ORIGINAL

IN THE SUPREME COURT OF OHIO

Rumpke Sanitary Landfill, Inc., *et al.*	:	
Appellees,	:	Supreme Court Case No. 11-0181
v.	:	
Colerain Township, Ohio, *et al.*	:	On Appeal from the
Appellants.	:	Hamilton County Court of Appeals
	:	First Appellate District
	:	Court of Appeals
	:	Case No. C090223

MEMORANDUM IN SUPPORT OF JURISDICTION 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
JAN 31 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The question in this case is whether, after more than four decades of local zoning regulation, one of the largest landfills in the state can transform from a private business subject to local zoning regulation and control to a privately owned 'public utility' suddenly exempt from township zoning regulation after its request to rezone property for a massive landfill expansion is denied. The issue is the scope of the statutory exception for "public utilities" from township zoning under R.C. 519.211, and whether a privately owned sanitary landfill is such a 'public utility' and when it becomes one.

If allowed to stand, the decision of the Hamilton County Court of Appeals will allow the existing private 509 acre landfill owned by Rumpke Sanitary Landfill, Inc. ("Rumpke") in Colerain Township to expand a proposed 350 acres and beyond without any limitation as to its size or its effect on the properties that currently surround the landfill and those properties that will one day discover that they are adjacent to a landfill. Such expansion would occur irrespective of whether the township can provide adequate roads, fire and police protection and other services to its residents, and the landfill and its surrounds. This approach to judicially award public utility status to select landfills is contrary to the overall state scheme of solid waste management and regulation, the authority of local governments to plan, regulate, control and enforce land use within its boundaries, the obligation and authority of the state to regulate public utilities and the public interest, health safety and welfare.

Perhaps most critically, the decision below would allow a private landfill to have a court sanctioned monopoly without any regulations to protect members of the public from disparate treatment in the acquisition of the landfill's services, or public oversight, regulation or control of its disposal rates and charges, its duty to accept public waste or its obligation to provide service to the public. The location of sanitary landfills and the protection of properties surrounding landfills through local zoning are of great general interest and public concern throughout the state. The

regulation and management of solid waste, indiscriminate access to 'public utility' solid waste disposal facilities, and indiscriminate reasonable disposal rates and charges of an asserted 'public utility' are also of vital public concern.

R.C. 519.211 does not define what is or is not a 'public utility.' This Court has held that the question of whether a particular entity is a public utility is a 'mixed question of law and fact' determined on a case by case basis. *Marano v. Gibbs* (1989), 45 Ohio St.3d 310, 311, *St. Marys v. Auglaize Cty Bd. of Cty. Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026. Essential to the determination is the character of the business in which it is engaged and the regulations that exist in that industry. *Industrial Gas Co. v. Pub. Util. Comm. of Ohio* (1939), 135 Ohio St. 408, syllabus para.1; *Washington Twp. Trustees v. Davis*, 95 Ohio St.3d 274, 2002-Ohio-2123.

In 1992, this Court determined that it was possible for a privately owned landfill to be a public utility exempted from township zoning but found the landfill in question was not a public utility. *A & B Refuse Disposers, Inc. v. Ravenna Township Board of Trustees* (1992), 64 Ohio St.3d 385. In *A & B Refuse*, this Court held in its Syllabus (emphasis added) "[w]hile the definition of a "public utility" is a flexible one, the entity must provide evidence that it possess certain attributes ***associated with public utilities*** or its claim to that status must fail." This Court cautioned that further regulation may be necessary. *Id.* at 390.

Since *A & B Refuse* was decided, the state of Ohio has implemented a statewide plan for the management and disposal of solid waste that is generated in the state.[1] It created a requirement that the entire state be covered by solid waste and regional solid waste management districts ("SWMD") to plan, manage and assure disposal of solid waste generated in Ohio. SWMDs must provide for the disposal of *all solid waste* produced in their district for at least ten years. R.C. 3734.53(A). The state

[1] The statutory framework for solid waste disposal adopted in House Bill 592 was discussed by this Court in *Danis Clarkco Landfill Company v. Clark County Solid Waste Management District* (1995), 73 Ohio St.3d 590, 596-598.

has also adopted the State Solid Waste Management Plan with a stated goal to reduce reliance on the use of landfills for the management of solid waste with no single landfill being more important or essential than any other. R.C. 3734.50(A). The plan did not do away with local zoning or create regulation of the rates, charges, services or operations of private sanitary landfills or subject them to the control of the Public Utilities Commission of Ohio (PUCO) or SWMD. Solid waste authorities have since been found by this Court to be the "public utility" involved in the disposal and regulation of solid waste. *St. Mary., supra* at ¶54-68.

This case involves a large privately owned sanitary landfill owned by Rumpke Sanitary Landfill, Inc. in Colerain Township. Previous to its latest attempts, the landfill had expanded by complying with the Colerain Township Zoning Resolution and/or asking for and obtaining judicial relief from certain zoning regulations. Rumpke was not so successful in this case and the expansion was denied after several expansions were represented to be the final expansions on the site. Rumpke diverted then to arguing the landfill itself was a public utility. The public utility attribute asserted by Rumpke and relied upon by the court of appeals was its claimed monopolistic position in the marketplace. However, a large share of the marketplace alone is insufficient and is a basis on which public utility status must be denied, unless there are sufficient regulations in the solid waste industry that protect the public from unreasonable rates and charges, discriminatory practices and guaranteed service. There are none here. The Rumpke landfill has no regulated rates, no regulation by the PUCO and holds no public hearings with regards to the amounts charged at the landfill for disposal of sanitary waste. Waste disposal at the landfill is done by contract without obligation for renewal. There is no public oversight from the standpoint of regulation of size, territory, rate control, obligations to the general public, uniformity of service, or any other normal public utility function.

The court below shortchanged this case and in doing so, provided no direction as to what is and what is not a public utility exempt from township zoning. Location and disposal of sanitary waste is a state-wide concern. This is not a matter of purely local concern for a landfill that becomes

a public utility without public oversight which can be exempt from zoning and expand at will destroying and severely handicapping local zoning attempts to identify, organize and promote land use is beneficial to the townships and counties in Ohio.

In Ohio, sanitary landfills may be publically or privately owned.[2] Although there is no governmental regulation of the rates, charges and services of private sanitary landfills, publicly owned sanitary landfills operate in an open, public environment. They must set uniform rates following public hearings based upon the cost of providing the service and are required to be open and available to the general public. R.C. 343.08(c). They operate under Ohio public records and open meetings acts (the sunshine law) and their meetings and records are open for public participation and inspection. R.C. 3734.52, 343.01, 343.011, 143.43 and 121.22. They are run by public officials who are publicly accountable. Although the township and county zoning statutes would permit an exemption from zoning for a 'public utility' "whether publicly or privately owned," in Ohio, privately owned sanitary landfills do not operate under the same rules or with the same public disclosure, duties or accountability as public landfills or the public officials that own and operate them. R.C. 519.211.

In 2008, the General Assembly included an amendment of R.C. 519.211 and 303.211 in the Capital Appropriations Bill clarifying that privately owned landfills were statutorily precluded from being exempt from county or township zoning as a 'public utility.' Rumpke again sued, challenging the constitutionality of the legislative process adopting the amendment. This Court held the state's amendment to R.C. 519.211 unconstitutional as violating the single subject rule. Appellant, Colerain Township was not permitted to participate in that case for lack of standing. *Rumpke Sanitary Landfill Inc. v. State of Ohio,* 2010-Ohio-6037. Colerain Township now urges this Court to accept jurisdiction of this case on the issue of whether or not Rumpke is a 'common law' public utility

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[2] Townships, counties, municipalities, solid waste authorities and regional solid waste authorities may own and operate sanitary landfills. R.C. 343.01, 505.27 and 717.01.

exempt from Colerain Township zoning under R.C. 519.211. If select private landfills can become public utilities by judicial decree when they disagree with a zoning decision, as Rumpke did in this case, then this Court should accept jurisdiction to establish standards for determining whether or not a privately held landfill company with no public accountability for rates, structure, territory or operation should get the ability to expand outside of any zoning controls of townships or counties.

This is not an isolated case. These same issues can and do arise in other townships and counties that own, operate or regulate landfills through local zoning as stated by the *amici* township associations, township and counties in their supporting memoranda. If this case is allowed to stand, every township and county that permits a landfill to be established, or in which a landfill is currently located is at risk that their local zoning authority could be extinguished, at any time, should a private landfill increase its size or number of customers and/or meet some other criteria that allows it to become a public utility based on the self-serving affidavits of the landfill's owns and managers. This has a chilling effect on both counties and townships allowing new landfills to be established or permitting existing landfills to expand. This is a matter of great general interest and public concern and Appellant Colerain Township respectfully urges this Court to accept jurisdiction of this case.

STATEMENT OF THE CASE AND FACTS

The significance and importance of the issues in this case and its the public and great general interest is best understood within the context of the history of the landfill, the facts that gave to Rumpke's filing of this action and the nature of the proceedings below. Colerain Township, Hamilton County, Ohio is one of Ohio's largest townships with more than 60,000 residents. It has been the host community for Rumpke's sanitary landfill for more than 60 years. That solid waste facility was established before there was any zoning and has been subject to and regulated by local zoning since zoning was initially adopted more than 40 years ago – first by Hamilton County and then by Colerain Township. Each time Rumpke has expanded its solid waste facility, it has sought a local zoning change. When a zoning change has been denied, Rumpke has filed one or more lawsuits

against the local zoning authority challenging its actions. In 1999, Colerain Township denied a request from Rumpke to rezone 138 acres to allow a 'southern' expansion of the landfill. Rumpke sued the township claiming the township's zoning resolution was unconstitutional as applied to its property and constituted a taking without just compensation. In 2000, Colerain Township entered into a consent decree in that case allowing the expansion and believing it was the final expansion of the landfill.[3]

Just six years later, Rumpke again requested rezoning, this time for an additional 350 acre eastern expansion. In 2007, Colerain Township denied the rezoning request. Rumpke again sued Colerain Township in the case now before this Court for declaratory judgment, mandamus and money damages asserting that the township zoning resolution was unconstitutional and constituted a taking without just compensation. Rumpke amended its complaint to include a new claim that it had become a "public utility" and is no longer subject to the township zoning under R.C. 519.211.

Even though there were depositions on both sides of the issue, conflicting expert opinions, thousands of pages of documents produced and disputed issues of material facts were evident in the record, Rumpke filed a motion for summary judgment claiming that, without dispute, it was a public utility. Colerain opposed. Colerain filed motions for summary judgment on two grounds: (1) Rumpke was not a public utility under R.C. 519.211 *as amended* (which Rumpke challenged to the exclusion of Colerain in a separate action)[4]; and (2) Rumpke was barred from any further expansion by the 2000 Consent Decree for the southern expansion. The trial court, without opinion, granted Rumpke's motion for summary judgment. Colerain Township appealed.

Although establishing a private landfill as a public utility means it does not have to comply with the zoning, zoning plans or regulations of townships and counties in Ohio, and the unbridled expansion of the Rumpke landfill will impact the township and its residents for generations, the court of appeals took the matter on an expedited docket and created a judgment below with no opinion.

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[3] *Rumpke Sanitary Landfill, Inc., et al. v. Colerain Township, Ohio, et al.*, Hamilton County Court of Common Pleas Case No. A007121 (the 138 acre 'southern' expansion).

[4] *Rumpke Sanitary Landfill Inc. v. State of Ohio,* 2010-Ohio-6037.

Matters cited by the court of appeals are obviously incorrect on even a short review of the record. The court of appeals below relied on the idea that Rumpke was a "monopoly" in the area. The court of appeals did not consider or apply all the necessary common law utility factors in making its determination. Key requirements in finding a private business is a public utility that are not present here are (1) the entity must demonstrate that it provides its service to the public "indiscriminately and reasonably;" (2) the public must have a legal right to demand and/or receive the service; and (3) the entity is regulated by a government authority on public utility attributes. The court of appeals made no findings to support any of these factors and could not because Rumpke does not meet any of them. The courts below erred. Rumpke is not a public utility, as a matter of law.

Appellee Rumpke Sanitary Landfill, Inc. is a private family corporation that is part of a conglomerate of privately-owned Rumpke family companies operating a number of businesses in the solid waste industry including waste collection and disposal, transportation, landfills, recycling, and composting. This conglomerate, including the landfill, operates as a single business enterprise under the parent corporation known as Rumpke Consolidated Companies, Inc. ("Rumpke Consolidated"). While it is only the landfill component of Rumpke Consolidated that claims public utility status, its operations are not distinct.

The consolidation of Rumpke services is significant because the landfill is highly discriminatory in its operations, favoring the Rumpke Consolidated over the general public and its competitors. The majority of the landfill's "customers" are its own Rumpke Consolidated waste haulers who contract with local municipalities and private business to remove their waste without regard to where the waste is disposed. The city of Cincinnati has its own solid waste collection service and hauls solid waste generated in the city directly to the landfill. Following a competitive bidding process, Cincinnati entered a five year contract (with an optional three year renewal) with Rumpke for the landfill to accept waste delivered by the city to the landfill at the rate Rumpke bid. Rumpke is not required to accept the city's waste by statute or rule nor is it required to renew its contract with Cincinnati when the term expires. Rumpke's obligation to Cincinnati is merely

contractual, as with all of its customers, not regulatory or statutory.

In almost all aspects, Rumpke both is and operates its landfill like a traditional, private, for-profit business. It is undisputed that Rumpke does not charge uniform rates. The landfill charges its own hauling companies preferential disposal rates that are not approved by PUCO, as would be the case for legitimate public utilities, roughly equal to the actual cost of disposing the waste at the landfill. The landfill charges non-Rumpke haulers rates that vary widely, sometimes by more than double the actual cost of disposal. Because Rumpke Companies and the landfill are privately owned, they do not make financial reports to any regulatory governmental entity and are free to charge rates and charges and accept waste Rumpke deems are in its own business interests without any public disclosure or oversight.

The Hamilton County Solid Waste Management District ("HCSWMD") was established in 1989 pursuant to Chapters 343 and 3734 of the Ohio Revised Code. The HCSWMD is charged with the statutory responsibility of planning and ensuring the solid waste disposal for waste generated in its single county district for at least the next ten years. The HCSWMD can adopt rules for the management of solid waste, but has chosen not to. R.C. 343.01(G). It also has the authority to "designate" a landfill as necessary for the disposal of waste from the district but again has chosen not to. R.C. 343.01, 343.013-.015. This is important because Rumpke asked the HCSWMD to designate its landfill as necessary for the disposal of solid waste in Hamilton County claiming, as the court of appeals erroneously found, that there is "no other cost-effective alternative to its services." (Court of Appeals Opinion, p. 4). Rather than designate the Rumpke landfill to receive the solid waste generated in the district, the HCSWMD gathered data and conducted studies to ensure there was adequate waste disposal capacity available to the district if Rumpke was not designated, refused to accept district waste or closed its operations, as was anticipated.

The HCSWMD found that while 80% of the solid waste generated the district currently goes to the Rumpke landfill, there are 33 other facilities with adequate capacity that could reasonably accept waste from within the district at a net increase in the price for waste disposal to a district

household between $1.25 and $2.13 per month (around $25.56 per year). Jeff Rumpke, the designated representative of Rumpke, testified the company did not know exactly how much the price of waste disposal would increase if any other landfill or transfer station were used and admitted the landfill did not have a monopoly, but rather a competitive advantage because of its location in Colerain Township.[5] While 80% is significant, it is not service to "virtually all residents and businesses of Southwest Ohio" or a monopoly as erroneously found by the court of appeals. (Court of Appeals Opinion, p. 4). There are cost-effective alternative solid waste facilities both within and near Hamilton County that are receiving at least 20% of the local waste and could receive much more for a small increase in cost ($25 per year). Rumpke also asked the HCSWMD to support its proposed 350 acre rezoning in Colerain Township, and the HCSWMD refused. When the court below found Rumpke to be a 'public utility' in a "monopolistic position with no other cost-effective alternative for its services," it erred and usurped the powers of the HCSWMD erroneously substituting its judgment for that of the District who had special expertise in the matter.

The trial court and court of appeals issued cursory entries in an attempt to limit the public interest in and precedential value of this case. If this jurisdiction is not accepted and this case is not reviewed, Colerain Township will be saddled with one of the largest sanitary landfills in the state and country to the detriment of the township and its 60,000 residents for the benefit of a private corporation, the Rumpke Consolidated and its customers. It assures that the Rumpke landfill can expand without limitation in perpetuity, free from any land use planning, local regulation or zoning by Colerain. The court's declaration provides that when it comes to landfills, one of the hardest, most intrusive and destructive uses of land, Colerain Township cannot plan, cannot regulate, and cannot protect the health, safety and welfare of its residents and properties around the landfill. Conversely, Rumpke will reap the benefits of public utility status without having to submit to any of the governmental controls that justify that status. This is of great general and public concern not just for Colerain Township, but for the health safety and welfare of its residents as well as counties,

[5] Deposition of Jeff Rumpke, p. 116-117.

townships, and existing and future public and private landfills throughout the state, irrespective of the attempt of the court's below to limit its effects.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I. A private sanitary landfill is not exempt from township zoning regulations under the comprehensive statutory framework of solid waste disposal and township zoning.

Ohio has adopted a statewide statutory framework for solid waste disposal that has three regulatory components: (1) solid waste management districts ("SWMD") that plan for solid waste disposal and assure that there are facilities available for the disposal of solid waste generated in the district with sufficient capacity to accept the district's solid waste for at least ten years (R.C. Chapters 3734, 343); (2) OEPA that protects the environment from the adverse environmental effects related to the collection and disposal of solid waste (R.C. Chapter 3734); and (3) local governments (townships, counties and municipalities) that plan and regulate through local zoning laws the use of land, location of landfills and protection of surrounding properties from the adverse impacts of landfills for the health, safety and welfare of their residents (R.C. Chapters 519, 303, 717).[6] Each component has a separate purpose, and none supersedes the other. None are to protect members of the public from disparate treatment in the acquisition of landfill services. Under this comprehensive legislative scheme, private sanitary landfills are not exempt from township zoning.

In the statutory framework for solid waste disposal, SWMDs plan, manage and assure solid waste disposal generated within the state for at least ten years. R.C. 3734.52(A). *St. Marys, supra* at ¶66. A SWMD may designate various landfills to receive district waste. R.C. 3734.55(C)(4), 3734.56, 343.01; *Danis Clarkco, supra.* If no solid waste facility is designated, solid waste from the district can be disposed of in various private and public landfills within or outside the state with no

[6] Townships, counties, and municipalities may also own landfills and provide for the collection and/or disposal of solid waste in their jurisdictions. R.C. 505.27, 343.08, and 715.43.

single facility being of primary importance.[7] R.C. 3734.573, 3734.57(B)(1) through (3). In *St. Marys,* this Court determined these functions, along with the authority to levy uniform fees set based upon the cost of service rather than market conditions, and made the SWMD a public utility.

The OEPA provides environmental regulation of solid waste facilities. This Court has determined environmental regulation is separate and distinct from the concern involved in the regulation of public utilities. *A & B Refuse* at 389. Townships' comprehensive planning, zoning, and land use regulation and enforcement is also not a utility services concern. In adopting this comprehensive regulatory scheme for solid waste is Ohio, the General Assembly chose not to impose any traditional public utility regulations on privately owned sanitary landfills or require private landfills to accept solid waste, even from the landfill's host community.

Within this comprehensive solid waste regulatory framework, it is apparent that the General Assembly intended for townships to retain their zoning authority over private landfills within their respective jurisdictions in at least two ways. First, when the General Assembly created SWMD, it authorized them to adopt, publish, and enforce rules that would allow <u>the district</u> to exempt a landfill from compliance with any amendments to township or county rural zoning that is modified within two years of the filing of its landfill permit. R.C. 343.01(G)(4). By granting SWMD the authority to exempt landfills from zoning changes that occurred two years before an application for a landfill permit is pending, the General Assembly recognized that zoning applies to landfills.

Second, the General Assembly expressly exempted <u>only</u> hazardous waste facilities from local zoning, and not sanitary landfills. R.C. 3734.05(E). If the General Assembly had intended to relieve private landfills from local zoning laws, it would have granted them an express exemption from zoning as it did for hazardous waste facilities. It did not for the simple reason that private landfills

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[7] In this case, the HCSWMD refused to designate Rumpke to receive the solid waste generated in Hamilton County choosing to "allow <u>any</u> industry, political subdivision and solid waste hauler to use any solid waste management facility" within or outside the HCSWMD.

are and remain subject to local zoning within the statutory framework for solid waste disposal in Ohio. The court of appeals erred when it determined Rumpke is a public utility contrary to the comprehensive statutory framework regulating solid waste disposal and sanitary landfills.

<u>Proposition of Law No. II</u>: A privately owned sanitary landfill cannot be a common law "public utility" exempt from township zoning when there is no public regulation or oversight of its rates and charges, no statutory or regulatory requirement that all solid waste delivered to the landfill be accepted for disposal, and no right of the public to demand and receive its services.

Assuming, *arguendo,* this Court determines that the General Assembly did not preclude private landfills from being or becoming public utilities in the statewide statutory scheme regulating the disposal of solid waste, then the various common law factors must be applied to determine whether Rumpke is a common law public utility. If it has achieved common law public utility status, it will relieve itself from any zoning control by Colerain Township pursuant to R.C. 519.211. If it has not, it will remain subject to Colerain Township zoning.

Rumpke failed to prove that it possesses sufficient attributes associated with public utilities and its claim to public utility status must fail. *A & B Refuse* at Syllabus. Rumpke did not prove, within the context of the solid waste industry, that it provides "an essential good or service [1] to the general public which has [2] a legal right to demand or receive this good or service" "[3] generally and indiscriminately." *A & B Refuse* at 387 and *St. Marys* at ¶¶56-57. "Further, this attribute requires [4] an obligation to provide the good or service which [5] cannot be arbitrarily or unreasonably withdrawn." *A & B Refuse* at 387. These are sometimes referred to as the 'public service' characteristics. *A & B Refuse* at Syllabus. Rumpke does not meet any of these give noted criteria.

The court of appeals found that the 'disposal of waste is an essential public necessity' then ignored the entire solid waste management scheme of the state of Ohio, orchestrating an 'obligation' for Rumpke to provide the service based upon: (1) Rumpke's contractual obligation in a five year

agreement with the city of Cincinnati allowing its haulers to dispose of city waste at the Rumpke landfill; and (2) self serving 'pledges' made by Rumpke to the HCSWMD and OEPA that it will remain open. These are not statutory or regulatory requirements that either permit 'the public' to demand or require Rumpke to provide services. A single limited term contract between one municipality and Rumpke does not constitute a legal obligation for Rumpke to provide services to the public nor does it give the general public the right to demand landfill services or require Rumpke to provide them. This Court has held that simply being open to the public is not sufficient. *A & B Refuse* at 389.

The court below did not and could not find that Rumpke provides its services indiscriminately because it does not. It is highly secretive and discriminatory in its rates and services, which it is entitled to be as long as it is not a public utility. If Rumpke wants to relieve itself from governmental zoning regulations, then it should be required to conduct itself as a public utility similar to public landfills with uniform public rate setting, disclosure and access.

In addition to the 'public service' factors, this Court has identified various indicia giving rise to 'public concern.' *A & B Refuse* at Syllabus. Public concern criteria include consideration of: (1) the good or service provided; (2) competition in the local marketplace; and (3) regulations by governmental authority. The court of appeals found Rumpke had a 'monopolistic position' in the marketplace. Without question, Rumpke has a large share (80%) of the disposal services in the local marketplace, but it is not exclusive and it is not regulated. There were 33 other viable landfills with sufficient capacity to serve waste generated in the district for a marginal increase in cost and sufficient competition for the HCSWMD to reject Rumpke's request to be a designated landfill for the district or to support rezoning for a 350 acre expansion. The unbridled use of land or monopolistic control of rates and services by Rumpke was not sanctioned by the General Assembly, Colerain Township or the HCSWMD and should not have been sanctioned by the courts below. Simply put, there are no sufficient governmental safeguards and regulations of Rumpke services for

it to be a matter of public concern or a common law public utility in Ohio. Rewarding Rumpke with public utility status assures that Rumpke can act with impunity when it sets its rates and charges and selects the customers Rumpke wants.

<u>Proposition of Law No. III</u>: Summary judgment cannot be granted when there are material facts in dispute and conflicting expert opinions.

The courts below erred by determining, by summary judgment, that Rumpke was a public utility when there were disputed material facts and contradictory expert opinions. Second, assuming *arguendo,* summary judgment was proper, the court below erred by failing to construe the conflicting evidence most strongly in favor of Colerain Township.

Summary judgment is not appropriate when it disallows competing viewpoints or requires the weighing of expert opinions and acceptance of one opinion over another. *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679. The witnesses must appear, be subject to cross-examination, and their credibility evaluated by the trier of fact. The determination of whether a private for-profit commercial business qualifies as a common law "public utility" not subject to local township zoning under R.C. 519.211 is a 'mixed question of law and fact' determined by a 'flexible rule' in which no one factor is controlling. *Marano, supra*; *Bd. of Twp. Trustees of Montville Twp, supra*; *St. Marys, supra* at ¶¶54-55; *A & B Refuse, supra at Syllabus.* The very nature of the test with its myriad of factors precludes summary judgment in this case. The record is replete with conflicting material facts, some of which are set out in this memorandum, and conflicting opinions of experts of both parties, including current and former state and local landfill regulators and zoning authorities as well as solid waste and zoning planners. This important case should have been tried on the merits, not decided by summary judgment and on expedited appeal.

If the courts below construed all of evidence most strongly in favor of Colerain and against Rumpke in "comprehensively determining" whether Rumpke met its burden to prove it had sufficient public utility attributes, Rumpke's motion for summary judgment must be denied. Civ. R. 56(C); *A & B Refuse, supra* at 388. The record in this case requires the conclusion that Rumpke failed to

satisfy sufficient criteria to be deemed a public utility, or that reasonable minds could differ the case must be tried on the merits or that Rumpke agreed, by consent decree to limit the footprint of the landfill to the 138 acre southern expansion in 2000 and granted Colerain's motion for summary judgment.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. This Court should not permit the application of the planning and zoning regulations of Colerain Township on the Rumpke landfill, the most severe and intrusive use of land in the township, to be summarily extinguished by judicial decree on summary judgment without any opinion or analysis. Rumpke should not be entitled to reap the benefits of public utility status without having to submit to any of the governmental controls that justify the privileges conferred on public utilities or relieve itself of township zoning to the detriment of the township and its residents simply to maintain a competitive advantage in its provision of comprehensive solid waste collection and disposal services. The Appellants request that this Court accept jurisdiction of this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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

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 31st day of January, 2011:

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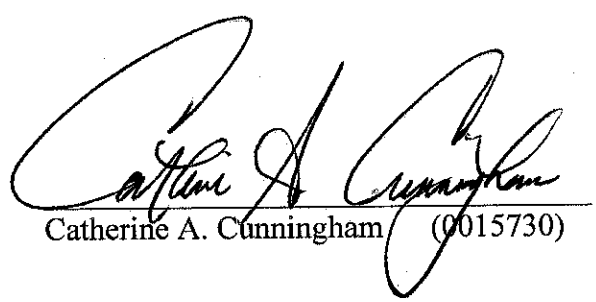

Catherine A. Cunningham (0015730)

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

RUMPKE SANITARY LANDFILL, INC.,	:	APPEAL NO. C-090223 TRIAL NO. A-0703073
CLAIRE A. STEPANIAK,	:	*JUDGMENT ENTRY.*
CHARLES M. STOEPPEL and JOHN J. STOEPPEL, Trustees of the Henry and Lillian Stoeppel Family Living Trust dated November 5, 1997, Family Trust Share and Survivor's Trust Share,	:	
STATE OF OHIO ex rel. RUMPKE SANITARY LANDFILL, INC.,	:	
STATE OF OHIO ex rel. CLAIRE A. STEPANIAK,	:	
and	:	
STATE OF OHIO ex rel. CHARLES M. STOEPPEL and JOHN J. STOEPPEL, Trustees of the Henry and Lillian Stoeppel Family Living Trust dated November 5, 1997, Family Trust Share and Survivor's Trust Share,	:	
Plaintiffs-Appellees,	:	
vs.	:	
COLERAIN TOWNSHIP, OHIO, COLERAIN TOWNSHIP TRUSTEES, BERNARD A. FIEDELDEY, Trustee, KEITH N. CORMAN, Trustee,	:	
and	:	
JEFF RITTER, Trustee,	:	
Defendants-Appellants.	:	

ENTERED
DEC 17 2010

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court.[1]

The defendants-appellants, Colerain Township, Ohio,("Colerain") and its related parties, appeal from the trial court's entry of summary judgment in favor of plaintiffs-appellees, the Rumpke Sanitary Landfill, Inc., ("Rumpke") and its related parties, on Rumpke's complaint seeking, inter alia, a declaration that under R.C. 519.211 Rumpke is a public utility exempt from township zoning regulations.

Rumpke sought to expand its landfill to an area 350 acres adjacent to its current facility in Colerain Township, Ohio. The current zoning status of the property, already owned by Rumpke, did not allow its use as a sanitary landfill. Rumpke's attempts to have the township rezone the property had failed. And Rumpke commenced this litigation.

In its first assignment of error, Colerain argues that the trial court erred in entering summary judgment for Rumpke when genuine issues of material fact remain as to whether Rumpke is a public utility. Because summary judgment presents only questions of law, an appellate court reviews a summary-judgment ruling de novo.[2]

The function of summary judgment is to determine from the evidentiary materials whether triable factual issues exist, regardless of whether the facts are complex.[3] Civ.R. 56(A) makes summary judgment available to "[a] party seeking to recover upon a claim * * *."[4] A party moving for summary judgment bears the burden of establishing that (1) no issue of material fact remains to be litigated; (2) the moving party is entitled to summary judgment as a matter of law; and (3) it appears from the evidence, when viewed in a light

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[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.
[2] See *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258.
[3] See *Gross v. Western-Southern Life Ins. Co.* (1993), 85 Ohio App.3d 662, 666-667, 621 N.E.2d 412.
[4] See *Robinson v. B.O.C. Group*, 81 Ohio St.3d 361, 367, 1998-Ohio-432, 691 N.E.2d 667.

most favorable to the nonmoving party, that reasonable minds can only come to a conclusion adverse to that party.[5]

"As a general rule, Ohio law provides that townships have no power under the zoning laws to regulate the location, erection, or construction of any buildings or structures of any public utility."[6] R.C. 519.211 was "intended to exempt public utilities providers from regulation by township zoning boards and boards of zoning appeals."[7] The "exemption ensures that public utilities will be able to construct the facilities required to serve the public interest across the state without undue interference from township zoning resolutions."[8]

In 2009, this court held that the statutory amendments enacted as part of Am.Sub.H.B. No. 562, the 2009-2010 biennial budget bill, which modified the statutory definition of a "public utility" to exclude "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," violated the one-subject rule of Section 15(D), Article II, Ohio Constitution.[9] Therefore, as the Ohio Supreme Court has instructed in *Trustees of Washington Twp. v. Davis*, "[t]o determine 'public utility' status for purposes of the R.C. 519.211(A) exemption," a court must consider the " 'factors related to the 'public service' and 'public concern' characteristics of a public utility.' "[10]

The factors relating to the public-service requirement include a demonstration that the entity provides "an essential good or service to the general public which has a legal right

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[5] See *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.
[6] *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 551, 2000-Ohio-470, 721 N.E.2d 1057, citing R.C. 519.211(A).
[7] *Campanelli v. AT&T Wireless Servs., Inc.*, 85 Ohio St.3d 103, 107, 1999-Ohio-437, 706 N.E.2d 1267.
[8] *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 556, 2000-Ohio-470, 721 N.E.2d 1057.
[9] *Rumpke Sanitary Landfill, Inc. v. State*, 184 Ohio App.3d 135, 2009-Ohio-4888, 919 N.E.2d 826, ¶3 and 18, discretionary appeal allowed, 124 Ohio St.3d 1442, 2010-Ohio-188, 920 N.E.2d 373.
[10] 95 Ohio St.3d 274, 278, 2002-Ohio-2123, 767 N.E.2d 261, quoting *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 1992-Ohio-23, 596 N.E.2d 423, syllabus.

to demand or receive this good or service."[11] The entity must also demonstrate that it provides its service to the public "indiscriminately and reasonably."[12] And the provider must have an obligation to provide the good or service that cannot be arbitrarily or unreasonably withdrawn.[13]

Next the public utility must "conduct its operations in such a manner as to be a matter of public concern."[14] Factors considered in reaching this determination include the nature of the services provided, competition in the local marketplace, and regulation by a government authority.[15]

Here, from the evidence before the trial court, when construed most strongly in favor of Colerain, we conclude that no genuine issues of material fact remain as to whether (1) Rumpke provides virtually all residents and businesses of Southwest Ohio a vital and essential service—the sanitary disposal of solid wastes in a facility licensed under R.C. Chapter 3734; (2) Rumpke operates in a monopolistic position with no other cost-effective alternative to its services; (3) Rumpke is legally required to dispose of all of the city of Cincinnati's solid waste; (4) Rumpke has pledged, in sworn statements to the Hamilton County Solid Waste Management District and the Ohio Environmental Protection Agency, that it will remain open and will accept any qualifying solid waste so long as it has the capacity to do so; and (5) the disposal of solid waste is an essential public necessity. Therefore, Rumpke provides an essential public service, and its operations are a matter of public concern. As a matter of law, Rumpke was entitled to the trial court's declaration that it is a public utility for purposes of R.C. 519.211. The first assignment of error is overruled.

ENTERED
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[11] *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d at 387, 1992-Ohio-23, 596 N.E.2d 423.
[12] Id.; see, also, *St. Mary's v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶57, citing *S. Ohio Power Co. v. Pub. Util. Comm.* (1924), 110 Ohio St. 246, 143 N.E. 700, paragraph two of the syllabus.
[13] See *St. Mary's v. Auglaize Cty. Bd. of Commrs.* at ¶57
[14] *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d at 388, 1992-Ohio-23, 596 N.E.2d 423.
[15] See id.

Colerain next argues that the trial court erred in denying its motion for summary judgment because the plain language of the amended public-utility statute prohibits a privately owned landfill like Rumpke from benefiting from the regulatory exemptions of a public utility. As we have already noted, this court has declared that the Am.Sub.H.B. No. 562 modifications to R.C. 519.211 are unconstitutional and not enforceable.[16] Absent reversal by the Ohio Supreme Court, we will apply this decision in each case submitted for our review.

In its final argument, Colerain asserts that the trial court erred in denying its motion for summary judgment because Rumpke is prohibited from further landfill expansion by a consent decree that it entered to secure a 138-acre rezoning in the township in 2000. The consent decree was reached in a separate action, numbered A-007121. Colerain's argument must fail because the decree did not prevent any further expansion of the landfill. Rather it limited and provided conditions for the rezoning and use of the Southern Expansion Property—a parcel of land separate and distinct from the land at issue here. Moreover, nothing in the text of the decree prevented the trial court from recognizing Rumpke as a public utility in this case. The second assignment of error is overruled.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., SUNDERMANN and HENDON, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 17, 2010

per order of the Court

Presiding Judge

ENTERED
DEC 17 2010

[16] *See Rumpke Sanitary Landfill, Inc. v. State* at ¶18.

ENTERED
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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
Ralph E. Winkler, Judge
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.