

ORIGINAL

IN THE SUPREME COURT OF OHIO

Rumpke Sanitary Landfill, Inc., <i>et al.</i>	:	Supreme Court Case No. 2011-0181
	:	
Appellees,	:	On Appeal from the
	:	Hamilton County Court of Appeals
v.	:	First Appellate District
	:	
Colerain Township, Ohio, <i>et al.</i>	:	
	:	Court of Appeals
Appellants.	:	Case No. C090223

**MOTION FOR RECONSIDERATION TO ACCEPT 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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APPELLANTS' MOTION FOR RECONSIDERATION TO ACCEPT JURISDICTION

Appellants respectfully move this Court, pursuant to Rule 11.2(B)(1) of the Supreme Court Rules of Practice, to reconsider its 4-3 decision in this matter rendered on April 20, 2011 declining to accept jurisdiction to hear this discretionary appeal. The reasons and authority for reconsideration are set forth in the following memorandum and incorporated as part of this motion.

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

A. Introduction

This case involves the zoning authority of townships to regulate one of the most intense and obtrusive uses of land - sanitary landfills. Until the decision of the courts below in this case, townships, counties and municipalities throughout the state who have adopted local zoning have regulated landfills through their zoning jurisdiction. In this case, for the first time, a massive 500+ acre sanitary landfill in Colerain Township, Hamilton County, Ohio has been granted an exemption from township zoning by way of a judicial declaration that it has become a privately held "public utility."

The legal issue is whether the general provisions of R.C. 519.211 excepting "any public utility or railroad, whether publicly or privately owned" from township zoning regulations can be extended and interpreted to include the Rumpke landfill.¹ In this case, Rumpke Sanitary Landfill, Inc. was granted public utility status by the court for the first time after it had been subject to county, then township, zoning for more than forty (40) years. The landfill had

¹ R.C. 519.211 contains no statutory definition of "public utility" or standards for the determination of 'public utility' status. R.C. 303.211 is an identical statutory provision for county zoning.

previously entered a court approved Consent Decree settling a prior zoning case involving 138 acres that allowed the expansion of the landfill with the township committing to a particular 509 acre footprint and maximum height of 1,074 feet for the Rumpke landfill in the township. All of that is now gone.

Of public and great general interest and importance throughout the state is the authority of townships and counties to plan and zone and control development within their jurisdictions. Even more significant is the substantial interest and ability of townships, counties, developers and property owners to reliably determine, by using an established standard: (1) whether landfills are public utilities; (2) if and when a landfill can become a public utility exempt from all local land use regulations; and (3) how and when a landfill can lose its public utility status and become subject to local zoning. Such determinations cannot be made from the cursory entries of the courts below. To the contrary, the decisions below allow existing and future landfills to orchestrate their own relief from local zoning constraints as Rumpke did in this case.

The planning and management of solid waste throughout the state is also of great state-wide interest and import. The court below erred when it ignored the studies, findings and Plan of the Hamilton County Solid Waste Management District (“HCSWMD”) when determining the public utility status of Rumpke’s private landfill within its district. It also erred by considering only select indicia of a public utility and ignoring other factors this Court has identified as frequently the most important attributes of a public utility: (1) providing service that the general public has a legal right to demand or receive (not just a single municipal customer); (2) “in fact” providing services “indiscriminately and reasonably.” *A & B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 385, 387. Rumpke Sanitary Landfill does not

meet either of these important attributes and the few factors identified by the court of appeals would allow many, if not all, landfills in the state to be considered public utilities.

For Colerain Township, which has 60,000 residents, this is critical because of the significant impact the Rumpke landfill has on the township, its services and surrounds. Since its inception more than 60 years ago, the Rumpke landfill has had a major landslide, underground fires that burn for months, and other events that have required the township fire department to respond and provide services and OEPA involvement. It is uncontested in the record below that there are numerous complaints about blasting, noise, odor, truck traffic and other concerns. The concerns could never be developed here because the trial court, in a four line entry, granted Rumpke summary judgment even though significant contrary evidence by way of affidavits and depositions was in the record. The opinion of the court of appeals fared no better. The case was put on an expedited docket, page limitations were imposed as were limitations on oral argument resulting in a decision, but not an opinion, of the court of appeals. Appellants urge this Court to reconsider its prior decision and accept jurisdiction to review and determine these important and far-reaching issues.

B. The Court of Appeals' Decision Adversely Impacts Economic Growth and Development and is a Matter of Public and Great General Interest and of Compelling State and Local Concern.

While perhaps not readily apparent on its face, this Court's failure to accept jurisdiction of this case is a development issue as much as it is a question of the operation of a single privately run landfill. Zoning allows for predictable, regulated growth in accordance with a comprehensive plan and protects properties by limiting neighboring incompatible uses and imposing development controls such as setbacks, buffering, height and size limitations among

many others. Zoning authority is vested in townships, counties and municipalities. R.C. Chapters 519, 303 and 713.

The decision of the courts below, without trial, that Rumpke's privately run sanitary landfill in Colerain Township is a 'private' public utility makes Colerain Township's control of Rumpke's use of land in the township both under its Comprehensive Plan and its Zoning Resolution non-existent.² The decision allows virtually unlimited expansion of the Rumpke landfill with a total disregard for surrounding properties and land uses. This uncontrolled landfill expansion will have significant impacts on surrounding properties, land values and government services in perpetuity. No one seeking to develop in Colerain Township can rely on the township zoning plan to establish their businesses, residential community or industrial activities and protect their land uses. It is a well known principle that uncertainty kills development. Existing homes and businesses that were built distant from the landfill may find themselves next to it as the landfill moves ever near them or expands into a new location in Colerain Township or elsewhere. New development simply will not take that risk. Existing uses will move. Empty shops and houses are almost a certainty.

New development will also be curtailed in every township or county that has or may have a landfill that becomes a public utility, which under the court of appeals' entry may be most, if not all, landfills in the state. If developers and property owners cannot rely on local zoning plans and land use control to protect them from hard uses next door and the substantial and adverse

² Though not apparent from the findings of the courts below, there are many disputed and additional facts in the record in this case that have a direct bearing on the public utility status of this and other landfills and should be heard. There were 20 depositions, thousands of pages of discovery and many affidavits from experts and lay witnesses on both sides of the issue of the facts and public utility standards. Many of the traditional items that denote a public utility are not present in this here, but these issues were not explored by the either court below. Most of these facts could not be argued in the court of appeals due to the limitations of the accelerated calendar imposed by the court.

impacts of a landfill such as odors, blasting, noise, and trucks hauling waste, there will be no development anywhere in townships and counties where that uncertainty exists. They will go somewhere else.

The only new 'development' that is certain to occur in Colerain Township under the decisions below is the growth of the Rumpke landfill. Without zoning to regulate the size, location and the impacts of the landfill, Colerain Township and other similarly situated townships and counties throughout the state will become dumping grounds – not only for solid waste generated in their solid waste district, but also for waste generated throughout Ohio and beyond. Solid waste is commerce and Ohio cannot prevent or discriminate against the receipt and disposal of out of state garbage under the interstate commerce clause. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority* (2007), 550 U.S. 330, 127 S.Ct. 1786. Unlimited expansion provides an outlet for out of state garbage, but does nothing for Ohio.

A landfill like Rumpke is not limited to any specific geographic area (as are many public utilities) for the source of the waste it is disposing. In fact, only about forty-eight percent (48%) of the solid waste disposed of at the Rumpke landfill in Colerain Township is generated in Hamilton County. The remaining fifty-two percent (52%) is generated either out of district or out of state. With the right of unbridled landfill expansion in Ohio it may become economical for other states with more restrictive solid waste standards or higher fees to ship their waste to privately owned "public utility" landfills in Ohio that are exempt from zoning with unlimited landfill expansion available. Without governmental regulation over the obligation to provide services or services areas (like traditional public utilities), there is no assurance what services a

private landfill will provide and to whom. Private Ohio landfills could become the primary or exclusive service provider for distant waste generators.

Once a landfill is a public utility, there is no statute or law that would prevent Rumpke or any other private landfill owner from accepting even more waste or allowing its local disposal contracts to expire and accepting more lucrative waste from any source including out of state waste generators.³ If Rumpke landfill were to stop providing services to a predominant portion of the residents and businesses of Southwest Ohio, would it lose its public utility status? Can its public utility status be removed once granted? Appellants urge this Court to reconsider its decision and accept this case for review to consider these important statewide issues.

C. This Case Raises Novel and Important Issues Involving the Regulation of Sanitary Landfills and is of Public and Great General Interest.

The decisions below provide little or no guidance as to what constitutes a private public utility for future consideration by planning departments in all 88 counties and all 1,300 townships and what criteria are sufficient or determinative for a landfill to be sanctioned a public utility. Other than the fact that Rumpke has used its landfill to create an unnecessary monopoly on waste transportation, services and disposal, the select public utility factors identified by the court of appeals can be met by practically every landfill in the state. They are not a sound basis for determining a landfill is a “public utility” exempt from public scrutiny and zoning controls. Critical factors that should have been considered that were not. Given the history of this case, it has to be concluded that the decisions below are a political victory for Rumpke in Hamilton County and a legal disaster for townships and counties throughout the rest of Ohio.

³ This is one reason why a term limited ‘contractual obligation’ to accept the solid waste of the City of Cincinnati is not tantamount to an ongoing regulatory or statutory obligation to provide service as erroneously found by the court of appeals. (Judgment Entry at 4).

This Court has considered the 'public utility' status of various enterprises, including sanitary landfills on many occasions as cited in the jurisdictional memoranda of the parties. Appellants do not, as suggested by the Appellees, seek to have *A & B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 385 and the long line of cases on common law utilities overturned.⁴ Appellants ask this Court to accept jurisdiction to have the cases and statutes properly applied to all the evidence in this case, to review the new public utility factors created by the court of appeals in contravention of this Court's prior decisions and, as a matter of first impression, to consider the solid waste management district findings and plan in determining the public utility status of a landfill within its district.

1. **A private landfill that charges discriminatory rates without any public oversight or accountability is not a public utility.**

The decisions below departed from existing law and ignored the plan of the solid waste management district. The lower courts failed to consider the critical factor of non-discriminatory rates in determining the public utility status of the Rumpke private landfill. Particularly in light of this Court's analysis and decision in *St. Mary's v. Auglaize Cty. Bd. of Cty. Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, ¶66-67 finding uniform rates were a primary determining factor in finding a solid waste management district a public utility.

The rates charged by Rumpke at the landfill are not uniform and discriminate among the various customers. All haulers affiliated with the Rumpke Consolidated Companies are charged

⁴ Courts have not previously found that a private sanitary landfill is a common law public utility exempt from township zoning under R.C. 519.211. See *Rumpke Waste, Inc. v. Henderson* (1984), 591 F.Supp. 521 (S.D. Ohio W.D.); *A&B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 385; *Newbury Disposal, Inc. v. Newbury Twp. Trustees* (1968), 15 Ohio St.2d 113; *Atwater Twp. Trustees v. B.F.I. Willowcreek Landfill* (1993), 67 Ohio St.3d 293; *Clarke v. Warren Cty. Bd. of Cty. Commrs.*, 150 Ohio App.3d 14, 2002-Ohio-6006; *Hulligan v. Columbia Twp. Bd. of Zoning Appeals* (1978), 59 Ohio App.2d 105, 108; and *Scioto Haulers, Inc. v. Circleville Twp. Zoning Bd. of Appeals* (Sept. 18, 1981), Pickaway App. No. 80 CA 8 (1981 WL 6023), unreported.

a flat disposal rate of \$15 per ton.⁵ Rumpke Consolidated Companies then bundle and sell their collection and landfill services in order to gain a competitive advantage. The rates charged to the end user (the waste generator or contracting governmental authority) by the various haulers are not uniform (but more difficult to compare because they include hauling services).

Rates charged to those who haul their own waste to the landfill also vary widely, even without a transportation component. For example, the City of Cheviot pays a rate of \$41.00 per ton, the Village of Lockland a rate of \$30.25 per ton, and the City of Cincinnati a sliding scale rate from \$28.50 per ton to \$24.50 per ton of waste. The “gate rate” at the landfill for persons from the general public that come to dispose of their waste personally is \$99.00 per ton for the first ton and \$33.00 per ton for every ton thereafter. There are also commercial and industrial customers of the landfill who have no uniform rate for disposal.

There is not one single government agency that is regulating the business of a private landfill as a public utility, the areas it serves or the rates it charges.⁶ Landfills are not, as commonly thought, controlled by the Public Utilities Commission of Ohio (“PUCO”) or any other public utility watchdog. The Ohio Environmental Protection Agency (OEPA) regulates only the environmental impacts of the landfill, which this Court has determined is not a public utility concern. *A & B Refuse* at 389, R.C. Chapter 3734. Solid waste management districts are responsible for preparing plans for solid waste management throughout the state and assuring there are facilities with sufficient capacity for the disposal of all of the district’s solid waste. *St. Mary’s* at ¶59. R.C. 3734.52 and 3734.53. They do not regulate the operations or rates of

⁵ Rumpke affiliated companies do not actually ‘pay’ for waste services in the traditional sense. Since the landfill, haulers and other business enterprises all operate under the umbrella of ‘Rumpke Consolidated Companies,’ credits and debits are simply made on the ledgers of the various companies for the transactions.

⁶ Conversely, publically owned landfills are regulated as public utilities with complete public accountability, public record keeping and rate-making. *See* R.C. 343.08.

private landfills. Rumpke's discriminatory rates and how and when the consolidated companies choose to raise their rates or adjust them upon the expiration of a contract are strictly a private business matter (except to the extent that contracts are entered into with public entities and they become public records available for review). The decision of the court of appeals gives Rumpke Consolidated Companies a competitive advantage in southwestern Ohio without any governmental regulation of its business operations and virtually guarantees discriminatory services and rates by Rumpke in direct contravention of the precedent of this Court.

2. **If the legal duty of a public utility to provide service to the general public is satisfied by the unilateral pledge of a private landfill to remain open or by a single competitively bid municipal contract, then every private landfill could make itself a public utility.**

A second public utility factor this Court has found critical is the proposed utility must provide a service that the general public has a legal right to demand or receive. Since Rumpke could not satisfy this factor, the court of appeals allowed the private landfill to create its own public utility status by unilaterally pledging in sworn statements to the Ohio Environmental Protection Agency and the HCSWMD that it will remain open and accept waste. (Judgment Entry, p.4). Such declarations are meaningless and achievable by every landfill in the state. In *A & B Refuse, id.* at 389, this Court expressly rejected a landfill's claim that simply making its services "open to the public" can establish it as a public utility.

Neither the OEPA nor the HCSWMD have the jurisdiction to accept these pledges nor the ability to enforce them. (Rumpke's own OEPA witnesses acknowledged that the OEPA cannot require Rumpke or any other landfill to accept solid waste from or provide its services to any person – it can only issue a permit to allow Rumpke to accept whatever qualifying solid

waste it chooses.⁷) Furthermore, as Rumpke's business interests change, it may withdraw its 'pledge.' Rumpke may sell its landfill in Colerain Township or its company to a new owner with a different interest who may not agree to accept all qualifying waste at the landfill. (As the only landfill in the state with public utility status, it is likely to have high value with broad appeal and marketability.)

Finally, this Court should take jurisdiction of this case to reverse the court of appeals and establish a standard to prohibit a private enterprise from creating its own public utility status by entering into one competitively bid contract with a single local government. In this case, the court of appeals found that Rumpke's contract with the city of Cincinnati was sufficient for public utility status. That contract was entered following competitive bidding for a fixed term. The total waste from the city of Cincinnati represents approximately 6% of the waste disposed of at the Rumpke landfill. Rumpke Sanitary Landfill offered no other evidence of any public contracts or any obligation to the general public for waste disposal. This is primarily because governmental contracts with political subdivisions are not entered by the landfill, rather by the haulers of the Rumpke Consolidated Companies whose obligation is to remove and dispose of trash at any licensed landfill. They simply choose to dispose of trash at the Rumpke Sanitary Landfill because they receive a discounted disposal rate that other haulers do not.

3. **The public utility status of a private landfill cannot be determined without consideration of the solid waste management district.**

The courts below erred in failing to consider the findings, determinations and plan of the Hamilton County Solid Waste Management District in evaluating the public utility status of a private landfill within its jurisdiction. See R.C. Chapter 3734 and R.C. Chapter 343. This is a

⁷ Depositions of Christopher Jones, a former Director of the OEPA, and Tom Winston, district chief of the OEPA Southwest District office.

case of first impression on the determination of public utility status of a landfill after the adoption and *implementation* of comprehensive legislation establishing statewide solid and hazardous waste management policies and programs, as Appellants argued below.⁸ When the HCSWMD evaluated the Hamilton County wasteshed and landfills and transfer stations available to dispose of waste from its district, it determined that there was approximately 249 years of disposal capacity in area landfills (within the Hamilton County wasteshed) available to dispose of waste generated in Hamilton County, at least 20% of the solid waste generated in the district was not disposed of at landfills other than the Rumpke landfill, the Rumpke landfill was not the only cost-effective landfill service available and that the Rumpke landfill was neither critically important nor the only landfill available to the region.⁹ *See* R.C. 3734.52 and 3734.53 (establishing the duties of the district to evaluate and plan for regional solid waste disposal). Rumpke also identified numerous ‘competing’ landfills and transfer stations, all within a 50 mile radius of the landfill in Colerain Township.¹⁰ The courts below erroneously ignored these determinations by the very governmental authority with duty and expertise to make them and rendered an opinion in direct conflict with the findings and solid waste management plan of the district. By so doing, the court below undermined the solid waste management statutes and policies of the state of Ohio.

⁸ House Bill 592 established statewide policies for the management of solid and hazardous waste and became effective in 1988. *See* 142 Ohio Laws, Part III, 4418, adopted in 1988. However, the Bill was implemented with the formation and establishment of solid waste management districts which were not implemented until 1992, after *A & B Refuse* was litigated. (See *Greenburg Affidavit*). ~~The statutory framework of H.B. 592 is discussed in detail in *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.* (1995), 73 Ohio St.3d 590, 596.~~

⁹ Hamilton County Solid Waste Management District Plan 2006-2021.

¹⁰ Competing landfills and transfer stations identified by the Rumpke landfill manager include the CSI/Republic transfer station in Evandale (Hamilton County), the Bavarian landfill in northern Kentucky, a Waste Management site outside of Dayton and the Stony Hollow landfill. Rumpke also acquired and owns the Bond Road landfill in southwestern Ohio.

There are many other examples of critical and determinative factors that should have been considered by the courts below that are beyond the scope of this motion and more appropriate for consideration of the merits. They are in the record and will be discussed further should this Court reconsider its decision and accept discretionary jurisdiction.

D. Conclusion.

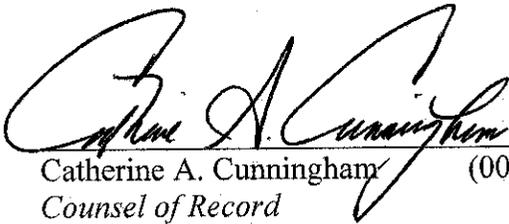
Landfills are intense land uses with far reaching impacts. They generate large amounts of heavy truck traffic, routinely blast to expand the space for disposal and produce unpleasant odors and a stench that directly affects surrounding properties in a wide radius. They devalue the land around them. Landfills receive state permits to fill designated land and 'airspace' with pollutants. Once filled with waste, with rare exception, the land becomes unproductive and undevelopable for decades. By declaring Rumpke Sanitary Landfill, Inc. a public utility, the courts below gave Rumpke carte blanche to expand its landfill in Colerain Township and possibly establish new landfills without local land use regulation or the protection of surrounding properties. The decision opens the door for other landfills to do the same throughout the State of Ohio.

Appellants urge this Court to reconsider its decision to refuse to accept jurisdiction in this case and accept jurisdiction to properly apply the law in this case and consider the magnitude of the effect of the decision of the court of appeals on Colerain Township, counties and townships throughout the state, solid waste commerce and the entire solid waste industry. The impact of an unfettered, uncontrolled landfill not subject to zoning will have a disastrous effect on development and the certainty of any development in Colerain Township (and other jurisdictions with public utility landfills) except landfill expansion. It stands as a bellwether to other counties and townships that landfills may be developed anywhere in any township or county based upon

standards which change from day to day and which are subject to the political power and self proclamations of the landfill in the given community and not the community itself. As long as a landfill has sufficient customers, contracts with political subdivisions and accepts and promises to accept most local waste, it may become a public utility. It endorses discriminatory rates and services with no guarantee of service to the general public. Ohio has enough development issues without creating more impediments to organized planning and utilization of land in Ohio for something other than hard uses.

Because of these issues, Appellants Colerain Township, Ohio; Colerain Township Board of Trustees; Bernard A. Fiedeldey, Trustee; Keith N. Corman, Trustee; and Jeff Ritter, Trustee, respectively request that this Court reconsider its prior decision and accept jurisdiction of the discretionary appeal of this case.

Respectfully submitted,



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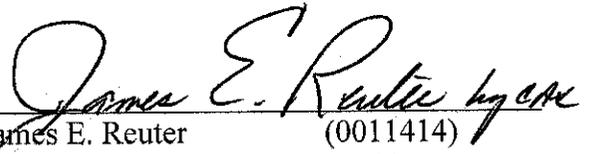
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CERTIFICATE OF SERVICE

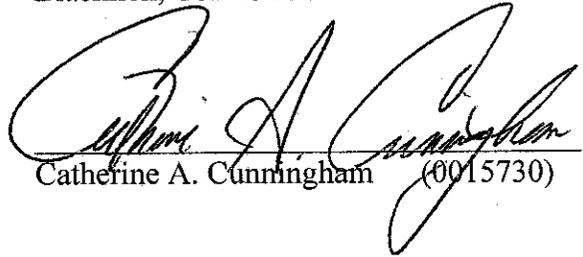
The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following parties via regular U. S. mail, postage pre-paid, on this 2nd day of May, 2011:

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