

ORIGINAL

IN THE SUPREME COURT OF OHIO

RUMPKE SANITARY LANDFILL, INC., *et al.*)
) Case No: 11-0181
)
 Appellees,)
)
 -v-) ON APPEAL from the
) Hamilton County Court of Appeals,
) First Appellate District
)
 COLERAIN TWP., *et al.*,) Ct. of App. No.: C090223
)
 Appellants.)
)
)

MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION

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I. THE MOTION FOR RECONSIDERATION DOES NOT ADDRESS ANY PROPOSITION OF LAW

The initial instinct upon receiving a motion for reconsideration, particularly of a declination of jurisdiction, is to waive a response. The Court has already considered the argument, and reached a reasoned decision. The applicable rule cautions, “A motion for reconsideration shall not constitute a reargument of the case”. S.Ct. Prac. R. 11.2(B). It is not at all uncommon for the denial of reconsideration to be unanimous even where the initial vote wasn’t. The individual justices respect and adhere to the decision of the Court, even if the movant doesn’t. Nothing about this case would cause the Court to depart from this jurisprudential doctrine. The Motion for Reconsideration in this case is solely reargument. That said, the reargument here is so odd that it calls for limited response.

The Motion makes no mention of which proposition of law should be reconsidered. Nary a word appears referencing any of them. Appellants have abandoned their ill-received propositions of law altogether. Filling the vacuum are policy arguments. The Motion contains four lettered headings, including “A. Introduction” and “D. Conclusion.” The “substantive” sections address “Economic Growth” and the perceived need for a “Regulation of Sanitary Landfills.” Thus, the Appellants make two substantive arguments for revisiting a decided case. This abandonment of the propositions of law alone is cause to deny the motion.

II. ILLOGICAL POLICY ARGUMENTS ARE NO BASIS FOR RECONSIDERATION

The first substantive section counterintuitively argues that the expansion of Rumpke’s business “adversely impacts economic growth and development.” Apparently, expansion of a successful local family-owned business doesn’t constitute economic growth and expansion. In reality, Appellants are attempting to stop economic growth and development. In any event, the topic of economic growth is of no moment to this Court. This is a Court of law, not of economic

feasibility. This Court has been heralded for its *Norwood* decision because it put the rule of law protecting property rights ahead of political expedience. The Appellants have asserted a policy argument, not a legal one. Thus, it should not move the Court.

The policy argument isn't even compelling. Essentially, Appellants contend that Rumpke is a reincarnation from the Steve McQueen film *The Blob*, and will soon engulf the Township. The contention is ridiculous. Rumpke's expansion is limited by geography, geology, topography, property rights (Rumpke can't exercise eminent domain), market forces (it can't force people to throw things away), and regulatory oversight by the EPA and the Solid Waste Management District. There is no threat that Rumpke will use its zoning status to secretly take over the Township.

Appellants wrongly claim Rumpke's landfill is unregulated. In reality, the EPA controls landfill design, siting,¹ emissions, operations, closure and post-closure management.² See R.C. Ch. 3734. See also OAC §§ 3745-27-01, *et seq.* Appellants also wrongly mock Rumpke as a "private' public utility." Many public utilities are privately owned including electric, natural gas, telephone, rail, and motor carriage providers. Appellants' contention that an entity must be governmentally owned to be a public utility is patently false.

Appellants muddle the motion with issues which would not be before the Court. Questions regarding effects of hypothetical future changes to the operation of the Rumpke landfill were not raised below; would have been unripe and speculative if they had been; are unrelated to the simple, correctly decided issues here; and at best, seek an advisory opinion.

¹ Siting oversight is equivalent to zoning regulations and requires setbacks from houses, property lines, parks, surface water, water supplies, natural areas, and aquifer protection. See OAC § 3745-27-07(H).

² A description of the EPA Division of Solid and Infectious Waste Management Municipal Solid Waste Landfill Program is available at <http://epa.ohio.gov/dsiwm/pages/mswpro.aspx>

III. SANITARY LANDFILLS ARE HIGHLY REGULATED

For its second argument, Appellants claim that “regulation of sanitary landfills . . . is of public and great general interest.” This is a truism and would explain the existence of Revised Code Chapter 3734, the related administrative provisions, and the Ohio EPA and county Solid Waste Management District (“SWMD”) oversight. However, this case is not about the regulation of sanitary landfills. It is about a statute that is designed to prohibit NIMBY local zoning decisions interfering with the provision of public services to the residents of this State.

The Revised Code contains an entire Chapter regulating solid waste and other types of wastes. Among the myriad regulatory provisions of Chapter 3734. are sections providing for: the inspection and licensing of landfills;³ inspection of facilities and enforcement by the State of Ohio;⁴ inspection and certification by local boards of health;⁵ suspension, denial or revocation of operating licenses;⁶ and enforcement via injunctions⁷ and/or private civil actions.⁸

Chapter 3745-27 of the Ohio Administrative Code contains some 78 separate administrative regulations governing the operation, permitting, application, record keeping, monitoring, and closure of sanitary landfills. Every aspect of the operation of a landfill, from beginning to end is regulated. The regulation begins long before a landfill is operational. The exhaustive siting restrictions contained in Ohio Administrative Code 3745-27-07 alone comprise five pages. No landfilling may occur within 1,000 feet of a residence 300 feet from any property line. OAC § 3745-27-01(H)(4)(b) and (c). Claims that the siting of landfills is unregulated in the absence of local zoning are simply false. Siting restrictions also protect parks, surface water, water supplies, natural areas, and aquifers. OAC § 3745-27-07. Even after the exhaustive siting

³ R.C. 3734.02

⁴ R.C. 3734.04

⁵ R.C. 3734.07

⁶ R.C. 3734.09

⁷ R.C. 3734.10

⁸ R.C. 3734.101

requirements are met, extensive and demanding design and construction requirements ensure the protection of human health and the environment. *See, e.g.* OAC § 3745-27-08. These State regulations complement the Federal CERCLA Subtitle D requirements and federal regulations created thereunder, which like the Ohio regulations are enforceable either by the government, or affected individuals through citizens suits.

These multi-layered regulations, limitations and restrictions are cumulative of the well-defined common-law property rights of adjoining and nearby owners, and nuisance protections afforded to individuals and the community at large.

The most demanding and very local form of regulation is the Solid Waste Management District. Each SWMD has the power to essentially put any and all private landfills within their jurisdiction out of business. A SWMD may “acquire, construct, improve, . . . and operate” a solid waste facility. R.C. 343.04. The SWMD can designate its sanitary landfill as the landfill where “solid waste *generated within or transported into* the [SWMD] *shall* be taken for disposal” R.C. 343.014(A). Through this simple procedure, the SWMD can open its own sanitary landfill and mandate that *all* waste generated in and transported to County be disposed of at its landfill. *See* R.C. §§ 343.01(C), 343.014(A). The SWMD has the further statutory authority to prohibit a private landfill within its jurisdiction from *accepting any waste generated outside the county*. R.C. 343.019(G)(1). Logic dictates that if the SWMD can require that all waste must go to its own landfill and no waste to another private landfill, the private landfill is out of business. This regulatory authority of the SWMD is broad, severe, and acts as a complete check against all actions that private landfills take. This regulatory power is far more comprehensive and Draconian than mere zoning regulation.

Knowledge of these very comprehensive State and local regulations disarm Appellants' doomsday argument that absent NIMBY zoning constraints, landfills will unstopably expand. Ohio counties can regulate away this trumped-up and unfounded fear. Appellants' policy argument is no basis for reconsideration.

IV. APPELLANTS DISTASTE FOR *A&B REFUSE* WAS ADEQUATELY STATED BEFORE, AND IS NOT BASIS FOR RECONSIDERATION

Appellants spent a great deal of their Memorandum in Support of Jurisdiction arguing that the Rumpke landfill is not a monopoly, although it disposes of nearly all municipal solid waste generated in three counties. Appellants concluded, "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". (Memo in Support at 9.) Now, Appellants have fatally backtracked and concede "Rumpke has used its landfill to create an unnecessary monopoly on waste transportation, services and disposal . . ." (Motion at 6.) Appellants apparently believe that it is acceptable for Southwestern Ohioans to pay substantially higher rates for waste disposal—\$9.8 million per year for Hamilton County residents alone according to the Township. Whether the monopoly is "unnecessary" is immaterial to whether Rumpke is a public utility for zoning purposes. It has been found to be in a monopolistic or oligopolistic position with no other *cost-effective* alternative. Appellants have admitted the lower courts correctly applied existing law when concluding that Rumpke has the characteristics of a common law public utility. This Court was correct to deny review. Reconsideration is unwarranted.

In an attempt to make it appear this case is a departure from precedent, Appellants include a footnote citing to eight cases that "have not previously found that a private sanitary landfill is a common law public utility exempt from township zoning under R.C. 519.211." Only one of the cited cases even discusses R.C. 519.211. A laundry list of cases that are not on point

is inapposite. It is also true to say that none of these seven cases held that a sanitary landfill cannot qualify as a public utility. They prove nothing. Even the case that required a township to rezone property to allow for the creation of a landfill isn't germane.

The one cited case that does discuss R.C. 519.211 is *A&B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 385. Both Appellants and Rumpke discussed *A&B Refuse* at length in the jurisdictional briefing. The Court was fully informed that *A&B Refuse* held that a sanitary landfill may qualify as a public utility, but that the landfill in that case had not factually demonstrated that it was one. The courts below applied *A&B Refuse* and found the Rumpke landfill had factually demonstrated it is a common law public utility. This case represents a proper application of this Court's precedent, which is why jurisdiction was denied.

V. REPETITION OF FAILED ARGUMENTS IS NOT GROUNDS FOR RECONSIDERATION.

The remaining arguments in the Motion for Reconsideration are a regurgitation of the incorrect arguments that failed to persuade the Court the first time. Rumpke adequately debunked those arguments the first time and will not participate "in a reargument of the case" prohibited by S.Ct. Prac. R. 11.2(B). Most importantly, these arguments are directed at whether the lower courts correctly found that the Rumpke landfill meets the requirements of being a common law public utility. They are arguments of application of existing law. Appellants are forced to admit the lower courts correctly stated the law. This is not an error correction court—especially where error is nonexistent.

In response, Rumpke will repeat itself:

Appellants allege that Rumpke is not a public utility because its rates are unregulated. This has never been a requirement of the common law. "It is not essential that a utility be subject to regulatory control by the commission in order for it to be a public utility." *Ohio Power Co. v. Attica* (1970), 23 Ohio St. 2d 37, 40, 52 O.O. 2d 90, 92, 261 N.E. 2d 123, 126. Rather, "in a case where the

business enterprise serves such a substantial part of the public that its rates, charges and methods of operation become a public concern, it can be characterized as a public utility.” *A & B Refuse*, 64 Ohio St. 3d. at 388, *citing, Industrial Gas Co.*, 135 Ohio St. at 414. Moreover, the Solid Waste District can either condemn or close a landfill that is not reasonably providing its services to the public, create its own facility and establish rates that will be charged. R.C. §§ 343.014, 343.04, 343.08. There surely is no more effective-rate regulation than the ability to put an entity out of business if its rates become unreasonable.

The courts below found the Rumpke Landfill to be a public utility based upon the unique attributes of this particular landfill. The courts recognized that the disposal of solid waste is an essential public necessity. 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. Failing to abide by those statements would be grounds for the revocation of Rumpke's permit to operate. Rumpke provides virtually all residents and businesses of Southwest Ohio—including Butler, Hamilton, and Warren Counties—with this vital and essential service. Non-Rumpke affiliated haulers deposit solid waste they collect at the Rumpke Landfill. Rumpke is legally required to dispose of all of the city of Cincinnati's solid waste. Rumpke operates in a monopolistic position with no other cost-effective alternative to its services. Based upon these attributes the lower courts correctly found that the Rumpke Landfill qualifies as a common law public utility.

Appellants attempt to downplay the significance of Rumpke's obligation to accept all solid waste generated in the City of Cincinnati, population 333,000. Appellants claim that the contractual nature of the obligation somehow reduce the public utility stature of the service. Binding precedent from this Court holds otherwise. “The provisions of Section 4, Article XVIII, of the state Constitution, confer authority upon municipalities to contract with a public utility for its product or service. . . . A contract so entered into is binding upon both parties”. *East Ohio Gas Co. v. Public Utilities Com.* (1940), 137 Ohio St. 225, 239, 28 N.E.2d 599. Rumpke's commitment to be the exclusive landfill for Ohio's third largest city is a public service and makes Rumpke's landfill of public concern.

(Memo Op. Jur. at 9-10).

VI. THE CONCLUSION SAYS IT ALL

Appellants concluded by asking the Court to “accept jurisdiction to properly apply the law . . .” This is a case of application of existing law. There is no new law to make. It isn’t a case worthy of this institution. Appellants also contend that if the unpublished First District opinion stands chaos will reign. Contrary to their argument, the First District applied the test this Court articulated in *A&B Refuse*. This law applied here has been unchanged for decades. There is no chaos. An appellant’s taking offense to the proper application of existing law isn’t cause for reconsideration of a declination of jurisdiction.

This Court thoroughly considered and rejected Appellants’ arguments the first time. Appellants’ desperate attempt to abandon their weak propositions of law and focus solely on questionable policy arguments shouldn’t be rewarded. Rumpke respectfully requests this Court unanimously stand by its decision not to entertain this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail this 11th day of May 2011 on:

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