSNABURG TOWNSHIP

STARK COUNTY, OHIO

WHEREAS, the Board of Trustees of Osnaburg Township, Stark County, Ohio, has deemed it advisable to promote the public health, safety, and general welfare for the residents of said township; and,

WHEREAS, a zoning resolution for the building and land use within the unincorporated territory of the township was adopted in 1961, in accordance with Section 519.10 and related sections of the Ohio Revised Code; and,

WHEREAS, five (5) persons have been duly appointed by the Board of Trustees of Osnaburg Township to serve as a Zoning Commission for said Township; and,

WHEREAS, said Zoning Commission has recommended the complete revision of the Osnaburg Township Zoning Resolution and Official Zoning Map, and have submitted such amendments and map to the Board of Trustees of Osnaburg Township under the authority and in accordance with the provisions of Section 519.12 of the Ohio Revised Code on May 19, 2008.

THEREFORE, the Board of Trustees of Osnaburg Township did adopt the amendments to the Zoning Resolution and map on June 23, 2008, under the authority and in accordance with the provisions of the Ohio Revised Code, and said amendments became effective on July 23, 2008.

two hundred (200) feet to any residence, the stack shall be at least twenty-five (25) per cent of the height of the eave line of the residence, plus an additional two (2) feet.

SECTION 702 R-1 SINGLE FAMILY RESIDENTIAL DISTRICT

SECTION 702.1 PURPOSE

This district is established to accommodate single-family residential dwellings in areas expected to be served with central sewer and/or water facilities.

SECTION 702.2 USES

Within an R-1 Single Family Residential District no building, structure, or premises shall be used, arranged to be used, or designed to be used except for one or more of the following uses:

A. Permitted Uses
   1. Single-family dwelling.
   2. Public buildings.
   3. Churches and other buildings for the purpose of religious worship.
   4. Roadside stands (agricultural).
   5. Accessory uses or structures incidental to the principal use which do not include any activity conducted as a business.
   6. Signs as permitted and regulated by Article VIII.
   7. Off-street parking as permitted and regulated in Article IX.
   8. Licensed family home (for the developmentally disabled).
   9. Home occupations: as permitted and regulated in Article VI Section 603.09

B. Conditionally Permitted Uses

   The Board of Zoning Appeals may issue Conditional Zoning Certificates For uses listed herein subject to the general requirements of Article XI and to the specific requirements of Article XI, referred to below:
   1. Surface Mining and/or Strip Mining under the direction of the Ohio Department of Natural Resources (ODNR) as permitted and regulated by Article XI Section 1103.
   2. Cemetery, subject to Subsections 103, 106, 117, 123.
   3. Home occupations, subject to Subsection 113, 120.
   4. Institutions for education, subject to Subsections 101, 102, 103, 104, 105, 106, 109, 123, 127.
   5. Private or governmentally owned and/or operated picnic areas, playgrounds, parks, swimming facilities, golf courses, tennis clubs, country clubs, riding academies, and other similar recreational facilities or uses, but excluding such commercial recreation uses as drive-in theaters, miniature golf and golf driving ranges, subject to Subsections 101, 102, 103, 104, 105, 108, 112, 119, 120, 123, 124, 129.
   6. Private Fire Stations subject to Subsections 112, 123, and 127.
   7. Group dwellings limited to detached single-family dwellings, subject to Subsections 105, 107, 109, 114, 125, 126, 127, 143.

SECTION 702.3 MINIMUM LOT AND YARD REQUIREMENTS

Lot Area	Lot Frontage	Lot Width at Building Line	Front Yard Dept	Rear Yard Depth	Side Yard Depth
Without Central Sewer System:					
20,000 sq. ft.	50 feet	100 feet	40 feet	30 feet	10 feet
With Central Sewer System:					
12,000 sq. ft.	50 feet	80 feet	40 feet	30 feet	10 feet

Minimum Side Yard Width on Corner Lot Next to Street - Thirty (30) feet.

SECTION 702.4 MAXIMUM BUILDING HEIGHT
Thirty-five (35) feet

SECTION 702.5 MINIMUM FLOOR AREA FOR SINGLE FAMILY DWELLING
Seven hundred fifty (750) square feet

SECTION 722 I-2 GENERAL INDUSTRIAL

SECTION 722.1 PURPOSE

The purpose of this district is to create areas where heavy industry can operate and still ensure the protection of the neighboring environment.

SECTION 722.2 USES

Within an I-2 General Industrial District no building, structure, or premises shall be used, arranged to be used, or designed to be used except for one or more of the following uses:

A. Permitted Uses

1. All uses specifically permitted in an I-1 Light Industrial District.
2. Automobile assembly and major repair.
3. The following types of manufacturing, processing, cleaning, servicing, testing, or repair activities:
   a. Pottery and figurines or similar ceramic products using previously pulverized clay and kilns fired only with gas or electricity.
   b. Electric and neon signs, billboards, and other such structures.
   c. Laboratories and processing, experimental, film, or testing.
   d. Light sheet metal products, including heating and ventilating equipment.
   e. Blacksmith, welding, or other similar type of metal shop, including machine shop operations of the tool, die, and gauge types.
   f. Bag, carpet, and rug cleaning, provided necessary equipment is installed and operated for the effective recovery of dust.
4. The following uses, provided storage is within an enclosed building or an area enclosed on all sides by a solid masonry wall or a minimum six foot (6') solid painted fence with openings no greater than fifteen (15) percent:
   a. Building materials and lumber yard, including mill work when within a completely enclosed building.
   b. Contractors' equipment storage yard or plant, or storage and rental of equipment commonly used by contractors.
   c. Fuel, food, and goods distribution station, warehouse and storage, but excluding coal and coke, inflammable liquids, underground storage only if located more than three hundred (300) feet from any Residential district.
   d. Public storage garage and yards.
5. Warehouses and wholesale business establishments.
6. Carpenter, cabinet, upholstering, sheet metal, plumbing, heating, roofing, air conditioning, sign painting, and other similar establishments.
7. Foundry, casting lightweight nonferrous metals, not causing noxious fumes or odors.
8. Laundry, cleaning, and dyeing plant.

9. Repair services for machinery and equipment, including repair garages and specialty establishments such as motor, body, and fender, radiator, and tire services involving retreading and vulcanizing.
10. Stone or monument works if, employing power tools, within a completely enclosed building.
11. Accessory uses incidental to the uses permitted on the same premises.
12. Signs, as permitted and regulated by Article VIII hereof.
13. Communication towers/facilities as permitted and regulated by Article XI Section 1105

B. Conditionally Permitted Uses

The Board of Zoning Appeals may issue Conditional Zoning Certificates for uses listed herein subject to the general requirements of Article XI and to the specific requirements of Article XI listed below:

1. All uses as conditionally permitted in an I-1 Light Industrial district and subject to the same conditions.
2. Junkyard, subject to subsection 138.
3. Demolition materials site, subject to subsections 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 120, 127, 132, 145, 146, and 147.
4. Sanitary landfill sites, subject to subsections 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 120, 127, 128, 132, 146, and 147.
5. Adult Uses as permitted and regulated by Article XI Section 1104

SECTION 722.3 LOT REQUIREMENTS

A. Minimum Lot Area -
Twenty thousand (20,000) square feet.

B. Minimum Lot Width
Eighty (80) feet

C. Minimum Lot Frontage
Fifty (50) feet

SECTION 722.4 YARD REQUIREMENTS

A. Yards Adjoining Any Residential District
Where the boundary of an Industrial district adjoins the boundary line of any Residential district, the minimum front, rear, or side yard, as the case may be, shall be one hundred (100) feet. The area abutting the residential boundary, to a depth of fifty (50) feet, shall be landscaped and maintained so as to minimize any undesirable visual effects of an industry on adjacent residential uses; the balance of the yard area shall be used for open space or vehicular parking.

B. When permitted uses in this district are proposed on property adjacent to an R-R, R-1 or R-2 District, they shall be in accordance with requirements of Article VI, Section 603.11

SECTION 722.5 MAXIMUM BUILDING HEIGHT
Eighty (80) feet

SECTION 722.6 PARKING AND LOADING REQUIREMENTS
The parking and loading requirements for this district shall be regulated by Article IX hereof

ARTICLE X

NONCONFORMING USE

SECTION 1001 **PURPOSE**

The purpose of this section is to provide for the continuation of uses that do not conform to the existing zoning, but which were in operation prior to the enactment of this Resolution or amendments thereto.

SECTION 1001.1 REGULATIONS

The lawful use of any building or land existing at the effective date of this Resolution or amendments thereto may be continued, although such use does not conform with the provisions of this Resolution.

A. Alterations and Enlargement

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.

B. Nonconforming to Nonconforming Use

A nonconforming use may be changed to another nonconforming use provided that the changed nonconforming use is identical or in less conflict with character and use of the district than the existing nonconforming use, as determined by the Board of Zoning Appeals.

C. Reconstruction

Nothing in this Resolution shall prevent the reconstruction, repairing, rebuilding, and continued use of any nonconforming building or structure damaged by fire, collapse, explosion, or acts of God, subsequent to the date of this Resolution and if started within one (1) year of the aforementioned acts, and provided such replacement or repair does not extend the nonconforming use in square foot area.

D. Construction Approved Prior to Resolution

Nothing in this Resolution shall prohibit the completion of construction and use of a nonconforming building for which a zoning certificate has been issued prior to the effective date of this Resolution, or any amendment thereto, provided that construction is commenced within ninety (90) days after the issuance of such zoning certificate, that construction is carried on diligently and without interruption for a continuous period in excess of thirty (30) days, and that the entire building shall have been completed within one (1) year after the issuance of said zoning certificate.

E. Discontinuance or Abandonment

Whenever a nonconforming use has been discontinued for a period of two (2) years or more, any further use shall be in conformity with the provisions of this Resolution.

In the event that a landowner does not hold a current Certificate of Nonconforming Use, it shall be presumed that the nonconforming use

has abandoned and otherwise discontinued for the purposes of this Resolution.

F. Unsafe Structures

Nothing in this Resolution shall prevent the strengthening or restoring to a safe condition of any portion of a building or structure declared unsafe by a proper authority.

G. Certificate of Nonconforming Use

Within one (1) year of the effective date of this Resolution the Zoning Inspector shall issue a "Certificate of Nonconforming Use" to all known owners of legal nonconforming use property.

1. In accordance with the provision of this section, no use of land, buildings, or structures shall be made other than that specified on the "Certificate of Nonconforming Use" unless said use shall otherwise be in conformance with the provisions of the Zoning Resolution.
2. A copy of each "Certificate of Nonconforming Use" shall be filed in the office of the Zoning Inspector.
3. A Landowner's Certificate of Nonconforming Use shall be in force until the earlier of the following two events occurs:
    a. The nonconforming use of the land is abandoned, or
    b. A period of one (1) calendar year has lapsed since the Certificate of Nonconforming Use was issued.
4. On or before the first day of January of each year, the Zoning Inspector shall issue a renewal "Certificate of Nonconforming Use" to all known owners of legal nonconforming use property.
5. Upon completion of the one (1) year term, the landowner of the nonconforming use shall apply for an additional one (1) year certificate with the Zoning Inspector. Appropriate documentation shall govern the application for renewal which demonstrates that the nonconforming use has not been abandoned.

H. District Changes

Whenever the boundaries of a district shall be changed so as to transfer an area from one district to another of a different classification, the foregoing provisions shall also apply to any nonconforming use existing therein.

SECTION 1102 **REGULATIONS PERTAINING TO CONDITIONALLY PERMISSIBLE USES AS LISTED IN SECTIONS 701.2B, 702.2B, 703.2B, 704.2B, 705.2B, 706.2B, 711.2B, 712.2B, 713.2B, 721.2B, AND 722.2B**

101 All structures and activity areas shall be at least one hundred (100) feet from all property lines.

102 Loud speakers which cause a hazard or annoyance shall not be permitted.

103 All points of vehicular entrance or exit shall be located no closer than two hundred (200) feet from the intersection of two (2) major thoroughfares, or not closer than one hundred (100) feet from the intersection of a major thoroughfare and a local or collector thoroughfare.

104 There shall be no more than one (1) advertisement located on each abutting road identifying the activity.

105 No lighting shall constitute a nuisance and shall in no way impair safe movement of traffic on any street or highway; no lighting shall shine directly on adjacent properties.

106 Such development shall be located on major thoroughfares or at intersections of major and/or collector thoroughfares.

107 Such uses shall not require uneconomical extensions of utility services at the expense of the township.

108 Site locations shall be preferred that offer natural or manmade barriers that would lessen the effect of intrusion into a residential area.

109 Buffer Yard

a. A buffer yard of twenty (20) feet shall be provided in B-1, B-2 and B-3 Districts in accordance with requirements of Article VI, Section 603.11
b. A buffer yard of twenty (20) feet shall be provided in I-1 and I-2 Districts in accordance with requirements of Article VII Section 721.4 and Section 722.4 and Article VI, Section 603.11.

110 Requirements:

a. Processing equipment to be located at the site in such a way that will minimize adverse noise impact upon surrounding dwellings.
b. Existing natural and manmade barriers at the site shall be provided as protection and screening against noise, dust and visual protection for all operations.
c. Haul roads shall be positioned to provide for safe access to State, County and Township roads. These roads shall be hard surfaced for dust control; subject to Osnaburg Township Trustee approval.
d. Stakes of one color shall be set and maintained along the perimeter of the area designated for top soil or mineral removal at 100' intervals or less.

e. The storage of minerals, peat or coal from other surface mined or strip mined operations shall be permitted only on sites in Industrial Districts.
f. All public and private roads are to be swept and/or cleaned with a street sweeper of the water variety type.
g. A road bond shall be required.

111 Truck routes shall be established for movement in and out of the development in such a way that it will minimize the wear on public streets and prevent hazards and damage to other properties in the community.

112 All permitted installations shall be maintained in a neat, orderly condition so as to prevent injury to any single property, any individual, or to the community in general; a bond may be required to ensure that this provisions will be met.

113 Such uses shall be permitted subject to the following conditions:
a. Such use shall be permitted to be conducted within a structure accessory to the residence, provided the application so specifies and not more than forty-five (45) percent of the gross floor area of the structure accessory shall be devoted to the use.
b. Such use shall be clearly incidental and secondary to the use of the dwelling for dwelling purposes.
c. There shall be no more than one (1) non-resident employee or volunteer permitted to be engaged in the proposed use.
d. There shall be no display nor stock in trade nor commodities sold except those which are produced on the premises.
e. One (1) unlighted name plate not more than three (3) square feet in area announcing the name and home occupation shall be permitted.
f. Such uses shall not create a nuisance by reason of noise, odor, dust, vibration, fumes, smoke, electrical interference, or other causes.
g. Adequate parking spaces shall be provided off-street for any traffic generated by such uses.

114 Special provisions for group dwellings:
a. The type of group dwelling units permitted shall be as listed in the permitted uses in the district in which the group development is located—i.e. single family dwelling units only in the R-1 District.
b. The maximum number of dwelling units permitted shall be no more than are permitted for dwellings on individual lots in the district in which it is located. Lot area devoted to private roadways, common parking lots and/or recreational structures shall not be included in the calculations for minimum lot size.
c. A minimum of twenty (20) per cent of the total site area shall be reserved as open space as defined by these regulations. Active recreational areas such as swimming pools, tennis courts, etc. shall not be located within fifty (50) feet from an adjacent property line. Provisions for the future maintenance of common areas, open space and recreational facilities shall be reviewed by the Township's legal representative prior to the issuance of the zoning certificate.
d. Group dwellings shall be considered as one (1) building for the purpose of determining front, side, and rear yard requirements; the entire group as a unit requiring one (1) front, one (1) rear and two (2) side yards as specified for dwellings in the appropriate district.

e. In a group dwelling development, no two (2) separate dwelling structures shall be closer to each other along the sides or end of a court than twenty (20) feet.
f. The court shall be unoccupied by any vehicles, buildings, or other structures, except utilities.

115 Such uses shall be permitted under the following conditions:
a. Provided that such facilities be located at the extremity of the business districts so as not to interfere with the pedestrian interchange between stores in the district and provided further that it would not limit expansion of the pedestrian-oriented facilities.
b. No more than two (2) driveway approaches shall be permitted directly from any thoroughfare and shall not exceed thirty (30) feet in width at the property line.
c. If the property fronts on two (2) or more streets, the driveways shall be located as far from the street intersections as is practical.
d. At least a six (6) inch high pedestrian safety curb shall be installed along all street right-of-way lines except at driveway approaches.

116 Such uses should be located on a major thoroughfare, adjacent to nonresidential uses, such as commerce, industry, or recreation, or adjacent to sparsely settled residential uses.

117 The area proposed for a cemetery shall be used for cemetery purposes only, and shall meet the following requirements:
a. Except for office uses incidental to cemetery operations, no business or commercial uses of any kind shall be permitted on the cemetery site.
b. Minimum area required for a cemetery site shall be ten (10) acres.
c. Pavement width of driveways shall be at least twenty (20) feet.
d. Sufficient parking space shall be provided as to not deter traffic flow within the cemetery.
e. Area drainage and/or sanitary facilities are subject to approval by the County Board of Health, the County Sanitary Engineer, and County Engineer prior to the issuance of a conditional use permit.
f. Only signs designating entrances, exits, traffic direction and titles shall be permitted and must be approved by the Board.
g. Adequate screening with shrubs, trees, or hedge shall be provided parallel to property lines adjacent to or abutting residential dwellings.
h. Location of cemetery buildings and all other structures shall conform to front, side, and rear yard building lines of the particular district in which it is located.
i. No gravesites shall be located within one hundred (100) feet of the right-of-way lines of any public road nor within fifty (50) feet of an adjacent property line.

118 An integrated planned commercial development, which is a grouping of two (2) or more commercial establishments which have common vehicular parking facilities, controlled access to abutting streets, and are developed under a unified site plan, shall be permitted provided the following conditions are met:
a. Only those types of business uses permitted for conventional development in

the district shall be permitted in integrated planned business developments.

b. The minimum setback building line shall be fifty (50) feet measured from the street right-of-way line.
c. There shall be twenty (20) feet between buildings.
d. Side yards and rear yards shall be required only on the perimeter of the planned development and shall be twenty-five (25) feet except where the business development is adjacent to a residential zone, the side and/or rear yard shall be fifty (50) feet on the side(s) abutting the residential zone only.
e. All points of entrance and/or exit shall be located no closer than one hundred (100) feet to the intersection of two (2) streets.
f. Review and approval by the Stark County Regional Planning Commission shall be required in accordance with the Stark County Subdivision Regulations before a permit may be granted.

119 Only retail uses which are customarily accessory or incidental to the main recreational use shall be permitted, and shall include such uses as refreshment stands, souvenir stands, and concession stands.

120 A Conditional Zoning Certificate for a use permitted under these regulations shall be issued for a one (1) year period only. After a one (1) year period has elapsed, a new Conditional Zoning Certificate shall be required and may be issued provided the Board and the Zoning Inspector determine that the said use has been and is being operated according to the specifications of the zoning resolution and the previous Conditional Zoning Certificate. If necessary, the Board may make additional requirements for the continued operation of the use as a prerequisite for reissuance of the Conditional Zoning Certificate.

121 Campsites, cabins, rooms, or other accommodations shall be used on a seasonal basis only. No permanent or year 'round occupancy shall be permitted.

122 Only retail uses which are customarily accessory and incidental to the main recreational use shall be permitted as part of the park, recreational area, or campground. Included as such retail uses are refreshment stands, souvenir stands, concession stands, park office, and the limited sale of groceries when the customers are primarily the campers using the park.

123 All facilities and structures shall meet all county and/or State of Ohio health, building, electrical, and other applicable codes.

124 All activities, programs, and other events shall be directly related to the Conditional Use Permit so granted, and shall be adequately and properly supervised so as to prevent any hazard and to assure against any disturbance or nuisance to surrounding properties, residents, or to the community in general.

125 The proposed project shall conform to all requirements and/or conditions as the Board may deem necessary to meet the following criteria:

a. Vehicular approaches to the property shall be so designed as not to create an interference with traffic on surrounding public streets or roads.
b. On-site circulation shall be designed to make possible adequate fire and police

protection.

c. Paved, off-street parking and service areas shall be required. All parking and service areas shall be paved with concrete, asphalt, or equivalent, and shall be located no closer than twenty (20) feet from any residential structure. Paved vehicular access drives of at least ten (10) feet in width shall be required for parking areas of ten (10) vehicles or less capacity, and two-way drives of twenty (20) feet paving width minimum shall be required for parking areas of eleven (11) or more vehicle capacity.

d. The property must be served by central sewer and central water facilities approved by the appropriate state and county departments and operated and maintained according to the inspection and rules of said departments.

126 No zoning certificate shall be issued until final site plans have been submitted and approved in accordance with the Stark County Subdivision Regulations, where applicable, and the Board of Appeals. Zoning certificates shall not be issued until approval by the appropriate state and county departments has been obtained concerning the proposed sanitary sewerage facilities.

127 The design and construction of all access drives, access points to public streets, and parking and service areas shall be approved by the Township Trustees, or county or state where applicable.

128 All sanitary landfill sites shall be subject to approval by the county and state health departments and subject to their requirements governing landfills. All work connected with such operations shall be done between the hours of 7:30 a.m. and 5:00 p.m. No sanitary landfill site shall be permitted to accept recyclable material.

129 Recreational Uses:

a The maximum lot coverage for permitted accessory building and parking areas shall not be more than five (5) per cent of the total acreage.

b. Such accessory building and parking areas shall not have access through a residential neighborhood and shall be located a minimum of one hundred (100) feet from adjacent property lines.

c. The Board of Appeals shall consider whether the intensity or type of the recreational use will be compatible to adjoining residential areas and may prohibit those which would detrimentally affect existing residents.

130 The following requirements shall be met:

a. The parking lot shall be accessory to and for the use in connection with one (1) or more permitted or conditionally permitted uses in an adjoining business or industrial district.

b. Such parking lot shall abut at least fifty (50) feet, either directly or across an alley or street on the district in which the use for which the parking is provided, permitted, or conditionally permitted.

c. Such parking lot shall be used solely for the parking of passenger vehicles, and no commercial repair work or service of any kind shall be conducted on such parking lot.

d. No sign of any kind, other than those designating entrances, exits, and conditions of use shall be maintained on such parking lot.
e. Entrances and exits shall be at least twenty (20) feet distance from any adjacent property located in any Residential district.
f. A buffer yard twenty (20) feet shall be provided in accordance with requirements of Article VI, Section 603.11.

131 Outside play areas shall be enclosed by a six (6) foot fence.

132 Sufficient parking and "drop off and pick up" areas shall be provided off the public roadway.

133 The proposed mini-storage facility shall be limited to only rental of storage facilities and not as a transfer and storage business where the use of vehicles is part of such business.

134 Storage of explosive or hazardous materials shall be prohibited.

135 Outside storage areas shall be completely enclosed by walls, fences, building, landscaping, or a combination thereof.

136 A minimum lot size of one (1) acre shall be required, and no individual compartment or unit shall be more than five thousand (5,000) square feet in area.

137 The movie screen shall be set back two hundred (200) feet from property lines and shall not be located to face any public streets.

138 The scrap or junk yard use shall be permitted only under the following conditions:
a. All sites, procedures, and processes shall be subject to the approval of the appropriate county and state agencies; no conditional zoning certificate shall be issued until the necessary county and/or state approvals are obtained.
b. The site shall be located so as to minimize the potential effect of winds carrying objectionable odors to urbanized or urbanizing areas.
c. Suitable control measures shall be taken whenever dust or odor is a problem or potential problem.
d. There shall be no burning of refuse, garbage, or other waste materials.
e. Scrap yards or junk yards shall be located no closer than two hundred (200) feet to any Residential District and/or public street right-of-way line, and shall otherwise have front, side, and rear setback of at least one hundred fifty (150) feet. At least a fifty (50) foot wide strip in the two hundred (200) foot setback shall be planted for camouflaging purposes according to the following specifications:
    1. The fifty (50) foot wide strip shall be planted with pine, Norway spruce, or other plants of similar screening value.
    2. Said trees shall be planted on a staggered pattern with no more than ten (10) feet between trees.
    3. The fifty (50) foot wide planting strips shall be so located as to achieve the greatest screening or camouflaging effect, and no visual opening shall exist.
    4. Trees shall be planted that are at the optimum transplanting size and age

while still being as large as possible.

f. A minimum area of twenty (20) acres shall be required for a use proposed under this category.

g. The area of use shall be completely enclosed by a six (6) foot fence (open or closed) and appropriately landscaped to be harmonious with surrounding properties.

139 Minimum lot and yard requirements for a group home shall be the same as listed for "Other Permitted Uses" in Section 704.3 of these Regulations for an R-3 Low Density Multifamily Residential District and in Section 705.3 of these regulations for the R-4 High Density Multifamily Residential District.

140 No such group home shall be located within a one-mile radius of another such facility for the developmentally disabled.

141 Such facility shall be designed to be compatible with surrounding land uses and the residential character of the neighborhood.

142 One unlighted name plate not more than three (3) square feet shall be permitted for a licensed group home, as regulated by Article VIII of these regulations.

143 Special provisions for Group dwelling developments in R-R, R-1, and R-2 Districts.

a. The minimum gross area required for a group dwelling development be devoted to open space and recreational facilities. A minimum of fifty (50) feet of contiguous frontage is required for each separate area.

b. Group dwelling developments shall be limited to single-family detached dwellings. The maximum overall density shall not exceed three (3) dwelling units per gross acre of land.

c. Along private streets, the dwellings will have an average front yard setback of thirty-five (35) feet with no front yard setback of less than thirty (30) feet from the center line of the road.

d. Final development plans and all documentation required by the Zoning Inspector shall be submitted at least twenty (20) days prior to the hearing date.

144 Where the state does not require a bond for reclamation, to guarantee the restoration, rehabilitation, and reclamation of mined-out areas, every applicant granted a mining permit as herein provided, shall furnish a

145 All demolition material sites shall be subject to the Ohio Administrative Code Chapter 3745-400 and must have prior approval of County and State Health Departments.

146 All structures and activity areas shall be located at least three hundred (300) feet from all property lines.

147 All structures and activity areas shall be located at least five hundred (500) feet from all dwellings.

2007 DEC 19 PM 1:31
NANCY S. REINBOLD
CLERK OF COURTS
STARK COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

OSNABURG TOWNSHIP ZONING INSPECTOR,	)	CASE NO. 2007 CV 02262
Plaintiff,	)	JUDGE TARYN L. HEATH
vs.	)	**STIPULATED FACTS**
ESLICH ENVIRONMENTAL, INC.,	)	
Defendant.	)	

1. Plaintiff, Osnaburg Township Zoning Inspector, Dorothy Bucher, is the duly appointed and acting zoning inspector for Osnaburg Township, Stark County, Ohio.

2. Defendant, Eslich Environmental, Inc. (hereinafter "Eslich"), owns approximately 175 acres located at 7280 Lisbon St. S.E., East Canton, Osnaburg Township, Stark County, Ohio (the "Property").

3. Defendant purchased the Property in July 1989 from the Crescent Brick Company, and the transfer was duly recorded in October 1989.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. Under date of March 26, 1990, the Osnaburg Township Board of Zoning Appeals issued a Certificate of Non-Conforming Use to Eslich Environmental related to the Property.

10. Plaintiff's Exhibit 7 is a true and accurate copy of the Certificate of Non-Conforming Use at issue in this case.

11. From 1989-1996, Eslich Environmental operated the C&DD disposal facility on the Property.

12. 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.

13. Since 1996, Stark C&D has operated the C&DD disposal facility on the Property.

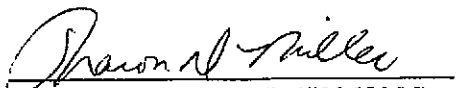
14. As of September 30, 1996, and through the present, approximately twenty and two/tenths (20.2) acres are designated as the Active Licensed Disposal Area under the annual license issued to Stark C&D by the Stark County Board of Health.

15. 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."

16. 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.

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

Respectfully submitted and stipulated to,

By: 

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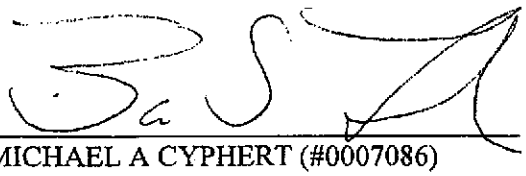
By: 

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Attorneys for Defendant

BOARD OF ZONING APPEALS

CERTIFICATE OF NONCONFORMING USE

Osnaburg Township, Stark County, Ohio

Property owner: Eslich Environmental, Inc.

Phone no. where property owner may be reached (216) 455-6338

Occupant Same

Phone no. where occupant may be reached (216) 488-8300

Address and description of property 7280 Lisbon Street, S. E., East Canton, Ohio 44730 - Open Acreage - in use as demolition dump site.

Zoning district in which property is located R-1 Single Family Residential

Date of Issue 3-26-90 Time Limit (indefinitely) Indefinite

This is to certify that the above described property is a legal nonconforming use and shall be governed by Article VII, Section 701, Nonconforming Uses of the Osnaburg Township Zoning Resolution.

F. R. Taylor

Secretary, Board of Zoning Appeals
F. R. Taylor