

ORIGINAL

IN THE SUPREME COURT OF OHIO

RUMPKE SANITARY LANDFILL,
INC., et al.,

Plaintiffs-Appellees,

vs.

COLERAIN TOWNSHIP, OHIO,
et al.,

Defendants-Appellants.

Case No.: 11-0181

On Appeal from the Hamilton County
Court of Appeals, First Appellate District

Court of Appeals Case No.:
C-090223

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE
CRAWFORD COUNTY, LOGAN COUNTY, LORAIN COUNTY, MIAMI COUNTY,
WOOD COUNTY, AND NEW RUSSIA TOWNSHIP, OHIO, IN SUPPORT OF
DEFENDANTS-APPELLANTS COLERAIN TOWNSHIP, OHIO, et al.

Respectfully submitted,

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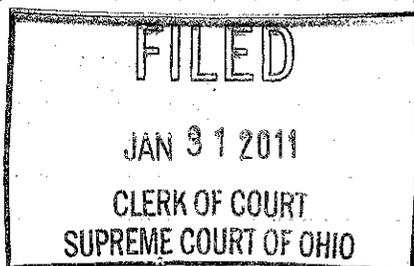
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THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

In this case, both lower courts gave short shrift to an issue of great statewide importance. The question is simply whether a privately owned landfill is a “public utility” that is exempt from township zoning regulations under R.C. 519.211 (and an identical exemption from county rural zoning in R.C. 303.211). The three sentence common pleas court decision was upheld by an equally perfunctory court of appeals judgment entry, without opinion. This cursory treatment stands in sharp contrast to a related opinion of this Court, wherein at least three justices have already acknowledged the significance of this issue. As the dissent stated, “Rumpke’s challenge to the township’s zoning authority in the zoning case raises a significant legal issue because, according to the township, Rumpke is only now, after 40 years of submitting to the township’s zoning resolution, asserting that it is not subject to the township’s zoning resolution.” *Rumpke Sanitary Landfill, Inc. v. State*, Slip Opinion No. 2010-Ohio-6037, ¶32 (Cupp, J., dissenting) (emphasis added). This Court should accept jurisdiction based upon the fact that several justices have already acknowledged its importance. The private landfill does not possess the most basic attributes of a public utility as set forth by this Court in the past.

The Rumpke Sanitary Landfill is the sixth largest landfill in the nation. For decades prior to instituting the core legal action in this suit, Rumpke acquiesced to the authority of Colerain Township’s local zoning ordinances with respect to Rumpke’s landfill. However, when Colerain Township denied Rumpke’s request to re-zone 350 acres as part of a major expansion that would nearly double the size of the landfill, Rumpke sued. For the first time, and by way of an amended complaint well into the litigation, Rumpke asserted the landfill was a “public utility” exempt from local zoning regulations under R.C. 519.211.

Rumpke’s assertion that it is a public utility is simply disingenuous. Rumpke is not required to allow rival solid waste hauling companies, or any other customer it doesn’t want,

access to Rumpke's landfill; Rumpke is not required to set its landfill disposal rates to governmentally-approved levels, or to charge the same disposal rates to similar users without discrimination; and there is little public oversight regarding how this privately held corporation operates. Without any real analysis of the common law test for determining whether an entity is a public utility, the lower courts simply adopted Rumpke's self-serving affidavits. If the adage that "bad facts make bad law" rings true, this is a case of no facts make bad law, and the bad law in this case has far reaching implications. Because there is no meaningful distinction between the Rumpke Sanitary Landfill and any other privately owned landfill in Ohio, private landfills will have little incentive to work with township or county zoning authorities. This will allow private landfill companies to expand landfills with utter disregard to the land use planning regulations of host communities, and 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.

In the midst of this particular dispute, the 127th Ohio General Assembly attempted to correct Rumpke's claim of public utility status. The General Assembly amended R.C. 519.211 through the State's biennial budget bill, as Rumpke's assertion that it is a public utility was inapposite to this Court's previous conclusion, which held that a landfill cannot be a public utility. See *A&B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St. 3d 385, 596 N.E.2d 423. The General Assembly added a sentence specifying that a privately owned solid waste facility is not a public utility for purposes of abridging township zoning ordinances. In response, Rumpke filed a separate suit to invalidate the change in law, asserting it violated the single-subject rule of the Ohio Constitution.

After that separate lawsuit was appealed to this Court, a four justice majority affirmed the lower court rulings striking down the statutory change, and also affirmed that Colerain Township was not a necessary party to that legal action. See *Rumpke Sanitary Landfill, Inc. v. State*, Slip Opinion No. 2010-Ohio-6037. However, the dissenting opinion joined by three justices acknowledged that the prior version of R.C. 519.211, the version at issue in this appeal, is “silent regarding whether privately owned solid-waste facilities were ‘public utilities’ and exempt from township zoning. The 2008 amendment to R.C. 519.211 clarified this ambiguity.” *Rumpke Sanitary Landfill, Inc. v. State*, Slip Opinion No. 2010-Ohio-6037, ¶32 (Cupp, J., dissenting). It now falls upon this Court to clarify any ambiguity in the law as it now stands, based upon the lack of analysis from the courts below. This is especially true because the facts of this case are virtually identical to those of *A&B Refuse*, yet the courts below reached a different conclusion.

On the very day after this Court issued its decision on the single-subject rule, the Court of Appeals issued a brief judgment entry without opinion on the public utility issue, which had been stayed. The Court of Appeals affirmed the trial court decision granting Rumpke’s Motion for Summary Judgment, essentially ruling that the Rumpke Sanitary Landfill is a public utility. Despite previous failed attempts, no Ohio court has ever before ruled that a privately owned and operated sanitary landfill qualifies as a public utility exempt from township or county zoning.¹

This alone qualifies the decision for discretionary review before the Supreme Court.

¹ Township and county zoning regulations as applied to landfills have long and routinely been upheld. See, e.g., *Newbury Disposal, Inc. v. Newbury Twp. Trustees* (1968), 15 Ohio St. 2d 113 (Ohio Supreme Court upheld the right of a township to rescind a zoning resolution which allowed the township to close a private landfill); *Families Against Reily/Morgan Sites v. Butler Cty. Bd. of Zoning Appeals* (12th Dist. 1989), 56 Ohio App. 3d 90 (upheld decision of zoning board to issue conditional use zoning permit to a private landfill); *Hulligan v. Columbia Twp. Bd. of Zoning Appeals* (9th Dist. 1978), 59 Ohio App. 2d 105 (held zoning approval is required in addition to a state permit to construct private landfill); *Columbia Twp. v. Williams* (10th Dist. 1976), 1976 Ohio App. LEXIS 5972 (interpreted state environmental and township zoning laws harmoniously in the regulation of a private landfill); *Rumpke Waste, Inc. v. Henderson* (S.D. Ohio 1984), 591 F. Supp. 521 (township zoning resolution adopted to thwart landfill construction upheld as constitutional).

Determining whether a private, for profit landfill possesses enough of the characteristics of a public utility to escape compliance with township and county zoning regulations has widespread implications. In *A&B Refuse*, this Court opined that while the definition of a “public utility” is flexible, an entity claiming public utility status must provide evidence that it possesses certain attributes shared by public utilities, or its claim must fail. *A&B Refuse*, 64 Ohio St. 3d 385. Here, both the common pleas court and the court of appeals summarily adopted Rumpke’s assertion that its landfill fits the definition of a public utility. The record below is insufficient to establish whether the Rumpke Sanitary Landfill is, in fact, a public utility. Moreover, a fully developed record of the kind contemplated by *A&B Refuse* would assuredly demonstrate that the Rumpke Sanitary Landfill is not a public utility. Because landfills frequently seek to expand on to adjacent land, the failure to apply and properly analyze the test for determining whether a landfill is a public utility will undoubtedly result in a slew of new landfill zoning lawsuits unless this Court provides further guidance in this case.

The nullification of its zoning ordinances in furtherance of the interests of a powerful local private business is no doubt troublesome for Colerain Township and its residents. However, this is far from the only reason this Court should accept this case. The lower courts’ abrogation of township and county zoning ordinances is also of great concern to counties that exercise rural zoning authority subject to the public utility exemption under R.C. 303.211. By reviewing this case, the Supreme Court can protect and reaffirm the ability of township and county governments to develop, control, and enforce reasonable land use regulations within their boundaries for the good of the entire community. This is unequivocally a case of public and great general interest, and this Court should accept review.

STATEMENT OF AMICI CURIAE INTEREST

Ohio law gives county commissioners (and township trustees) the power to regulate land use in unincorporated county and township territory “in the interest of the public convenience, comfort, prosperity, or general welfare.” R.C. 303.02. The public interest is best served when the power granted to local governments to develop reasonable land use regulations within their boundaries is preserved. Amici curiae do not believe that allowing privately owned and operated landfills to bypass local government zoning regulations by masquerading as public utilities is in the public interest, or in keeping with the letter and spirit of Ohio law. If the judgment entry of the Court of Appeals below is allowed to stand, amici curiae fear that local government land use regulations throughout Ohio will be vulnerable to public utility claims by private landfills, wasting scarce resources during difficult economic times for local governments.

Crawford County is home to the publicly owned Crawford County Sanitary Landfill in Bucyrus, Ohio. Both Lorain County and New Russia Township are host communities to the privately owned and operated Lorain County Landfill, a large and busy operation which accepts approximately 5,000 tons of solid waste daily. Logan County is home to the Cherokee Run Landfill, Inc., in Bellefontaine, Ohio, which is a privately owned landfill. Miami County has a major investment in its county-owned and operated solid waste facility that could wind up useless if a new landfill was able to locate within the County because it was exempted from zoning as a public utility. Wood County owns its own landfill, and is also home to a major privately owned and operated landfill within the same County.

Each of these public entities submits this amicus brief to support and protect the right of township and county governments to develop, adopt, and enforce zoning regulations as an appropriate check on private landfills. Without this Court’s guidance, there is little doubt that both townships and counties will increasingly be targeted by privately owned landfills claiming

to be “public utilities” in order to avoid reasonable local zoning regulations designed to protect the public welfare. Therefore, amici curiae believe that this case is of public and great general interest, and respectfully request that this Court accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

The amici curiae parties defer to and adopt by reference the Statement of the Case and Facts submitted by Plaintiffs-Appellants Colerain Township, et al.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: 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.

Because this Court previously struck down the statutory change enacted by the General Assembly, this matter was ultimately decided by the lower courts on the public utility inquiry developed under the common law. The lower courts did not have sufficient evidence in this matter to determine the Rumpke Sanitary Landfill operates as a public utility. Further, the lower courts failed to properly apply the common law test, or provide written analysis explaining the decision.

This Court has held that the question of whether a particular entity is a public utility is a mixed question of law and fact, and each case must be determined on its own facts. See *City of St. Marys v. Auglaize Cty.*, 115 Ohio St. 3d 387, 2007-Ohio-5026, 875 N.E.2d 561 at ¶¶54-55, citing *Marano v. Gibbs* (1989), 45 Ohio St. 3d 310, 311, 544 N.E.2d 635, and *Indus. Gas Co. v. Pub. Util. Comm.* (1939), 135 Ohio St. at 408, 14 O.O. 290, 21 N.E.2d 166. As this Court has unequivocally held, “[a]bsent sufficient facts as to pertinent attributes, that claim must fail.” *A&B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St. 3d 385, 389, 596 N.E.2d 423.

According to this Court, an entity asserting public utility status in order to be exempt from local zoning regulations must demonstrate: 1) devotion of an essential good or service to the general public, which has a legal right to demand or receive this good or service; 2) that the entity provides the good or service indiscriminately and reasonably; and 3) that the entity conducts its operations in such a manner as to be a matter of public concern. To determine whether a matter is of public concern, the factors considered are: a) what goods or services are provided; b) the competition in the local marketplace; and c) the existence and degree of regulation by governmental authority. See *Trustees of Washington Twp. v. Davis*, 95 Ohio St. 3d 274, 278, 2002-Ohio-2123, 767 N.E.2d 261, citing *A&B Refuse*, 64 Ohio St. 3d 385. A careful analysis of the factors demonstrates that the Rumpke Landfill fails to meet this test on each relevant point.

By contrast, the lower courts summarily concluded that Rumpke met the criteria set forth by this Court for determining whether an entity is a public utility. See Judgment Entry, App. at A-1; Final Entry, App. at A-2. These conclusions were based solely upon selective testimony Rumpke submitted by way of its motion for summary judgment, and are indistinguishable from any other privately owned and operated landfill in Ohio, which have never before been able to successfully assert that landfills are public utilities.

Under a proper and thorough analysis of the factors set forth in *Washington Twp.* and *A&B Refuse*, this Court must conclude that the Rumpke Sanitary Landfill does not operate as a public utility. First, the Rumpke Sanitary Landfill fails the test of providing a service which the general public has a legal right to demand. There is no statute or regulation giving any person or entity the right to demand that Rumpke accept its solid waste in the first instance, let alone demand continuing provision of service. Rumpke could abruptly close its facility at any time,

and the public would have no legal recourse. According to *A&B Refuse*, the obligation to continue providing service must not be able to be “arbitrarily or unreasonably withdrawn” in order for an entity to qualify as a public utility. See *A&B Refuse*, 64 Ohio St. 3d 385, 387-88, citing *Freight, Inc. v. Northfield Ctr. Bd. of Twp. Trustees* (1958), 107 Ohio App. 288, 292-93, 8 O.O.2d 212, 158 N.E.2d 537 (holding that one public utility factor is “whether such use of its services cannot be denied or withdrawn at the whim of the owners.”). Rumpke is free to provide or cease to provide service upon its own whim, without restriction by statute, regulation, or governmental oversight.

Second, the Rumpke Sanitary Landfill fails the test of providing landfill disposal service “indiscriminately.” See *Marano v. Gibbs*, 45 Ohio St. 3d 310, 311; *A&B Refuse*, 64 Ohio St. 3d 385, 387. It is true that Rumpke submitted affidavits to the courts below asserting that its current business practice and future intention is to keep the landfill open and accessible to all. However, there is no statute, regulation, or governmental oversight in place to prevent Rumpke from barring any future user (or business rival) from its landfill as a strategic way to solidify its oligarchic position in the Southwest Ohio solid waste disposal marketplace. In fact, Rumpke can discriminate among and between landfill customers without constraint. It is a common practice of privately owned and operated landfills to favor select customers.

Third, the Rumpke Sanitary Landfill fails the test of demonstrating that it is operated in such a way as to be a matter of “public concern.” See *A&B Refuse*, 64 Ohio St. 3d 385, 388. Rumpke does not need to submit its landfill disposal rates and charges to any governmental authority for review and approval. Rumpke can increase its landfill rates and charges unilaterally and at any time without notice. Rumpke can charge similarly-situated customers disparate rates and charges for the identical service. This is in sharp contrast to other historic

public utilities, which are subject to statutes, regulations, and governmental oversight to monitor and approve pricing. See *Freight, Inc.*, 107 Ohio App. 288, 292-93 (finding that a public utility charges “rates which are determined prior to the application for service by a regulatory body having power to investigate and fix just and reasonable rates.”). While it may be true that Rumpke annually submits pricing information to the Ohio Environmental Protection Agency, it is only for the purpose of conducting a general survey of statewide landfill disposal prices. The Ohio EPA has no legal authority to increase, decrease, or otherwise regulate Rumpke’s pricing scheme.

While Ohio EPA regulates the Rumpke Sanitary Landfill for environmental safety, this is a separate and distinct public concern than that normally associated with public utilities, which is the potential for monopolistic abuses such as price gouging. See *A&B Refuse*, 64 Ohio St. 3d 385, 389. In *Washington Twp. v. Davis*, 95 Ohio St. 3d 274, 279, this Court previously determined that licensing by the Federal Communications Commission is insufficient governmental regulation to establish that a radio station is of public concern. See also *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St. 3d 290, 2006-Ohio-2420, 847 N.E.2d 420, at ¶¶28-29 (holding that subjugation to general governmental safety or environmental regulations is insufficient to create a public utility). Likewise, environmental regulation by the Ohio EPA fails to support the argument that a sanitary landfill is of public concern.

Fourth, and most importantly, Rumpke is a privately held corporation for all purposes under corporate law. Rumpke is not required by statute or regulation to submit its governance policies or financial information to any public body, let alone justify that its charges and resulting profits for providing solid waste disposal services are “reasonable.” This is the very antithesis of operating in such a manner as to be a matter of public concern. This is also in stark

contrast to the regulatory burden imposed on other traditional public utilities, such as those that must submit their business practices and rates and charges for approval to the authority of the Public Utilities Commission of Ohio. See *Freight, Inc.*, 107 Ohio App. 288, 292-93.

If this Court allows the lower court decisions to stand, a privately owned and operated landfill will be granted a significant benefit of public utility status – namely the ability to escape the reach of township and county zoning regulations – without any of the usual accompanying responsibilities, such as price controls, a “reasonable” return on investment, and defined service areas. This will only serve to strengthen Rumpke’s position as an oligarchic entity with little to no government oversight in Southwest Ohio. In effect, Rumpke has asked the courts to just “trust” that they will put the public interest before private profit. An entity which is a legitimate public utility does not have to operate on trust, because there is governmental oversight to protect the public interest.

By contrast, reaffirming Colerain Township’s (and, by way of implication, other public entities with zoning powers such as counties) role in protecting the general welfare of its citizens by preserving its right to enforce zoning regulations serves an important public purpose. Zoning regulations are entirely subject to public oversight. Zoning regulations are developed and shepherded through the process by elected public officials. The enactment of zoning regulations are subject to all of the usual weighing of competing interests that usually accompanies the advancement of public policy, all in plain view of the public. Finally, there is an available and prompt remedy by way of appeal in the event that the administration of township and county zoning regulations abridges the rights of a property owner.

If private landfills across Ohio suddenly become classified as public utilities, townships and counties will lose the power to engage in meaningful development of land use policies for

the benefit of the public. A privately owned landfill should not be afforded the benefits of being a "public utility" when there is no public oversight of its rates and charges, and no statutory or regulatory requirement that all solid waste delivered to the landfill be accepted for disposal.

CONCLUSION

For the reasons stated above, amici curiae believe this case involves a matter of public and great general interest. Therefore, amici curiae respectfully request that this Court accept jurisdiction so that the core legal question of whether a private landfill can be classified as a public utility can be determined on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing *Memorandum in Support of Jurisdiction of Amicus Curiae Crawford County, Logan County, Lorain County, Miami County, Wood County, and New Russia Township, Ohio, in Support of Defendants-Appellants Colerain Township, Ohio, et al.*, was mailed this 31st day of January, 2011, to:

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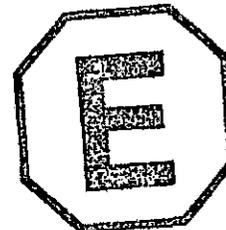


Attorney for Amici Curiae

ENTERED
MAR 06 2009



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.,	:	<u>FINAL ENTRY GRANTING AND</u>
	:	<u>DENYING SUMMARY</u>
DEFENDANTS	:	<u>JUDGMENTS</u>

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.

**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. STOEPPPEL and JOHN J.
STOEPPPEL, Trustees of the Henry and
Lillian Stoeppele 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.
STOEPPPEL and JOHN J. STOEPPPEL,
Trustees of the Henry and Lillian
Stoeppele 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.

OHIO FIRST DISTRICT COURT OF APPEALS

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

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.

OHIO FIRST DISTRICT COURT OF APPEALS

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

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.

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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.

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, ¶157, 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 ¶157

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.*

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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

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