

IN THE SUPREME COURT OF OHIO

ORIGINAL

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

**MEMORANDUM OF *AMICUS CURIAE* THE OHIO TOWNSHIP ASSOCIATION
ON BEHALF OF PLAINTIFF-APPELLANT OSNABURG TOWNSHIP ZONING
INSPECTOR AND
THIRD-PARTY DEFENDANT-APPELLANT OSNABURG TOWNSHIP**

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I. STATEMENT OF AMICUS INTEREST

Amicus curiae, The Ohio Township Association (“OTA”), respectfully requests that this Court reverse the decision of the Fifth District Court of Appeals.

OTA is a state-wide professional organization dedicated to the promotion and preservation of township government in Ohio. OTA, founded in 1928, is organized in 87 Ohio counties. OTA has over 5,200 active members, comprised of elected township trustees and township fiscal officers from Ohio’s 1,308 townships. OTA has an additional 3,000 associate members who are dedicated to supporting the causes of OTA.

As the form of government closest to the citizens of Ohio, townships play a critical role in promoting the health, safety and general welfare of their residents. The ability of townships to regulate land use, through the adoption and enforcement of zoning resolutions pursuant to Chapter 519 of the Ohio Revised Code, is central to this role. The Fifth District Court of Appeals’ decision in this case threatens the ability of townships (and presumably all other political subdivisions with zoning authority) to promote the health, safety and general welfare of their residents by denying them the authority to regulate the location of landfills throughout their respective jurisdictions.

By fixing its blinders and focusing solely on the regulations of a single zoning district, to the exclusion of all others, the Fifth District misinterpreted and misapplied this Court’s decision in *Village of Sheffield v. Rowland* (1999), 87 Ohio St.3d 9, 1999-Ohio-217, 716 N.E.2d 1121. In doing so, the lower court’s decision establishes a dangerous precedent whereby townships and all other zoning authorities are rendered powerless to exclude landfills from residential areas.

If the lower court’s decision is left undisturbed, township zoning authority will be significantly diminished due to the inability to prohibit clearly incompatible uses from residential

areas. This cannot be allowed. It is because certain activities and facilities, like landfills, pose a substantial risk to the health and safety of the public, that the General Assembly has adopted statutory schemes for their regulation. For this reason, townships, as well as all other zoning authorities, must be permitted to determine the most appropriate locations for landfills within their limits.

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

II. STATEMENT OF THE CASE AND FACTS

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

III. ARGUMENT

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

Townships have the authority, pursuant to Chapter 519 of the Revised Code, to regulate land use in order to further the health, safety and general welfare of their residents. Townships do so through the adoption and enforcement of zoning resolutions. However, the ability of townships to adopt and enforce zoning resolutions is not without limits. It is well-settled that a township may not adopt a zoning resolution that contravenes a general law of the state. *Yorkavitz v. Columbia Bd. of Twp. Trustees* (1957), 166 Ohio St. 349, 351, 142 N.E.2d 655, 657. *See also Sheffield; Fondessy Enterprises, Inc. v. Oregon* (1986), 23 Ohio St.3d 213, 492 N.E.2d 797; *Clarke v. Board of County Commissioners of Warren County* (2006), 2006 WL 689039 (Ohio App. 12 Dist.), 2006-Ohio-1271; *Aluminum Smelting & Refining Co., Inc. v. Denmark*

Twp. Zoning Bd. of Zoning Appeals (2002), 2002 WL 31743011 (Ohio App. 11 Dist.), 2002-Ohio-6690; *Center Township Board of Township Trustees v. Valentine* (November 9, 2000), No. WD-99-065, 2000 WL 1675511 (Ohio App. 6 Dist.); *Families Against Reily/Morgan Sites v. Butler County Bd. of Zoning Appeals* (1989), 56 Ohio App. 3d 90, 564 N.E.2d 1113; 1985 Ohio Att.Gen. Ops. No. 85-053 at 2-199 and 2-200.

General laws are defined as those laws “operating uniformly through 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*, at 11. The test for determining whether a conflict exists between a local government’s zoning resolution and a general law of the state is “whether the ordinance [or the resolution in the case of townships] permits or licenses that which the state forbids and prohibits, and vice versa.” *Id.* Hence, a township cannot, through zoning, forbid or prohibit what the general laws of the state permit, nor can a township permit what the general laws of the state forbid or prohibit.

The general law at issue in this case is Chapter 3714 of the Revised Code (“Chapter 3714”). “It appears beyond dispute that R.C. Chapter 3714 is a general law...” *Sheffield*, at 11. Chapter 3714 sets forth a scheme for state licensing and regulation of construction and demolition debris disposal facilities. Osnaburg Township’s Zoning Resolution does not forbid or prohibit these facilities, but rather restricts them to an appropriate district, more specifically to the Township’s General Industrial District. *See* Osnaburg Township Zoning Resolution, Section 722.2(B)(3).

The Fifth District Court of Appeals erroneously held that Osnaburg Township's Zoning Resolution contravenes Chapter 3714 and is preempted, to the extent that it prohibits state-authorized construction and demolition debris disposal facilities to be located within the Township's Single-Family Residential Zoning District. The lower court clearly overlooked the fact that the Zoning Resolution permits these facilities as conditional uses within the Township's General Industrial District. Simply stated, by looking solely to the regulations of the Single-Family Residential Zoning District in conducting its conflict analysis, the Fifth District misapplied this Court's holding in *Village of Sheffield v. Rowland*.

In *Sheffield*, the Village, unlike Osnaburg Township in the case at hand, sought to prohibit the location of construction and demolition debris disposal facilities, not within a single zoning district, or within a number of zoning districts, but throughout the entire village. Applying the conflict test enunciated above, this Court held that the Village's zoning scheme did, in fact, contravene Chapter 3714. However, this holding was limited to situations where a local government entity attempts to completely prohibit these facilities. **"Nothing in this decision should be construed to suggest that Sheffield cannot restrict state-authorized facilities to certain districts with appropriate zoning."** *Sheffield*, at 12 (emphasis added). Under this holding, it seems clear the Village could lawfully have included construction and demolition debris disposal facilities within certain zoning districts while excluding them from others without contravening Chapter 3714. This is precisely what Osnaburg Township had attempted to achieve through its Zoning Resolution.

By focusing exclusively on the regulations of Osnaburg Township's Single-Family Residential Zoning District, to the exclusion of all other zoning districts, the Fifth District misapplied *Sheffield*. In doing so, the lower court found a conflict to exist between the

Township's Zoning Resolution and Chapter 3714 where there is none. The Township did not forbid or prohibit construction and demolition debris disposal facilities within its borders. The Township simply restricted these facilities to an appropriate district, its General Industrial District, as this Court has indicated it is entitled to do.

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

In *Clarke v. Board of County Commissioners of Warren County*, the Twelfth District Court of Appeals found no conflict to exist between Warren County's Zoning Resolution, and Chapter 3734 of the Revised Code. Chapter 3734 of the Revised Code, like Chapter 3714, is a general law of the state. It, in part, establishes a scheme for licensing and regulating solid waste landfills. Warren County's Zoning Resolution permits solid waste landfills within its Solid Waste Disposal ("SD") District, but prohibits such facilities within its Solid Waste Disposal Transition ("SDT") District.

The appellant in *Clarke*, the owner of property located within the County's SDT District, filed a complaint alleging that the provisions of the SDT district regulations prohibiting solid waste landfills conflicted with the provisions of Chapter 3734. The Twelfth District, applying this Court's decision in *Sheffield*, held as follows:

"Unlike 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 property for the storage of solid waste, but restricts such use to property that is subject to SD 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*, at ¶29.

This is precisely the holding that *Sheffield* requires. Osnaburg Township's Zoning Resolution permits the use of property for the disposal of construction and demolition debris disposal facilities, but it restricts such uses to the Township's General Industrial District, a district safely removed from residential areas.

In *Center Township Board of Township Trustees v. Valentine*, the Sixth District Court of Appeals found Center Township's Zoning Resolution to contravene Chapter 3714 of the Revised Code. The Township had sought to prohibit all construction and demolition debris disposal facilities within its limits. The Sixth District noted, precisely as this Court did in *Sheffield*, that a conflict between the Zoning Resolution and Chapter 3714 could have been avoided had the Township sought to control the location of facilities rather than prohibiting them entirely. "While the Township could have controlled the location of the landfill, it could not prohibit its presence in the Township." *Center Twp. Bd. of Twp. Trustees v. Valentine*.

The Ohio Attorney General likewise gives proper application to *Sheffield* in an official opinion in which he advised a county that it could not amend its zoning resolution to prohibit construction and demolition debris disposal facilities "throughout the *entire* unincorporated territory of the county." 2007 Ohio Atty.Gen.Ops No. 07-038, at 8 (emphasis added).

There can be no question that this Court's holding in *Sheffield*, as expressly limited by this Court, determines the outcome of this case. It is the controlling law in the State of Ohio. The Appellee nevertheless trivializes the limitation that this Court placed on its holding in *Sheffield* to the point of ignoring it. The issue is not whether the conflict test applies, as the

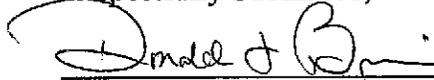
Appellee appears to suggest. Rather, the issue is whether the conflict test should be applied in accordance with the precedent set by this Court in *Sheffield*, or in some other fashion. Applying the conflict analysis used in *Sheffield*, one must conclude that a zoning resolution which merely restricts state-authorized facilities to certain districts does not forbid or prohibit that which the state permits or licenses.

For townships and other local government entities to effectively regulate land use for the health, safety and general welfare of their residents, they must be confident in their authority to do so, and they must be confident in the courts of this state to enforce the townships' regulations in a reasonable and consistent manner. The Fifth District's decision impairs this confidence and has the potential to undermine the zoning plan of all political subdivisions. Osnaburg Township does not prohibit construction and demolition debris disposal facilities throughout its borders. Instead, and in accordance with established precedent, Osnaburg Township simply restricts these facilities to an appropriate zoning district suited for this use. Contrary to the claim of Appellee, we submit that Osnaburg Township's R-1 Single Family Residential classification is not such a district.

CONCLUSION

The Ohio Township Association respectfully requests this Court to reverse the decision of the Fifth District. For purposes of determining whether a conflict exists between a state regulatory scheme and a local zoning plan, the zoning code must be viewed in its entirety. Otherwise, both the courts and local zoning authorities will find themselves jousting at windmills over purported conflicts which disappear when analyzed in the context of the entire zoning plan.

Respectfully Submitted,



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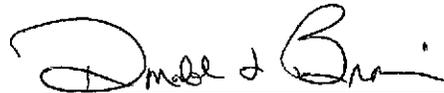
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Amicus Curiae is being mailed by regular U.S. Mail, postage prepaid, to all parties entitled to service under Rule 5 of the Ohio Rules of Civil Procedure, on the 15th day of July, 2009.



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