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## INTRODUCTION

This case involves a discretionary appeal of the decision of the First District Court of Appeals which held that Appellee's sanitary landfill in Colerain Township is a "public utility" that is exempt from township zoning under R.C. 519.211. Justices Pfeifer, Cupp, and McGee-Brown dissented from this Court's April 20, 2011 decision declining jurisdiction to hear this case. The reason why this case is more than a garden variety discretionary appeal, and the Supreme Court should reconsider its refusal to grant jurisdiction, is because the lower court's over-simplification of the factors for determining whether a private landfill is a "public utility" will result in **all** private landfills qualifying as public utilities that are exempt from township and county rural zoning, if other courts follow the decision.

## ARGUMENT

**Proposition of Law No. II: 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.**

The lower court's determination in this case, that Rumpke's private landfill in Colerain Township is a public utility, was based on two findings: (a) Rumpke's landfill has a contract that requires it to dispose all of the residential and commercial solid waste collected by the City of Cincinnati's Department of Public Services; and (b) Rumpke's landfill has a de facto monopoly over the provision of solid waste disposal in Hamilton County and its surrounding environs. *Rumpke Sanitary Landfill, Inc. v. Colerain Township* (Dec. 17, 2010), Hamilton App. No. C-090223, p.4. Although these factors may have some superficial value in determining whether a landfill is a public utility, in reality these factors do not provide an accurate view of Rumpke's

landfill operation, or enable a court to differentiate the landfill's business from other private businesses that supply goods and services to the government without being designated as public utilities.

**1. The Mere Existence Of A Municipal Contract Is A Poor Indicator Of A Private Landfill's Public Utility Status.**

The lower court rested its decision principally on Rumpke landfill's contract to dispose all of the City of Cincinnati's municipally-collected solid waste. This overstates the relevance of the municipal contract to Rumpke's public utility status, since solid waste collected by the City of Cincinnati represents less than six percent (6%) of all solid waste disposed at the landfill.<sup>1</sup> Based on this tiny fraction of the total amount of waste that goes to Rumpke's landfill, the lower court made the illogical and sweeping conclusion that the public has a legal right to receive service from Rumpke's landfill. *Rumpke Sanitary Landfill, Inc. v. Colerain Township* (Dec. 17, 2010), Hamilton App. No. C-090223, p.4. Cincinnati's contractual right to dispose its municipally-collected garbage at Rumpke is not equivalent to giving every member of the public a legal right to use the landfill. The remaining 94% of the solid waste that is disposed at Rumpke's landfill comes to Rumpke's facility as the result of market forces, and not because anyone has a legal right to use Rumpke's landfill.<sup>2</sup>

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<sup>1</sup> The City of Cincinnati's waste disposal contract with the Rumpke landfill (Rec., Ex. F) requires Rumpke to dispose solid waste collected by the City's Department of Public Services. The amount of solid waste collected by the City of Cincinnati was 102,850 tons per year. Hamilton County Solid Waste Management Plan (Rec., Ex. E, p. III-35). ~~The total annual amount of solid waste disposed at Rumpke's landfill from all of its customers was 1,890,000 tons (Rec., Riddle Affidavit, Ex. A, p. 1-6).~~

<sup>2</sup> It is precisely because no one has a legal entitlement to use Rumpke's landfill that the Hamilton County Solid Waste Management Plan (Rec., Ex. E, p. VI-1, Table VI-4) lists no less than ten different sanitary landfills that provided written assurances of available disposal capacity to

Frankly, under this Court's precedent of *A&B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 385, a private landfill should not qualify a public utility in any sense unless 100% of the landfill is devoted to service as a municipal public utility. It was unreasonable for the lower court in this case to classify Rumpke's landfill as a public utility based on its disposal of Cincinnati's municipally-collected solid waste when 94% of the landfill's business is unrelated to the City's waste.

The lower court's emphasis on Cincinnati's customer relationship with Rumpke presents another, equally troubling, implication. What if Rumpke's municipal collection contract was with a municipality that has a small population of 5,000 to 10,000 residents, instead of with Cincinnati? The mere fact that Rumpke is required to dispose of a city's solid waste cannot be sufficient to make the landfill a "public utility," yet that is a potential result of the lower court's decision.

2. **A Private Landfill's Naturally-Occurring Dominance Of A Local Market Is Not The Equivalent Of A Legal Monopoly That Is A Matter Of Public Concern Or, If It Is, Then Such A Monopoly Should Not Be Promoted And Perpetuated By An Exemption From Zoning.**

The lower court found that Rumpke's landfill occupies a monopoly position in the Southwest Ohio waste disposal market. *Rumpke Sanitary Landfill, Inc. v. Colerain Township* (Dec. 17, 2010), Hamilton App. No. C-090223, p.4. But the kind of monopolies with which public utility status is concerned are monopolies arising either from special privileges granted by the government or monopolies arising from the absence of competition due to oppressive machinations. E. Freund, *THE POLICE POWER* (1904), ¶ 377, p. 387. Neither of these conditions

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accept some of the 1,151,880 tons per year of solid waste generated in Hamilton County that require landfill disposal. Of these, Waste Management Inc. assured it could take up to 350,000 tons per year of solid waste generated in Hamilton County, and a combination of landfills in Kentucky assured they could take up to 715,000 tons per year. (*Id.*, p. VI-2).

exists with regard to Rumpke. The record contained evidence of numerous other landfills that are available to serve the Southwest Ohio market. See fn. 2, *supra*. What the lower court mischaracterized as a monopoly is really nothing more than a substantial degree of marketplace dominance by Rumpke in an otherwise open and competitive market. The mere fact that a large portion of waste generators choose to use Rumpke instead of other available landfills does not support giving Rumpke the status of a public utility. There is no evidence in the record that Rumpke's dominance in the marketplace has caused its rates, charges or methods of operation to become a matter of public concern. See *A&B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 385, 388.

To the extent Rumpke has a "monopoly," it clearly did not arise through any deliberate choice by the government to give Rumpke a franchise or other special privileges. Rumpke's virtual monopoly in Southwest Ohio exists as a result of market forces, and because Rumpke vertically combined the efforts of its solid waste disposal company with its legally separate solid waste collection, solid waste dumpster, and other solid waste-related service companies. Ohio law disfavors the perpetuation of such monopolies (see the Valentine Act, R.C. 1331.01 et seq.), but in this case, the lower court's ruling has the perverse effect of rewarding Rumpke for its anti-competitive conduct.

3. **Rumpke's Landfill Cannot Be A Public Utility Because It Is Not Regulated As A Public Utility.**

The lower court overemphasized the relevance of oversight of the landfill by Ohio EPA and the Hamilton County Solid Waste District. *Rumpke Sanitary Landfill, Inc. v. Colerain Township* (Dec. 17, 2010), Hamilton App. No. C-090223, p.4. As this Court opined in *A&B Refuse, supra* at p. 389, regulation of a landfill's environmental condition is irrelevant. A

facility's public utility status is concerned with whether there is comprehensive government regulation of the utility's business operations, territory, uniformity and provision of service, pricing, consumer protection, and profitability. The facts in this case demonstrate that Rumpke's landfill isn't subject to similar comprehensive government regulations of the sort that control the conduct of traditional public utilities. Rumpke cannot point to a single government agency that referred to Rumpke's landfill as a public utility during the 60 years of the landfill's existence before Rumpke filed this lawsuit.

4. **The Lower Court's Decision Dilutes The Supreme Court's Required Analysis For Determining Public Utility Status, And Will Result In Substantial Harm To Townships, Counties, and the Competitive Waste Disposal Market.**

The lower court truncated its public utility analysis down to two issues: (1) whether Rumpke's landfill had a contract for the disposal of municipally-collected solid waste; and (2) whether the landfill held a dominant market position. By doing so, the lower court committed the same basic error as the court whose decision was reversed in *A & B Refuse Disposers, supra*, which was treating the determination of public utility status as an itemized check-list, rather than "comprehensively" examining all of the circumstances surrounding the landfill's operation. *Id.* at 389. Indeed, by limiting its check-list review to identifying two factors that superficially point to public utility status, the lower court ignored many other factors weighing against Rumpke's public utility status. Equally important is that nothing in the lower court's opinion differentiates Rumpke's landfill from any other private landfill facility for purposes of public utility analysis.<sup>3</sup> In sum, the lower court's decision substantially watered-down the requirements

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<sup>3</sup> Because trash is generated by people, and most people live in municipalities, most solid waste requiring landfill disposal comes from municipalities. Thus, all private sanitary landfills exist primarily to dispose waste collected in municipalities. And, because no one wants to transport

set forth in *A&B Refuse Disposers* for a private landfill to qualify as a public utility under R.C. 519.211.

The damage that will result from the First District Court of Appeals' dilution of the comprehensive analysis required by *A&B Refuse Disposers* is that it sets the threshold for public utility status so low that all private landfills will be exempt from township and county rural zoning regulations.<sup>4</sup> In addition, townships and counties across Ohio will be targets for landfill construction and expansion, since home-rule municipalities are the only jurisdictions left where a private landfill that is deemed to be a public utility must still comply with local zoning requirements. Finally, by ruling that Rumpke's complete domination of the Southwest Ohio market makes its landfill exempt from township zoning, the lower court gives Rumpke a competitive advantage that doesn't extend to any other waste company that desires to establish a competing landfill facility in Southwest Ohio. A new landfill company won't have existing municipal waste contracts and marketplace dominance that it can identify, in order to obtain the same zoning exemption that Rumpke now enjoys because of the lower court's decision. The lower court's ruling actually has the perverse effect of perpetuating Rumpke's landfill monopoly against any new entrants who might otherwise attempt to establish a facility within the Southwest Ohio marketplace to compete with Rumpke's landfill.

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~~garbage further than necessary to get rid of it, all private landfills tend to dominate the waste disposal market where they are located.~~

<sup>4</sup> A current list of publicly-available landfills in Ohio, along with the amount of solid waste they can accept daily, is provided in Ohio EPA 2009 Ohio Facility Data Report Tables, Aug. 18, 2010, <http://www.epa.state.oh.us/LinkClick.aspx?fileticket=u71L5RiEFNE%3d&tabid=2615> <last visited April 25, 2011>.

**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 grant Appellant's motion for reconsideration and accept jurisdiction so that the core legal question of when a private landfill can be classified as a public utility can be determined on the merits.

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**CERTIFICATE OF SERVICE**

I hereby certify that copy of the foregoing *Amended Memorandum of Amicus Curiae Crawford County, Logan County, Miami County, Wood County, and New Russia Township, Ohio, in Support of Defendants-Appellants Colerain Township, Ohio, et al.'s Motion for Reconsideration of Refusal to Grant Jurisdiction*, was mailed this 2nd day of May, 2011, to:

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