

OPINION NO. 2007-038

Syllabus:

A county zoning resolution may not be amended to prohibit the installation and operation of landfills that are licensed as construction and demolition debris facilities or solid waste facilities under R.C. 3714.06(A) or R.C. 3734.05(A), respectively, throughout the entire unincorporated territory of the county.

To: Charles S. Howland, Morrow County Prosecuting Attorney, Mount Gilead, Ohio

By: Marc Dann, Attorney General, November 5, 2007

You have requested an opinion whether a county zoning resolution may be amended to prohibit the installation and operation of landfills that are licensed as construction and demolition debris facilities or solid waste facilities under R.C. 3714.06(A) or R.C. 3734.05(A), respectively, throughout the entire unincorporated territory of the county. Based on the following analysis, such an amendment to a county zoning resolution is not permitted.

Authority to Amend a County Zoning Resolution

Provisions governing county zoning are set forth in R.C. 303.01-.25. Under these provisions, a county is authorized, for the purpose of promoting the public health and safety, and when acting in accordance with a comprehensive plan, to enact and enforce certain types of zoning regulations in all or any part of the unincorporated territory of the county. R.C. 303.02. Before availing itself of the zoning powers conferred in R.C. 303.01-.25, a board of county commissioners must pass a resolution declaring its intention to proceed with county zoning under R.C. 303.01-.25, R.C. 303.03, and the electors residing in the unincorporated area of the county included in the proposed plan for zoning must approve the county zoning resolution, R.C. 303.11.¹

R.C. 303.12, which establishes procedures for amending a county zoning resolution, provides that amendments to a county zoning resolution must be initiated by motion of the county rural zoning commission, by the passage of a resolution by the board of county commissioners, or by the filing of an application by one or more owners or lessees of property with the county rural zoning commission. Upon the adoption of such motion, certification of such resolution, or filing of such application, the county rural zoning commission must schedule a public hearing and “transmit a copy of [the motion, resolution, or application] together with text and map pertaining to it to the county or regional planning commission, if there is such a commission.” R.C. 303.12. At the public hearing, the county rural zoning commission shall consider the planning commission’s recommendation to approve or deny the proposed amendment. *Id.* Following the public hearing, the county rural zoning commission must recommend the approval, denial, or modification of the proposed amendment and submit to the board of county commissioners such recommendation together with such motion, application, or resolution involved, the text and map pertaining to the proposed amendment, and the recommendation of the planning commission. *Id.*

The board of county commissioners must, upon receipt of the county rural zoning commission’s recommendation on the proposed amendment, schedule a public hearing. *Id.* Following the hearing, the board must adopt or deny the recom-

¹ Detailed procedures for adopting a county zoning resolution are set out in R.C. 303.03-.11.

mendations of the county rural zoning commission, or adopt a modification of the recommendations. *Id.*

An amendment to a county zoning resolution adopted by a board of county commissioners becomes effective in thirty days unless a petition for a zoning referendum is submitted. *Id.* A referendum petition is valid when it is signed by a specific percentage of “qualified voters residing in the unincorporated area of the township or part of that unincorporated area included in the zoning plan.” *Id.* An amendment to a county zoning resolution that is submitted for referendum takes effect when “a majority of the vote cast on the issue is in favor of the amendment.” *Id.* “Upon certification by the board of elections that the amendment has been approved by the voters, it shall take immediate effect.” *Id.*

Limitations on County Zoning Authority

The authority of a county to amend the text of its zoning resolution is not unlimited, however. It is well established that a county or other political subdivision may not “adopt zoning resolutions which are in contravention of general laws previously enacted by the General Assembly.” *Yorkavitz v. Columbia Bd. of Twp. Trustees*, 166 Ohio St. 349, 351, 142 N.E.2d 655 (1957); see *Village of Sheffield v. Rowland*, 87 Ohio St. 3d 9, 716 N.E.2d 1121 (1999); *Clarke v. Bd. of County Comm’rs of Warren County*, CA2005-04-048, 2006-Ohio-1271, 2006 Ohio App. LEXIS 1161 (Warren County Mar. 20, 2006); *Aluminum Smelting & Refining Co., Inc. v. Denmark Twp. Zoning Bd. of Zoning Appeals*, Case No. 2001-A-0050, 2002-Ohio-6690, 2002 Ohio App. LEXIS 6462 (Ashtabula County Dec. 6, 2002); *Center Twp. Bd. of Twp. Trustees v. Valentine*, Case No. WD-99-065, 2000 Ohio App. LEXIS 5177 (Wood County Nov. 9, 2000); *Families Against Reily/Morgan Sites v. Butler County Bd. of Zoning Appeals*, 56 Ohio App. 3d 90, 564 N.E.2d 1113 (Butler County 1989); 1985 Op. Att’y Gen. No. 85-053 at 2-199 and 2-200; 1981 Op. Att’y Gen. No. 81-065. See generally *Fox v. Johnson*, 28 Ohio App. 2d 175, 275 N.E.2d 637 (Mahoning County 1971) (if a conflict exists between a township zoning ordinance and a state statute, the state statute controls).

The test for determining when a conflict exists between a local zoning resolution and the general laws of the state is “whether the ordinance permits or licenses that which the state forbids and prohibits, and vice versa.” *Clarke v. Bd. of County Comm’rs of Warren County*, at ¶24 (quoting *Village of Sheffield v. Rowland*, at 11); accord *Aluminum Smelting & Refining Co., Inc. v. Denmark Twp. Zoning Bd. of Zoning Appeals*, at ¶24; *Center Twp. Bd. of Twp. Trustees v. Valentine*, at *5; see *Families Against Reily/Morgan Sites v. Butler County Bd. of Zoning Appeals*, at 94. This means that a county’s zoning resolution cannot prohibit what the general laws of the state permit and license. See *Village of Sheffield v. Rowland*; *Aluminum Smelting & Refining Co., Inc. v. Denmark Twp. Zoning Bd. of Zoning Appeals*; *Center Twp. Bd. of Twp. Trustees v. Valentine*; see also *Clarke v. Bd. of County Comm’rs of Warren County*, at ¶26-29 (“[a]fter reviewing the record, including the applicable statutes, we find no conflict between the Warren County Zoning Code and R.C. Chapters 3734 and 3745 ... [insofar as] the Warren County Zoning Code does not prohibit what is permitted by the general laws of this state”).

See generally Yorkavitz v. Columbia Bd. of Twp. Trustees, at 352-53 (because “the General Assembly has indicated in its general laws that airports are beneficial to the public of Ohio and are to be promoted and encouraged, it follows that in delegating to township trustees the power to zone it did not include in that delegation the power to circumvent the general law by completely prohibiting airports, throughout the unincorporated territory of a township, as being nuisances per se”); *Clermont Env'tl. Reclamation Co. v. Wiederhold*, Case No. 1057, 1981 Ohio App. LEXIS 14476, at *8-9 (Clermont County Dec. 23, 1981) (“[i]f every political subdivision of the state prevented the disposal of these hazardous wastes within its territorial confines, as Jackson Township, Clermont County, is attempting to do, a goodly portion of the state’s industries would come to a halt. The state thus not only has a duty to provide a place for their disposal, but also a duty to safeguard the public from the dangers of their indiscriminate disposal. This is the problem the state is meeting with its enactment of R.C. 3734.05, in the exercise of its state-wide police powers. Under these circumstances, local governmental units cannot be permitted to interfere by means of their own ordinances or resolutions”), *aff’d*, 2 Ohio St. 3d 44, 442 N.E.2d 1278 (1982); 1988 Op. Att’y Gen. No. 88-053 (syllabus, paragraph one) (“[w]hen an applicant has received a permit under R.C. Chapter 3734 for the installation and operation of a hazardous waste facility on a site in a township at which such use is not permitted by existing zoning, the township is prohibited by R.C. 3734.05(D)(3) from enforcing its existing zoning provisions”); 1981 Op. Att’y Gen. No. 81-065 (syllabus, paragraph one) (“[p]ursuant to R.C. Chapter 519, a township may enact resolutions to regulate surface mining, so long as its resolutions do not come into direct conflict with R.C. Chapter 1514, by which the General Assembly regulates the method of surface mining or other laws of the state”).

County Zoning May Not Be Used to Prohibit the Installation and Operation of Landfills Throughout the Entire Unincorporated Territory of the County

In light of the foregoing legal principles, we must now determine whether a county zoning resolution that prohibits the installation and operation of landfills that are licensed as construction and demolition debris facilities or solid waste facilities under R.C. 3714.06(A) or R.C. 3734.05(A), respectively, throughout the entire unincorporated territory of the county prohibits what the general laws of the state permit and license.

Under R.C. Chapters 3714 and 3734, the General Assembly has established comprehensive schemes for regulating the disposal of construction and demolition debris² and solid wastes,³ respectively, in Ohio. As part of these schemes, the Gen-

² As used in R.C. Chapter 3714, “construction and demolition debris” means

those materials resulting from the alteration, construction, destruction, rehabilitation, or repair of any physical structure that is built by humans, including, without limitation, houses, buildings, industrial or commercial facilities, or roadways. “Construction and demolition debris” includes particles and dust created during demo-

eral Assembly requires that a person be licensed before operating or maintaining a landfill used as a construction and demolition debris facility or solid waste facility.⁴

R.C. 3714.06(A) states:

No person shall operate or maintain a construction and demolition debris facility without an annual construction and demolition debris facility operation license issued by the board of health of the health district in which the facility is located or, if the facility is located in a health district that is not on the approved list under [R.C. 3714.09], from the director of environmental protection. Any such license may be issued with such terms and conditions as the board or the director, as appropri-

tion activities. "Construction and demolition debris" does not include materials identified or listed as solid wastes or hazardous waste pursuant to [R.C. Chapter 3734] and rules adopted under it; materials from mining operations, nontoxic fly ash, spent nontoxic foundry sand, and slag; or reinforced or nonreinforced concrete, asphalt, building or paving brick, or building or paving stone that is stored for a period of less than two years for recycling into a usable construction material.

R.C. 3714.01(C).

³ R.C. 3734.01(E) defines "solid wastes," for purposes of R.C. Chapter 3734, as follows:

"Solid wastes" means such unwanted residual solid or semisolid material as results from industrial, commercial, agricultural, and community operations, excluding earth or material from construction, mining, or demolition operations, or other waste materials of the type that normally would be included in demolition debris, nontoxic fly ash and bottom ash, including at least ash that results from the combustion of coal and ash that results from the combustion of coal in combination with scrap tires where scrap tires comprise not more than fifty per cent of heat input in any month, spent nontoxic foundry sand, and slag and other substances that are not harmful or inimical to public health, and includes, but is not limited to, garbage, scrap tires, combustible and noncombustible material, street dirt, and debris. "Solid wastes" does not include any material that is an infectious waste or a hazardous waste.

⁴ A landfill may qualify as a construction and demolition debris facility under R.C. Chapter 3714 or solid waste facility under R.C. Chapter 3734. *See* R.C. 3714.01(E) (as used in R.C. Chapter 3714, a "facility" is "any site, location, tract of land, installation, or building used for the disposal of construction and demolition debris"); R.C. 3734.01(N) (as used in R.C. Chapter 3734, a "facility" is "any site, location, tract of land, installation, or building used for incineration, composting, sanitary landfilling, or other methods of disposal of solid wastes or, if the solid wastes consist of scrap tires, for the collection, storage, or processing of the solid wastes; for the transfer of solid wastes; for the treatment of infectious wastes; or for the storage, treatment, or disposal of hazardous waste").

ate, finds necessary to ensure that the facility will comply with this chapter and the rules adopted under it and to protect the public health and safety and the environment. Licenses issued under this section expire annually on the thirty-first day of December.

R.C. 3734.05(A)(1) similarly requires a person to be licensed before operating or maintaining a landfill used as a solid waste facility:

Except as provided in divisions (A)(4), (8), and (9) of this section, no person shall operate or maintain a solid waste facility without a license issued under this division by the board of health of the health district in which the facility is located or by the director of environmental protection when the health district in which the facility is located is not on the approved list under [R.C. 3734.08].

Upon the issuance of a license under R.C. 3714.06(A) or R.C. 3734.05(A) and compliance with the requirements of R.C. Chapter 3714 or 3734 and the rules adopted under those chapters, *see* R.C. 3714.02; R.C. 3734.02, a person is authorized to operate or maintain a construction and demolition debris facility or solid waste facility, respectively.⁵ *See Village of Sheffield v. Rowland*, at 11-12; *Clarke v. Bd. of County Comm'rs of Warren County*, at ¶27-28; *Center Twp. Bd. of Twp. Trustees v. Valentine*, at *5-6; *Families Against Reily/Morgan Sites v. Butler County Bd. of Zoning Appeals*, at 94. R.C. Chapters 3714 and 3734 thus govern the licensing and regulation of construction and demolition debris facilities and solid waste facilities throughout the state. *Village of Sheffield v. Rowland*, at 11; *Clarke v. Bd. of County Comm'rs of Warren County*, at ¶25; *Center Twp. Bd. of Twp. Trustees v. Valentine*, at *4; *see Families Against Reily/Morgan Sites v. Butler County Bd. of Zoning Appeals*, at 94; *see also Rumpke Waste, Inc. v. Henderson*, 591 F. Supp. 521, 531 (S.D. Ohio 1984) (“the Ohio legislature specifically authorizes sanitary

⁵ Once a permit for a construction and demolition debris facility or solid waste facility has been issued, the “permit is subject to those local zoning provisions which do not conflict with the environmental laws and regulations approved by the state.” *Families Against Reily/Morgan Sites v. Butler County Bd. of Zoning Appeals*, 56 Ohio App. 3d 90, 94, 564 N.E.2d 1113 (Butler County 1989); *see Village of Sheffield v. Rowland*, 87 Ohio St. 3d 9, 12, 716 N.E.2d 1121 (1999); *Clarke v. Bd. of County Comm'rs of Warren County*, CA2005-04-048, 2006-Ohio-1271, 2006 Ohio App. LEXIS 1161, at ¶27-28 (Warren County Mar. 20, 2006); *Center Twp. Bd. of Twp. Trustees v. Valentine*, Case No. WD-99-065, 2000 Ohio App. LEXIS 5177, at *5-6 (Wood County Nov. 9, 2000); *Hulligan v. Columbia Twp. Bd. of Zoning Appeals*, 59 Ohio App. 2d 105, 107-08, 392 N.E.2d 1272 (Lorain County 1978). *See generally Rumpke Waste, Inc. v. Henderson*, 591 F. Supp. 521 (S.D. Ohio 1984) (a township zoning resolution may be enforced when it does not act as an absolute bar to the installation of a sanitary landfill); *Fondessy Enter's, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986) (syllabus, paragraph five) (“[t]he authority of the Environmental Protection Agency to license, supervise, inspect, and regulate hazardous waste facilities does not preclude municipalities from enacting police power ordinances which do not conflict with that authority”).

landfills and that such land uses are strictly regulated by the Ohio [Environmental Protection Agency]”).

When a chapter of the Ohio Revised Code operates uniformly to prescribe a rule of conduct upon citizens and with general uniform application throughout the state under the same circumstances and conditions, the chapter is a general law. *Village of Sheffield v. Rowland*, at 11; *Garcia v. Siffrin Residential Ass’n*, 63 Ohio St. 2d 259, 271, 407 N.E.2d 1369 (1980); *Aluminum Smelting & Refining Co., Inc. v. Denmark Twp. Zoning Bd. of Zoning Appeals*, at ¶24. Using this definition of a general law, courts have concluded that R.C. Chapters 3714 and 3734 constitute general laws of the state. *Village of Sheffield v. Rowland*, at 11; *Clarke v. Bd. of County Comm’rs of Warren County*, at ¶25; *Center Twp. Bd. of Twp. Trustees v. Valentine*, at *4; *see also Clermont Env’tl. Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 442 N.E.2d 1278 (1982) (syllabus, paragraph one) (“R.C. 3734.05(D)(3), which prohibits any political subdivision of the state from requiring any additional zoning or other approval for the construction and operation of a hazardous waste facility authorized by a hazardous waste facility permit issued pursuant to R.C. Chapter 3734, is a ‘law, of a general nature’ of the state having uniform operation throughout the state”).

On the basis of this conclusion, the courts have concluded, further, that, while local governmental entities may use their zoning powers to control the location of landfills that are licensed as construction and demolition debris facilities or solid waste facilities under R.C. 3714.06(A) or 3734.05(A), respectively,⁶ *see note five, supra*, local governmental entities may not use their zoning powers to prohibit

⁶ The comprehensive zoning plan of a county may divide the unincorporated territory of the county into zones and restrict landfills that are licensed as construction and demolition debris facilities or solid waste facilities under R.C. 3714.06(A) or 3734.05(A), respectively, to certain zones. *See generally Village of Sheffield v. Rowland*, at 12 (indicating that nothing prevents a local governmental entity from restricting “state-authorized [construction and demolition debris] facilities to certain districts with appropriate zoning”); *Clarke v. Bd. of County Comm’rs of Warren County*, at ¶29 (“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”); *City of Garfield Heights v. Rockside Reclamation, Inc.*, Case No. 39790, 1979 Ohio App. LEXIS 11260 (Cuyahoga County Dec. 20, 1979) (upholding the validity of a city zoning ordinance that prohibited sanitary landfills in residential zones); Peter C. Krier, Comment, *Ohio’s Sanitary Landfills: State and Local Regulation of Solid Waste Disposal Facilities*, 63 U. Cin. L. Rev. 817, 847 (1995) (“[u]nlike a complete ban on solid waste disposal, a more common zoning scheme divides all of the land within a jurisdiction into higher use areas, such as commercial, industrial, or residential districts. In ef-

that which R.C. Chapters 3714 and 3734 permit or license. *Village of Sheffield v. Rowland*; *Clarke v. Bd. of County Comm'rs of Warren County*; *Center Twp. Bd. of Twp. Trustees v. Valentine*. Thus, since R.C. Chapters 3714 and 3734 permit and license the installation and operation of landfills that are used as construction and demolition debris facilities and solid waste facilities, respectively, a local zoning resolution that completely prohibits such landfills conflicts with the general laws of the state, and, as such, is invalid. *See Village of Sheffield v. Rowland*; *Clarke v. Bd. of County Comm'rs of Warren County*; *Center Twp. Bd. of Twp. Trustees v. Valentine*. *See generally* Peter C. Krier, Comment, *Ohio's Sanitary Landfills: State and Local Regulation of Solid Waste Disposal Facilities*, 63 U. Cin. L. Rev. 817, 846-47 (1995) (“[a] complete ban on solid waste disposal facilities, however, would probably fail judicial scrutiny because the Revised Code authorizes a regulatory scheme for solid waste disposal, thus making a complete prohibition by local authorities contradictory to the implied legislative intent to increase state landfill capacity”). Accordingly, a county zoning resolution may not be amended to prohibit the installation and operation of landfills that are licensed as construction and demolition debris facilities or solid waste facilities under R.C. 3714.06(A) or R.C. 3734.05(A), respectively, throughout the entire unincorporated territory of the county.

Conclusion

In sum, it is my opinion, and you are hereby advised that a county zoning resolution may not be amended to prohibit the installation and operation of landfills that are licensed as construction and demolition debris facilities or solid waste facilities under R.C. 3714.06(A) or R.C. 3734.05(A), respectively, throughout the entire unincorporated territory of the county.

fect, the comprehensive plan zones out solid waste disposal operations without banning them directly, thereby forcing a prospective landfill owner to apply for either an amendment or a variance to the existing regulation. Ohio courts have upheld such a zoning scheme as rationally related to the exercise of the police power” (footnotes omitted). *See generally also Center Twp. Bd. of Twp. Trustees v. Valentine*, at *6 (“[w]hile the Township could have controlled the location of the landfill, it could not prohibit its presence in the township”).