

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

Rumpke Sanitary Landfill, Inc.	:	
	:	
Appellee,	:	Supreme Court Case No. 2009-2004
	:	
v.	:	
	:	
State of Ohio,	:	On Appeal from the
	:	Hamilton County Court of Appeals
Appellee,	:	First Appellate District
	:	
and	:	
	:	
Colerain Township, Ohio, et al.	:	Court of Appeals
	:	Case No. C081097
Appellants.	:	

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**REPLY BRIEF OF APPELLANTS, COLERAIN TOWNSHIP, OHIO;  
COLERAIN TOWNSHIP BOARD OF TRUSTEES; BERNARD A. FIEDELDEY,  
TRUSTEE; KEITH N. CORMAN, TRUSTEE; AND JEFF RITTER, TRUSTEE**

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**FILED**

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## I. INTRODUCTION

To the extent that this declaratory judgment and injunction action presents a justiciable controversy that Rumpke Sanitary Landfill, Inc. has standing to bring, Colerain Township is both an interested party required to be joined under the declaratory judgment statute and a necessary party required to be joined under the Civil Rules. Without Colerain's joinder as a party, there is no jurisdiction and the decisions of the courts below are void.

Whether Colerain is a necessary and interested party must be determined based upon the claims made and the statute challenged by Rumpke Landfill, not the theory upon which the challenge is based or the timing of the filing of this action. The statute challenged by Appellee, Landfill in this action is to R.C. 519.211, as amended by House Bill 562, which prevents private landfills from qualifying as public utilities exempt from township zoning. (Appellee does not claim Amended Substitute House Bill 562 ("Capital Appropriations Bill") as a whole is unconstitutional.) The Landfill alleged it had a 'justiciable controversy' in this case because its common law claims in the Landfill Expansion Case<sup>1</sup> would be adversely affected and it would suffer irreparable injury *if R.C. 519.211 were permitted to become law*. Colerain Township is the adverse party in the Landfill Expansion Case and is equally affected. The Landfill did not, and could not claim the amended statute would subject it to new township zoning authority or regulations. The Appellee's landfill in Colerain Township is and has been subject to local zoning regulation since the initial adoption of zoning more than forty (40) years ago. The amended statute simply preserves the status quo.

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<sup>1</sup> *Rumpke Sanitary Landfill, Inc. v. Colerain Township*, Hamilton County Common Pleas Case No. A0703073, before Judge Ralph E. Winkler, referred to by Appellant Colerain in its Merit Brief and herein as the "Landfill Expansion Case" and by Appellee, Rumpke Sanitary Landfill, Inc. as the "Public Utility Case."

According to Rumpke Landfill, the timing of its constitutional challenge is critical to the determination of the essential parties to this case. It maintains that as long as a case is filed and decided *before the law became effective*, Colerain Township was not a necessary party; the only interested and necessary party is, in essence, the General Assembly. The Landfill characterizes a single subject challenge as a claim against the legislative process of the General Assembly, not the substance of the statute challenged. (Appellee's Brief, p. 8). This required a decision within the three weeks after Appellee Landfill filed its complaint. Appellee admitted that Colerain Township would become an interested and necessary party in this action after the law became effective. (Rec. 280 (96) and Rec. 260-261 (76 – 77)).<sup>2</sup> In order to bring a constitutional challenge, a party must show they have an actual case in controversy and a legal right or interest adversely affected by the claimed unconstitutional law, not simply a general interest in the state legislative process. There is no justiciable case before a law becomes effective. Thus, Colerain Township must be made a party in any event.

A constitutional challenge to a statute on the theory it was included in a bill in violation of the single-subject rule does not automatically exclude every party but the "State of Ohio." Appellee did not seek to have the entire Capital Appropriations Bill declared unconstitutional nor did it attempt to enjoin the Bill from becoming law. It only challenged the constitutionality of

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<sup>2</sup> At the hearing on the merits in the trial court, the Landfill claimed "We're seeking injunctive relief to stop the legislature (*sic*) from taking effect. This is not a case where there is a statute that is out there that is being enforced. No entity in the state is enforcing the revisions to these section (*sic*) at this date because they're not effective. The only party that – and the only entity that makes the statute effective is the State of Ohio. So at this time until the date that the legislation takes effect, the State of Ohio is the only party to whom could be enjoined in the action which is allowing the statute to take effect. So that is why the township is not a proper party, and should the Court grant our Motion for Preliminary Injunction, then, again, the statute has not taken effect anywhere in the state. It is binding upon everyone. And the township, again, would not be a necessary party." (Rec. 260-261 (76 – 77)).

the substantive law within the bill it claimed would adversely affect it: R.C. 519.211 and R.C. 303.211. It is those statutes that must be examined when determining the interested parties to this case.

Colerain Township is an interested and necessary party because it is the enforcing authority of township zoning under the authority of the state statute at the Rumpke Landfill. The constitutionality of R.C. 519.211 clarifying Colerain's police powers, zoning and zoning enforcement authority over the Rumpke Landfill in the township is being challenged by Appellee.

The only real case in controversy and harm claimed by Appellee Rumpke Landfill in this case is amended R.C. 519.211's effect in its Landfill Expansion Case with Colerain. Incredibly, the Landfill claimed, and the lower courts held, that being a party to the Landfill Expansion Case was sufficient to give Rumpke Sanitary Landfill standing to bring this case, but was not sufficient to give the other party in that action, Colerain Township, standing as well. If Rumpke Landfill has an interest in the Landfill Expansion Case that is sufficiently affected to bring this action, then Colerain also has an equal and adverse interest that would be affected by the declaration in this case and its joinder in this action is a jurisdictional prerequisite. Clearly, Colerain Township is an interested or necessary party in this case and was improperly excluded over the objection of Ohio's Attorney General and Colerain Township.

Rumpke orchestrated the parties and timeline in this case pressing for an immediate decision on the constitutionality of a statute that was not yet effective. It did so for the purpose of using the trial court's determination in this case against Colerain in the Landfill Expansion Case without litigating the merits of its constitutional claims in the real case in controversy. Contrary to Rumpke Landfill's assertion in its brief, its constitutional claims were never fully

litigated and determined in the Landfill Expansion Case by Judge Ralph E. Winkler are not *res judicata*.

This Court should not permit Rumpke Sanitary Landfill to bring a premature action to have the constitutionality of R.C. 519.211 determined without including Colerain as a party. Particularly when that determination directly affects Colerain Township's interests in pending litigation with Rumpke Landfill and its police powers of the Rumpke Sanitary Landfill in Colerain Township. The decision below should be voided for lack of jurisdiction. Alternatively, it should be reversed and remanded with an order requiring Colerain Township to be added as an interested and necessary party to the litigation so that all claims and defenses can be fully and fairly litigated, including ripeness, other necessary parties, constitutional avoidance, Rumpke Sanitary Landfill's standing to bring the action, and if appropriate, the merits of this case.

## **II. RESPONSE TO APPELLEES' STATEMENT OF THE CASE**

The Landfill implies throughout its brief that Colerain somehow delayed in seeking to be joined in this action. Appellee, Rumpke Sanitary Landfill, Inc. and Appellant, Colerain Township had been in litigation in the Landfill Expansion Case for more than eighteen (18) months at the time Rumpke Landfill filed this declaratory judgment action. The primary issue in the Landfill Expansion Case involved the interpretation of R.C. 519.211. In 2007, after being denied the zoning for a 350 acre expansion that would have permitted a massive 859 acre landfill in the township, Rumpke Landfill sued Colerain Township claiming its existing landfill and all future expansions were free from all local police powers and zoning regulation in the urban township.<sup>1</sup> Rumpke Landfill claimed it was exempt from Colerain Township zoning under

R.C. 519.211 because it had become a ‘common law’ public utility.<sup>3</sup> While that litigation was pending, R.C. 519.211 was amended to expressly exclude privately owned landfills from qualifying as public utilities exempt from zoning.

Instead of raising its constitutional claims in real case in controversy over the landfill expansion, just three (3) weeks before the amendment to R.C. 519.211 became effective, Rumpke Landfill filed this suit naming the “State of Ohio” as the sole defendant. Even though it was never served or notified of the filing, Colerain sought to both intervene and have this case consolidated with the Landfill Expansion Case just nine (9) days after the complaint was filed. At the Landfill’s request, sixteen (16) days after the case was filed, this case was tried on the merits to the exclusion of Colerain Township.<sup>4</sup> Just thirty-one (31) days after filing (and ten (10) days after the amendments to R.C. 519.211 became effective), the trial court issued a decision on the merits declaring the amendments to R.C. 519.211 unconstitutional and urging the parties to seek appellate review of its decision “[d]ue to the importance of the issue to the parties and the public \* \* \*.” Ironically, the trial court recognized the importance of the issue to Rumpke

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<sup>3</sup> Private sanitary landfills have not been declared to be common law “public utilities.” In 1992, this Court found the particular privately owned sanitary landfill in *A & B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 385 was not a public utility, but did not preclude all landfills from utility status. Since *A&B Refuse*, the General Assembly comprehensively reformed the regulation of solid waste throughout the state, creating solid waste management districts and requiring solid waste management plans. In 2007, this Court found that the solid waste management district was a public utility, not the public landfill. See *St. Mary’s v. Auglaize Cty. Bd. of Cmmrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026.

<sup>4</sup> Rumpke Landfill’s statement that it “offered to allow Appellants to argue the merits of the case at the trial court” is disingenuous. After Rumpke Landfill opposed Colerain Township’s motion to intervene and the State’s motion to dismiss, the trial court took the motions under advisement, and allowed only the State and Rumpke Landfill be heard on the merits. At the conclusion of the hearing on the merits, counsel for Rumpke Landfill stated it would not oppose the court allowing Colerain to be heard on the merits. Both the Attorney General and the court recognized the prejudice to Colerain to be required to argue the merits of a case without notice, preparation or even being a party in the action. (Rec. 273 277).

Landfill, the state and the public, yet denied the participation of Colerain Township, the public entity in whose jurisdiction the landfill is located and who is most affected by the court's decision.<sup>5</sup> Colerain Township is also the only public authority whose police powers were being challenged by Rumpke Landfill and whose 60,000 residents are most affected by the ever growing landfill in the heart of the populous township. As the host community of one of the largest landfills in the state, the constitutionality of R.C. 519.211 is a critical issue to Colerain Township. Colerain acted without delay and should have been permitted to be joined as a party by the trial court.

Appellee, Landfill claims that the Attorney General can adequately represent the interests of Colerain Township and speculates on why the Attorney General has elected not to participate in this appeal. The Landfill's speculation is irrelevant and should be disregarded by this Court. The competence of the Attorney General in constitutional claims is irrelevant to the determination of who is an interested party under R.C. 2721.12 or a necessary party that Rumpke Landfill was required to join under Civ. R. 19(A) or who was permitted to intervene under Civ. R. 24(A). Appellee erroneously claims R.C. 2721.12 "convert[s] the Civ. R. 24(A)(2) standard for intervention by right into a jurisdictions requirement in declaratory judgment actions." (Appellee's Brief, p. 7) It does not. Service on the attorney general is a jurisdictional pre-requisite to every constitutional challenge to a state statute. *Cicco v. Stockmaster* (2000), 89 Ohio St.3d 95. The attorney general's participation in a declaratory judgment case has no effect upon the statutory requirement that "persons who have or claim any interest that would be affected by the declaration" "shall be named parties to the action or proceeding." R.C. 2721.12.

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<sup>5</sup> The trial court expressly noted in its decision, "[d]ue to the importance of this issue to the parties and the public, this Court urges the parties to seek Appellate Review of this decision." (Appendix A-20, emphasis original).

The question of whether Colerain Township is an interested and necessary party is based upon whether it has rights or interests it claims will be affected by the declaration of the court, not upon the attorney general's participation in the case.

Colerain Township is clearly interested in this case. It is a party to the Landfill Expansion Case the Appellee relies upon for a justiciable claim. Furthermore, the same Attorney General whose competence is championed by Appellee Landfill in their brief repeatedly claimed that the state's interests were not aligned with the township, that it did not represent the township's interests and that without Colerain as a party, the trial court lacked jurisdiction to proceed. Plainly, the Attorney General cannot adequately represent Colerain's interests when it has chosen not to participate in the appeal to this Court.

### **III. THIS CASE IS NOT MOOT AND RES JUDICATA DOES NOT APPLY**

After the amendments to R.C. 519.211 became effective, Colerain Township moved for summary judgment in the Landfill Expansion Case on the grounds that under the amended statute Rumpke Landfill was not a public utility.<sup>6</sup> Rumpke Sanitary Landfill filed a three page memorandum in opposition to the motion stating:

The amended section of R.C. 519.211(A) which Defendants based their Motion for Summary Judgment upon has been declared unconstitutional by the Hamilton County Court of Common Pleas and permanently enjoined from taking effect. A copy of Judge Nadel's Order Granting Permanent Injunction is attached hereto as Exhibit "A". Because the amendments to R.C. 519.211(A) were declared unconstitutional, Defendants' Motion for Summary Judgment must be denied.

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<sup>6</sup> Colerain Township filed a second motion for summary judgment in the trial court below claiming Rumpke Sanitary Landfill, Inc. was barred from any future expansions by its settlement with the township in its 1999 litigation over the previous 168 acre landfill expansion in Hamilton County Common Pleas Court Case No. A0007121. (Rec. 032). That motion is referred to in the trial court's decision below, but not at issue before this Court. Rumpke Sanitary Landfill filed a motion for summary judgment on the merits of whether it qualified as a 'public utility' exempt from township zoning under *former* R.C. 519.211 in the Landfill Expansion Case.

Rumpke Sanitary Landfill did not amend its declaratory judgment action to claim the amended statute unconstitutional and did not allege, move or brief the merits of its claims that R.C. 519.211 was unconstitutional in the Landfill Expansion Case. Although the Landfill Expansion Case was an action for declaratory judgment, Appellee Rumpke Sanitary Landfill did not add the State of Ohio as a party or serve the Attorney General when it challenged the constitutionality of the very law in which it previously claimed the state an essential party. The declaratory judgment order and any injunction issued in this case could not be used against Colerain Township in the Landfill Expansion Case. Thus Appellee Rumpke successfully prevented Colerain from arguing the merits of the constitutional claims in either case. As the Assistant Attorney General repeatedly cautioned the trial court below when urging that Colerain be joined as a party in this action, “the Ohio Supreme Court has been very clear that declaratory judgment orders, just like preliminary injunctions, only bind the parties to the action. So even if this Court issues a declaratory judgment or preliminary injunction in this matter, it will not bind Judge Winkler and Colerain Township.” (Rec. 196 (12)). The Assistant Attorney General was prophetic. That is exactly what Rumpke Landfill did in these cases.

The parties did not litigate the issue of the statute’s constitutionality in the Landfill Expansion Case as Rumpke Sanitary Landfill claims in its Brief. Nor did Judge Winkler rule in the Landfill Expansion Case that the inclusion of the revision to R.C. 519.211 in the Capital Appropriations Bill violated the Single Subject Rule. Judge Winkler simply summarily denied Colerain Township’s motions for summary judgment and granted Rumpke Sanitary Landfill, Inc.’s motion for summary judgment which did not raise the constitutional issue. *See Final Entry Granting and Denying Summary Judgments* attached as Appendix A. That decision is now on

appeal before the First District Court of Appeals. The First District expedited the appeal and limited Colerain Township to a fifteen page brief on all issues, including the constitutional claims, without a reply and over Colerain's objection as advocated by the Landfill.

This Court should not permit Appellee Rumpke to: (1) exclude Appellant Colerain as a party and from the litigation in this case; (2) claim in the Landfill Expansion Case that the trial court's decision in this case is determinative on the constitutional issue; (3) then claim in this case a decision was made on the merits of the constitutional claims in the Landfill Expansion Case which is *res judicata* and render this case moot. This tactic is fundamentally unfair, violates Appellants' procedural due process rights and illustrates exactly why parties should not be permitted to bring premature claims and exclude the real parties in interest. At Appellee Rumpke's insistence, this case and the Landfill Expansion Case do not have identical parties and the decision in one of the cases is not *res judicata* in the other, as the Attorney General forewarned and admonished below. A jurisdictional defect cannot be waived or rendered moot.<sup>7</sup> This case is not moot and none of Colerain Township's claims are barred by *res judicata*.

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<sup>7</sup> An actual controversy remains between Colerain Township and Rumpke Landfill. The Landfill Expansion Case is being litigated on appeal, and it is possible for this Court to void the decisions below and grant the requested relief. *State ex. rel. Gaylor, Inc. v. Goodenow*, -- N.E.2d --, 2010-Ohio-1844.

#### IV. ARGUMENT

##### Proposition of Law No. I.

**A township is an interested and necessary party to a constitutional challenge brought by a property owner within the township's jurisdiction to a law passed by the General Assembly that directly affects the township's police powers over that owner's property and pending litigation.**

Appellant Colerain Township is required to be made a party to this action pursuant to R.C. 2721.12, Civ. R. 19 and Civ. R. 24 for at least two reasons. First, the declaration of the constitutionality of R.C. 519.211 in this case does, and in fact has, directly affected Colerain's claims in its pending litigation with Rumpke Sanitary Landfill, Inc. in the Landfill Expansion case. Second, the declaration directly affects the application of the township's zoning to Appellee's immense landfill in Colerain Township and the township's police powers over the landfill.

1. Appellant Colerain Township's interests in its pending litigation with Appellee Rumpke Sanitary Landfill, Inc. are affected by this action.

Appellee Rumpke Landfill claims that as to Colerain, this case will only have a "practical impact" on the Landfill Expansion Case. Conversely, as to its own claims in that same case, the Landfill claims irreparable harm. The Landfill argues that even though Colerain Township is engaged in litigation against Rumpke Landfill, the 'practical consequence' of this case "does not covert the Township into a necessary party so as to deprive the trial court of jurisdiction." (Appellee's Brief, p. 10). There is no distinction between the claims.

In the Landfill Expansion Case, Appellee Landfill claims it is a common law 'public utility' that is exempt from Colerain Township zoning under *former* R.C. 519.211. Amended R.C. 519.211 eliminates the Landfill's common law claim. Rumpke Landfill claimed it had a

justiciable controversy in this action, would suffer irreparable injury and was entitled to an expedited hearing and immediate relief based solely upon its status as a party in the Landfill Expansion Case and the affect the amended law would have on that litigation. It is Appellee who filed this action asserting Rumpke Landfill had a 'justiciable controversy' and would suffer irreparable harm because it was a party in litigation in the Landfill Expansion Case, not Colerain Township. If being a party to the Landfill Expansion litigation creates interest sufficient to give the Landfill standing in this case and creates a justiciable controversy, then it is also a sufficient interest to require Colerain to be a party and deprived the trial court of jurisdiction.

The cases cited by Appellee and the lower courts do not support the assertion that Colerain Township has a mere "practical interest" in this case. This Court's holding that township's are not parties to certain annexation proceedings is irrelevant and not instructive here. *See State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169. The *Butler Township* case involved the interpretation of statutes that defined who were statutory parties in special statutory annexation proceedings not a constitutional challenge under the single subject rule. This Court found the statute excluded Townships as parties.

*Dayton Metro. Housing Auth. v. Dayton Human Relations Council* (1992), 81 Ohio App.3d 436 is also not instructive. That case involved a dispute between two administrative agencies of the city of Dayton who were the only parties to a civil rights complaint, not a constitutional challenge. The *Dayton Human Relations Council* ("HRC") is the local equivalent of the Ohio Civil Rights Commission. It investigates charges of discrimination and issues complaints. *Id.* at 443. HRC (not the employee) filed a formal civil rights complaint against the Dayton Metropolitan Housing Authority ("DMHA") based upon charges filed with it by an

employee of DMHA. HRC and DMHA settled the case, then HRC attempted to renege on the settlement and set the case for hearing on the merits. DMHA filed suit to enforce the settlement and stop the hearing. The court held that HRC lost jurisdiction when it settled the complaint with DMHA and that the employees who initially filed the discrimination charge with HRC were not necessary parties to a lawsuit involving an interagency jurisdictional dispute. The suit had nothing to do with the merits of the discrimination claim. Here, unlike the *Dayton* case, the statute challenged by Rumpke under the single subject rule is at issue in and directly related to the claims of both parties in the Landfill Expansion Case. It is also directly related to the zoning enforcement authority of the township.

In *Driscoll v. Austintown Associations* (1975), 42 Ohio St.2d 263, this Court held that neighboring property owners are not necessary parties in declaratory judgment actions involving the constitutionality of a township zoning ordinance as it applied to a specific parcel of property. The necessary parties were the township and the owner of the property in question. As in *Driscoll*, in a constitutional challenge that involves the township's zoning authority, the township is an interested and necessary party, without whom the court lacks jurisdiction to proceed.

Appellee Rumpke Landfill brought this action for the purpose of affecting its rights and the rights of Colerain Township in the Landfill Expansion Case, to the exclusion of Colerain. Appellee's claimed interest in the Capital Appropriations Bill was to strike the amendments to R.C. 519.211 so that it could continue to pursue its claims under the former statute in the Landfill Expansion Case and prevent Colerain Township from continuing to enforce its zoning against the landfill it under the new law. (Rec. 005, 012, 017). As soon as the trial court's decision was issued in this case, Appellee Rumpke Sanitary Landfill, Inc. asserted it in the Landfill Expansion Case that the new law had been enjoined by Judge Nadel and was not effective. Without

question, Colerain Township's interests in its pending litigation with Rumpke Sanitary Landfill, Inc. are affected by this action. That was Appellee Landfill's the very purpose in bringing it.

2. Colerain Township's police powers over Appellee's Landfill are directly affected by this action and Colerain is an interested and necessary party without whom the court is deprived of jurisdiction.

Appellee Landfill selectively quotes only a portion of R.C. 519.211 in an effort to convince this Court that Colerain is not an "enforcing agency" under state law. (Appellee's Brief, p. 12). R.C. 519.211 does not limit Colerain's authority to regulate the Rumpke Sanitary Landfill. It empowers it by excluding landfills from the public utility limitation on zoning. R.C. 519.211(A) reads, in its entirety:

(A) Except as otherwise provided in division (B) or (C) of this section, sections 519.02 to 519.25 of the Revised Code confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad, for the operation of its business. *As used in this division, "public utility" does not include a person that owns or operates a solid waste facility or a solid waste transfer facility, other than a publicly owned solid waste facility or a publicly owned solid waste transfer facility, that has been issued a permit under Chapter 3734. of the Revised Code or a construction and demolition debris facility that has been issued a permit under Chapter 3714. of the Revised Code.*

If Colerain Township were not an enforcing agency, Appellee Rumpke would not be attempting to re-zone its property in Colerain Township or suing Colerain Township in the Landfill Expansion Case in an attempt to exempt itself from local zoning control.

R.C. 519.02 authorizes townships to adopt local zoning. R.C. 519.211 prevents townships from regulating "public utilities" through zoning. With limited exception, R.C. 519.211 does not define what is and what is not a "public utility" exempt from township zoning. Former R.C. 519.211 was silent as to whether public or private landfills were public

utilities.<sup>8</sup> See former R.C. 519.211; Appendix A-28. Amended R.C. 519.211 makes it clear, private sanitary landfills are expressly subject to township zoning, as the Rumpke and other landfills throughout the state historically have been. See R.C. 519.211; Appendix A-24. The township is the “enforcing agency” for all zoning pursuant to state statute, not “the court system” as Appellee argues. See R.C. 519.24.

In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1998), 86 Ohio St.3d 451, cited and relied upon by Appellee, the judge was named as a defendant not because he was an “enforcing authority” under the statute. The judge was named because the parties sought to enjoin common pleas judges from enforcing the tort reform statute in all cases that came before them since there is no way to enjoin or stay the effectiveness of a law once it is adopted by the General Assembly as Appellee seeks to do in this case. Following the *Sheward* logic, Appellee Rumpke Landfill would have had to name Judge Winkler as a defendant in order to enjoin him from enforcing R.C. 519.211 as amended against Rumpke Landfill. This was not necessary since Appellee Rumpke already had a real case in controversy before Judge Winkler where its claims should have been raised.

The township is a necessary party in any case such as this one in which its enforcement authority is being challenged. *Barnesville Education Assoc. v. Barnesville Exempted Village School District Bd. of Education*, Belmont App. 06 BE 32, 2007-Ohio-1109. When declaratory relief is sought that involves the constitutionality of a statute that “affects the powers and duties” of a township, the township must be made a party to the action so “that the issues involved will

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<sup>8</sup> There are limited exceptions in R.C. 519.211 for certain uses that do not qualify as public utilities exempt from zoning that are not relevant in this case. They include uses such as telecommunication towers, public utilities engaged in the business of transporting persons or property (trucking) and oil or natural gas well drilling and production.

be fully presented.” *City of Cincinnati v. Whitman* (1975), 44 Ohio St.2d 58. This is particularly true when, as here, the state has no enforcement authority under the statutes being challenged and the township has special expertise. When there is no state enforcing authority, the necessary party becomes the local enforcing authority as this Court recognized in *National Solid Wastes Management Association v. Stark-Tuscarawas-Wayne Joint Solid Waste Management District*, 124 Ohio St.3d 197, 2009-Ohio-6765 (finding the solid waste management district was the “enforcing agency” and necessary party not the Director of the Ohio EPA).

Appellee Rumpke Landfill claims that Colerain Township has failed to prove it has any heightened interest in this case above any other township or county in Ohio. Appellee itself established Colerain Township’s heightened interest in this case when it filed the case in Hamilton County and claimed the Landfill Expansion Case and Colerain’s enforcement of its zoning at Appellee’s landfill were the reason it had a justiciable controversy. The other townships and counties in the state that have adopted zoning and have private sanitary landfills located in their jurisdictions may also be interested and necessary parties in this action, though none were named or claimed to be interested or necessary parties like Colerain. Colerain Township has not claimed that ‘thousands of defendants are necessary in order for the trial court to strike a portion of the Capital Appropriations Bill as a violation of the Single Subject Rule’ as Appellee claims. (Appellee’s Brief, p. 13). Appellant Township and the State below have simply claimed one additional defendant is both necessary and jurisdictionally required: Colerain Township.

Rumpke Landfill asserts for the first time in its brief that the “Rumpke *family of companies*” operate in more than half of Ohio’s counties. It claims these family companies operate four landfills in three Ohio counties and waste transfer stations in seven counties. None of these facts were pled by the Landfill, are part of the record in this case or are relevant to this

Court's determination of whether Colerain Township is an interested and necessary party in this case. The members of the "family of companies" are not identified by Appellee or parties to this action. There is no evidence that the Appellee in this action, Rumpke Sanitary Landfill, Inc., owns and operates any landfills outside Hamilton County, Ohio. If Appellee Rumpke Landfill owns and operates landfills in other counties and townships with local zoning, they too may be interested and necessary parties to this action who should be notified of this action and joined. That, however, is not the issue before this Court. The issue is whether Colerain Township is permitted, indeed required, to be a party in this case. As the case was filed and pled by Appellee Rumpke Landfill, the answer is clearly yes.

3. A constitutional challenge to select statutes contained within a larger bill is a substantive challenge to the specific statute, not a procedural challenge to a legislative process.

Appellee Landfill claims its single subject challenge is "directed at the *legislative process* – not the substantive law." Appellee asserts this is particularly true when the action is "commenced prior to the effective date of [the] legislation." (Appellee's Brief, p. 8). Both statements are erroneous.

There is no general legally protectable interest in the legislative process of the General Assembly or the Capital Appropriations Bill. A private corporation or person does not have a general right to challenge a particular law or the legislative process of the General Assembly without some showing of specific and individual harm. Otherwise, the constitutionality of all or any portion of a law or bill adopted by the General Assembly may be challenged by anyone on the theory that it violated the one-subject rule without restraint, including during the ninety-day period before it becomes effective.

According to Appellee, a person need only sue the “State of Ohio” and have a common pleas judge in any county in the state enjoin the legislation from becoming effective. No particular harm needs to be shown or actual case in controversy exist. The attorney general would be required to defend every claim, or permit state laws to be declared unconstitutional by default. Appellee cites no law to support this theory or the authority of a court to enjoin the legislative process of the General Assembly or the date a state law becomes effective, and there is none. The General Assembly is *non sui juris* and immune from suit. A law becomes effective by the self executing provisions of the Ohio Constitution, which cannot be enjoined. Section 1c and 1g, Article II, Ohio Constitution. There is no harm or cause of action before a law becomes effective.

A challenge to the constitutionality of a particular law on the theory that it violates the single subject rule does require an examination of the substance of the law challenged and the connection of that substance to the subject and overall provisions of the bill by which it was adopted. *State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.* (“SERB”), 104 Ohio St.3d 122, 2004-Ohio-6363. That examination does not eliminate the need for a party challenging a statute to establish a valid cause of action and legal right or interest uniquely harmed by the substantive provisions of the statute in question. It is the substance of the statute challenged and the unique harm claimed that establishes the necessary parties to the action, not the theory upon which the statute is claimed to be unconstitutional.

Appellee Rumpke Sanitary Landfill, Inc. is a private corporation that owns and operates a private landfill in Colerain Township. It has no protected interest in the legislative process of the General Assembly. Rather, it must prove that it is directly, adversely and uniquely affected by a particular law before it can bring a cause of action to challenge it, even under the single subject

rule. Appellee's challenge to R.C. 519.211 was not ripe until the law became effective and is enforced or threatened to be enforced against the Landfill. As Appellee admits, as soon as R.C. 519.211 became effective, Appellant Colerain Township also had interests as a litigant in the Landfill Expansion Case and as a township with local zoning in which Appellee's private sanitary landfill is located and was thus required to be joined as a party.

## V. CONCLUSION

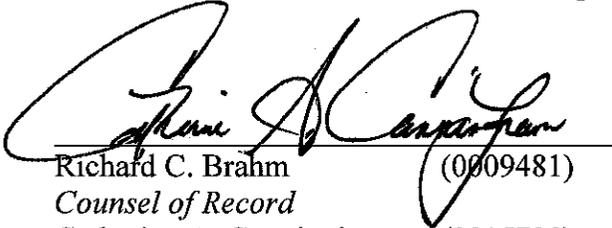
This case has an enormous affect on Colerain Township and every township and county who has adopted local zoning where a private sanitary landfill is located. If R.C. 519.211 is constitutional, Colerain Township will be able to continue to enforce its zoning on Rumpke Sanitary Landfill as it has for decades. If the statute is declared unconstitutional, Appellee's landfill in Colerain Township and private landfills throughout the state may be entitled to be sited and expand at any location free from any local zoning or land use regulation.

Rumpke Sanitary Landfill, Inc. has been in litigation with Colerain Township for years over its local land use controls of the landfill including its most recent litigation to expand this local landfill to more than 850 acres. A privately owned sanitary landfill in litigation with a local government over that government's enforcement of its zoning regulations against it should not be entitled to collaterally challenge the constitutionality of the statute that is the heart of the litigation, use the pending litigation as the basis to file the action, and then exclude the township from a premature constitution of challenge which was decided in a mere 31 days.

Colerain Township is an interested and necessary party in this case. By failing to join the township as a party, and opposing its intervention, Appellee Rumpke Sanitary Landfill, Inc. created a fatal jurisdictional defect in this case. Appellant, Colerain Township respectfully

requests that this Court declare the decisions below void for lack of jurisdiction and require Colerain Township to be joined as a party in any remand on the merits.

Respectfully submitted,



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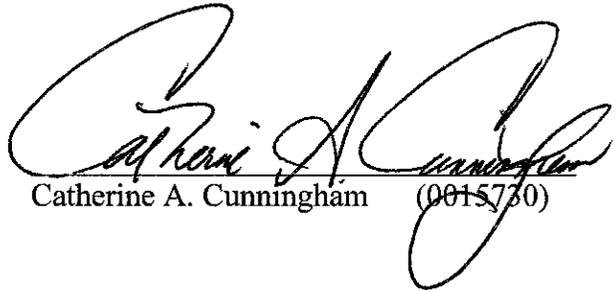
*Co-Counsel for Intervenors-Appellants,  
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Township Board of Trustees; Bernard  
A. Fiedeldey, Trustee;  
Keith N. Corman, Trustee; and  
Jeff Ritter, Trustee*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following parties via regular U. S. mail, postage pre-paid, on this 21<sup>st</sup> of June, 2010:

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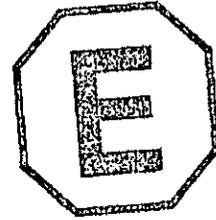
Catherine A. Cunningham (0015730)

**ENTERED**  
MAR 06 2009



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COURT OF COMMON PLEAS  
HAMILTON COUNTY OHIO



RUMPKE SANITARY LANDFILL, INC., et al., : CASE NO. A0703073  
: :  
PLAINTIFFS : JUDGE RALPH E. WINKLER  
: :  
V. : :  
: :  
COLERAIN TOWNSHIP, OHIO, et al., : FINAL ENTRY GRANTING AND  
: DENYING SUMMARY  
: JUDGMENTS  
DEFENDANTS :

In consideration of the written and oral arguments brought forth by the parties upon the motions for summary judgment of both the defendants and the plaintiffs, the Court rules as follows: (1) the plaintiffs' motion for summary judgment is granted, holding that Rumpke Sanitary Landfill is a public utility, not subject to the zoning restrictions of Colerain Township, Ohio, and (2) all defendants' motions for summary judgments are denied. Plaintiff shall be granted the relief sought in its motion for summary judgment. In addition, all outstanding crossclaims and counterclaims are dismissed. So ordered this fifth day of March, 2009.

COURT OF COMMON PLEAS  
ENTER  
*Ralph E. Winkler*  
HON. RALPH WINKLER  
THE CLERK SHALL SERVE NOTICE  
TO PARTIES PURSUANT TO CIVIL  
RULE 58 WHICH SHALL BE TAXED  
AS COSTS HEREIN.