

Richard C. Brahm (0009481)

Counsel of Record

Catherine A. Cunningham (0015730)

Aaron M. Glasgow (0075466)

BRAHM & CUNNINGHAM, LLC

145 E. Rich Street

Columbus, OH 43215

(614) 228-2030

Fax: (614) 228-1472

E-mail: rbrahm@brahmcunningham.com

E-mail: ccunningham@brahmcunningham.com

E-mail: aglasgow@brahmcunningham.com

Counsel for Appellants,

Colerain Township, Ohio; Colerain

Township Board of Trustees; Bernard A.

Fiedeldey, Trustee; Keith N. Corman,

Trustee; and Jeff Ritter, Trustee

James E. Reuter (0011414)

Law Director, Colerain Township

3025 W. Galbraith Road

Cincinnati, OH 45239-4222

(513) 521-8400

Fax: (513) 521-8401

E-mail: jamesreuter@fuse.net

Co-Counsel for Appellants, Colerain

Township, Ohio; Colerain Township Board

of Trustees; Bernard A. Fiedeldey, Trustee;

Keith N. Corman, Trustee; and Jeff Ritter,

Trustee

Albin Bauer, II, Esq. (0061245)

Counsel of Record

Dirk P. Plessner, Esq. (0039358)

Rene L. Rimelspach, Esq. (0073972)

Eastman & Smith, Ltd.

One SeaGate, 24th Floor

P.O. Box 10032

Toledo, OH 43699-0032

(419) 241-6000

Fax: (419) 247-1777

E-mail: abauer@eastmansmith.com

dpplessner@eastmansmith.com

rrimelspach@eastmansmith.com

*Counsel for Amici Curiae Crawford
County, Logan County, Lorain County,
Miami County, Wood County, and New
Russia Township, Ohio*

**MEMORANDUM OF AMICI CURIAE OHIO TOWNSHIP ASSOCIATION AND
COALITION OF LARGE OHIO URBAN TOWNSHIPS IN SUPPORT OF
APPELLANTS' MOTION FOR RECONSIDERATION**

Having chosen not to review the First District's decision in this case, this Court stands on the brink of a new era in township and county zoning law in Ohio, and that is the era of the unregulated public utility. For the sake of the citizens who reside, own property and operate their businesses in townships throughout Ohio, this Court should review this case to set the proper standards for a "public utility," standards that have been completely neglected by the lower courts in this case. If it truly is this Court's intention to ease or remove zoning restrictions on more intense, or "hard," land uses like landfills by making "public utility" status more available, this Court should announce that intention more clearly than through the tacit approval of a decision by the First District, a decision that is bereft of any meaningful analysis or rationale, made after only the most stunted review of the record in this case. In *A & B Refuse Disposers, Inc. v. Ravenna Township Board of Trustees* (1992), 64 Ohio St.3d 385, this Court lamented the "paucity of evidence." Unfortunately, in this case, while there has been a great deal of evidence presented on this issue, there has been a stunning "paucity of analysis" to support the findings of the lower courts. If this Court intends to alter the relationship between township governments and the property owners within their boundaries via this case, the court should do so with a clarifying decision analyzing the facts, not through ratification of the lower courts' purposefully abbreviated analysis that has occurred in this case.

The exercise of township zoning in Ohio is bound up with the concept of land use planning, which is the process of permitting land uses and development according to a comprehensive view of the welfare of the whole township. The ability to exercise zoning control, particularly over more intensive land uses, is integral to land use planning. Land use

planning is a tool for encouraging development, a way that the township can make some basic representations to potential businesses and residents about where and how development will occur in the township in the future. There can be no question, however, that an existing unregulated R.C. 519.211 public utility in the midst of a township renders comprehensive planning within a township effectively meaningless. For any township that is home to an unregulated public utility like the Rumpke landfill, there can be no reliability in land use planning because the township has no means of controlling the growth of the public utility. Absent zoning control, a township has control of neither the nature of the use of exempted property or the size, location, configuration or appearance of the buildings and structures located on the property. Townships that find themselves home to a R.C. 519.211 public utility are thus crippled in their ability to plan for the development of areas in the township anywhere near the unregulated public utility. Colerain Township, for instance, is now in the unenviable position of attempting to plan around a vast, intense land use that is limited in its growth only by minimal environmental regulations and by the amount of land that it can purchase. It would be no small wonder that businesses and residences will not be eager to locate in Colerain Township or any township that is home to a potential public utility if there is no predictability about how the utility will grow and how it will use its property.

The problems described above--erosion of township zoning control and the loss of the ability to engage in land use planning by townships--are only the short term threats posed by the lower courts' decision that affect townships that are already home to hard land uses that could be declared public utilities under the First District's decision. The much wider problem with the lower courts' standard-less decision is the potential chilling effect on the willingness of townships to permit more intensive land uses where they do not exist presently, but could in the

future. At its most fundamental, the decision of the First District tells townships that *if* they permit a hard land use within their borders and that hard land use thrives, the township could eventually lose all regulatory control over the use because it is a public utility. Intensive land uses, like mining, landfills, and other types of heavy industrial uses are important and must exist *somewhere*. In many cases, the most appropriate place is in rural areas, away from large, urban populations. However, townships in such areas will not easily allow the seeds of potentially unregulated public utilities to be planted within their boundaries if they believe that they will one day lose control of the use. When the full import of the First District's decision in this case is fully elucidated to township trustees throughout the state, as it will be in the coming months, the affect may be to drive many townships to reject or regulate to the point of impracticability many hard land uses that would otherwise be acceptable without the threat that they might someday grow into an unregulated public utility, based only on showing success in the marketplace and a large customer base. The way for this Court to deal with this problem is to review this case and set actual standards for the public utility test that can give townships some notice and warning about what a R.C. 519.211 public utility is, something that the lower courts failed utterly to do. The uncertainty injected by the First District's decision must be remedied, lest townships make development decisions based on fear of the specter of an unregulated hard land use in its midst.

Amici do not suggest that the above concerns—lack of zoning control, loss of comprehensive planning and hostility of townships to hard uses that could become R.C. 519.211 public utilities—mean that there is never a case in which an entity could be a public utility under R.C. 519.211, if that entity demonstrates that it is a public utility in *all* aspects of its operations, and not just that it is successful in its market. *Amici* are suggesting that these concerns are sufficiently important to all townships in the state to compel this Court to at least review the

decision of the First District and make a decision based on a review of the whole record, as to whether it is wise to interpret R.C. 519.211 as the First District has done. *Amici* were not parties to the underlying action before the trial court. However, from a review of the record, it is clear that the lower court's review of the evidence in this case was highly truncated, and that Colerain Township's opportunity to present evidence was severely curtailed. *Amici* urge this Court to provide two things that have not been previously been present in this case: a meaningful opportunity for *both* sides of this case to make their case, and a final decision that provides actual standards on which townships can rely as they face the issue of whether entities within their own borders are public utilities under R.C. 519.211.

CONCLUSION

This Court is the last and best forum to hear the important issues that are presented in this case. For the sake of Ohio townships that will increasingly be dealing with claims of public utility status, the Ohio Township Association and the Coalition of Large Ohio Urban Townships respectfully urge this Court to accept jurisdiction of this matter.

Respectfully submitted,



Matthew J. DeTemple, Esq. (0023294)
6500 Taylor Road, Suite A
Blacklick, OH 43004
(614) 863-0045
Fax: (614) 863-9751
E-mail: detemple@ohiotownships.org

*Counsel for Amici Curiae, Ohio
Township Association and Coalition of
Large Ohio Urban Townships*

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 2 of May, 2011:

Joseph L. Trauth, Jr., Esq.
Thomas M. Tepe, Jr., Esq.
Charles M. Miller, Esq.
Keating, Muething & Klekamp, PLL
One East Fourth Street, Suite 1400
Cincinnati, OH 45202

James E. Reuter, Esq.
Law Director, Colerain Township
3025 W. Galbraith Road
Cincinnati, OH 45239-4222

Richard C. Brahm, Esq.
Catherine A. Cunningham, Esq.
Aaron M. Glasgow, Esq.
BRAHM & CUNNINGHAM, LLC
145 E. Rich Street
Columbus, OH 43215

Albin Bauer, II, Esq.
Dirk P. Plessner, Esq.
Rene L. Rimelspach, Esq.
Eastman & Smith
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, OH 43699-0032


Matthew J. DeTemple, Esq. (0023294)