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## I. STATEMENT OF AMICI CURIAE INTEREST

For more than 40 years, the Rumpke Sanitary Landfill submitted to the local zoning regulations of its “host community,” Colerain Township. That is, until Rumpke desired to more than double the size of the landfill, and township zoning regulations provided an impediment to its unfettered growth. When Colerain Township’s zoning became an obstacle to Rumpke’s mega-expansion, Rumpke cleverly self-proclaimed its privately owned and operated landfill to be a common law public utility beyond the reach of township zoning ordinances. This amicus brief is submitted by the undersigned single county solid waste districts, multi-county joint solid waste districts, and individual townships throughout Ohio in support of Colerain Township’s request that this Court overturn the lower court decision upholding Rumpke’s public utility declaration.

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 and 519.02. Additionally, single or joint county solid waste districts have limited authority to exempt owners or operators of solid waste facilities from township zoning resolutions, if the district’s solid waste management plan provides for the construction or expansion of the facility. R.C. 343.01(G)(4). While solid waste facilities are regulated by the Ohio Environmental Protection Agency for environmental compliance, they have never been subject to market regulation by an entity such as the Public Utilities Commission of Ohio, unlike traditional public utilities. Historically, siting and land use regulation of solid waste facilities has been left to local government entities, with appropriate checks and balances, under Ohio law.

The amici curiae parties are comprised of five single county solid waste districts, four multi-county joint solid waste districts (representing fifteen counties in total), and five individual

townships located in two counties. There is great diversity among the amici curiae parties; some have none, one or multiple solid waste disposal facilities within their jurisdictions. Some of the facilities are publicly owned and operated (e.g., Erie County), while others are publicly owned and privately operated landfills (e.g., Medina County), and others are privately owned and operated landfills (e.g., Lorain County). For example, both Lorain County and New Russia Township are host communities to the privately owned and operated Lorain County Landfill. Logan County is home to the Cherokee Run Landfill in Bellefontaine, which is also privately owned, and several of the undersigned townships are located nearby in Logan County. Miami County has made a major investment of public dollars in its county-owned and operated solid waste facility. The Stark-Tuscarawas-Wayne Joint Solid Waste Management District is home to *seven* different privately owned and operated landfills.

What unifies the amici curiae parties is the belief that if the judgment below is allowed to stand, reasonable and locally developed land use regulations throughout Ohio will be vulnerable to attack by other private landfills, and possibly non-landfill businesses, that may be encouraged to self-proclaim their status as common law public utilities on dubious grounds, as Rumpke has done in this case. Amici curiae firmly believe that the public interest is best served when the power granted to local governmental entities to develop and enforce reasonable land use regulations within their boundaries is preserved. Amici curiae do not believe that allowing privately owned and operated landfills to unilaterally declare that they are common law public utilities, thereby usurping local government authority, is in accordance with Ohio law. Each of these public entities submits this amicus brief to support and protect the right of townships, counties, and solid waste districts to adopt and enforce zoning regulations as an appropriate check on landfill development.

## II. 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 Appellant Colerain Township.

## III. 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 exempt from township zoning was, for the most part, the result of 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, at 4, attached as Appendix 1. 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. By narrowly focusing on two superficial indicia of public utility status, the lower court’s ~~decision substantially watered down the requirements set forth in *A&B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 386, 596 N.E.2d 423, for a private landfill to qualify as a public utility under R.C. 519.211.~~ The lower court’s dilution of *A&B Refuse*

*Disposers* sets the threshold for public utility status so low that it will effectively exempt all private landfills from township and county rural zoning regulations.

**A. The lower court failed to conduct the rigorous inquiry required to determine whether Rumpke’s landfill is truly a public utility exempt from township zoning regulations.**

A review of this Court’s jurisprudence on the requirements for a private, non-PUCO regulated business to qualify as a “public utility” shows it is a difficult standard to meet. As this Court has held, the question of whether a particular entity is a public utility is a mixed question of law and fact, depends on the nature and character of the business, and no single factor is controlling; therefore, each case must be evaluated on its own merits. 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, *Indus. Gas Co. v. Pub. Util. Comm.* (1939), 135 Ohio St. at 408, 14 O.O. 290, 21 N.E.2d 166, and *Montville Bd. of Twp. Trustees v. WDBN, Inc.* (1983), 10 Ohio App.3d 284 (Ohio App. 9 Dist.), 461 N.E.2d 1345 (holding that a motion for summary judgment granted on the pleadings only presented insufficient proof that a radio station was a public utility exempt from township zoning). A common thread in the Court’s decisions is that the business claiming public utility status bears the burden of offering sufficient evidence that enables the court to “comprehensively” determine whether the business possesses the all of the essential characteristics of a public utility. *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 that it is a public utility exempt from local zoning regulations must pass a multi-factored test, demonstrating that the entity: (1) devotes an essential good or service to the general public, which has a legal right to demand or receive the good or service; (2) provides the good or service to the public indiscriminately and reasonably;

and (3) conducts its operations in such a manner as to be a matter of public concern. Moreover, to determine whether a matter is of public concern, the factors that must be 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 some 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*, supra. A careful analysis of the factors in more detail below demonstrates the Rumpke Landfill fails to meet these tests on each relevant point.

As this Court has unequivocally held regarding a previous landfill public utility claim, “[a]bsent sufficient facts as to pertinent attributes, that claim must fail.” *A&B Refuse* at 389. Ironically, *A&B Refuse* involved a privately owned and operated landfill which, like the Rumpke landfill in this case, was attempting to circumvent zoning regulations that interfered with the landfill’s growth plans. In virtually every way, the operation of the Rumpke landfill is indistinguishable from the facts of *A&B Refuse*; but while the Supreme Court in *A&B Refuse* found the evidence inadequate to determine the landfill was a public utility, the lower courts in this case paradoxically found that Rumpke’s landfill is a public utility.

**B. Rumpke’s relationship with the City of Cincinnati is insufficient to elevate its landfill to public utility status.**

The lower court unduly emphasized Rumpke’s solid waste disposal contract with the City of the Cincinnati as grounds for finding that Rumpke is a public utility. See Appendix 1 at 4. In its essence, however, the City’s contract provides that Rumpke will accept all of the solid waste collected and delivered by the City’s municipal waste department, and the City will pay a fixed rate for such disposal; nothing more. See December 21, 2005 Agreement between Cincinnati and Rumpke, attached as Appendix 2. The other contract provisions concerning hours of

operation, and safe and efficient operation of the landfill, are derived from Rumpke's operating permits and licenses from Ohio EPA and the local health department. Importantly, the City's contract does not contain any provision granting individual rights to Cincinnati's residents to deliver solid waste to the Rumpke landfill, or fixing the amount of fees that Rumpke will charge individual residents for disposal at the landfill. See Appendix 2. In addition, the City's contract specifies that the arrangement with Rumpke is "non-exclusive," so the City remains free to utilize the services of any other waste disposal providers at any time. *Id.*

Many political subdivisions contract with private entities for the collection and disposal of solid waste in a way that is similar to Rumpke's contract with Cincinnati. The emphasis placed by the lower courts on Cincinnati's customer relationship with Rumpke fails to recognize that voluntarily assumed contractual obligations between a political subdivision and a service provider do not result in public utility status. See *Pittsburgh & Conneaut Dock Co. v. Limbach* (1985), 18 Ohio St.3d 320, 481 N.E.2d 579.

Further, in *Inland Refuse Transfer Company v. Limbach* (1990), 53 Ohio St.3d 10, 558 N.E.2d 42, this Court applied the principles of *Pittsburgh & Conneaut Dock Co.* to a solid waste business. Inland voluntarily entered into a contract with Cleveland requiring Inland to "collect and dispose of solid waste at least weekly, obtain licenses for its vehicles, pay waste hauling fees, collect rubbish only at certain hours, clean its vehicles at least once a week, maintain vehicle logs, use city transfer sites, and suffer the prospect of having its vehicles impounded for any failures in these conditions." *Id.* at 11. As the Court found, these and other obligations assumed by Inland pursuant to its agreement with Cleveland simply amounted to policing the contract, not regulating Inland's business. *Id.* at 12. Importantly, this Court noted that

“Cleveland does not control the rates that Inland charges, other than negotiating a contract rate for itself...”. Id.

Rumpke’s contract with Cincinnati in this case is fundamentally the same as the solid waste contract analyzed in *Inland*. If this Court affirms the lower court’s decision, then every landfill that has a contractual arrangement with a political subdivision would be free to claim public utility status and operate outside local zoning requirements – a classic example of the exception swallowing the rule. Therefore, this Court should hold that Rumpke’s contract with Cincinnati does not support a determination that Rumpke is a public utility.

Furthermore, the lower courts drastically overemphasized the impact of Rumpke’s contract with Cincinnati. Solid waste collected by the City of Cincinnati represents just six percent (6%) of all solid waste disposed of at Rumpke’s landfill.<sup>1</sup> Based on this tiny fraction of the total amount of waste that winds up in Rumpke’s landfill, the lower courts somehow made the illogical and sweeping leap that the “public” has a legal right to receive service from Rumpke’s landfill. See Appendix 1 at 4. Nothing in Cincinnati’s contract gives the public that right, making Rumpke’s public utility claim based upon its contractual relationship with the City exaggerated at best.

**C. Rumpke can cease operations of its landfill at any time, without governmental approval of any sort; therefore, it fails to meet the public utility standard.**

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<sup>1</sup> Cincinnati’s waste disposal contract with the Rumpke landfill requires Rumpke to dispose of solid waste collected by the City’s Department of Public Services. See Appendix 2. The amount of solid waste collected by the City of Cincinnati is approximately 117,920 tons per year. See *Rumpke’s Motion for Summary Judgment* filed October 31, 2008, in the Hamilton County Court of Common Pleas, Ex. E, p. III-34. The total annual amount of solid waste disposed of at Rumpke’s landfill from all of its customers was 1,840,000 tons. See *Affidavit of Larry Riddle in Support of Rumpke’s Motion for Summary Judgment* filed October 31, 2008 in the Hamilton County Court of Common Pleas, Ex. A, p. 1-6.

The ability to cease landfill operations without governmental approval is by itself fatal to Rumpke's claim of public utility status. As this Court held in *Pittsburgh & Conneaut Dock Co. v. Limbach* (1985) 18 Ohio St. 32 320, 481 N.E. 2d 579, a company that "is free to cease doing business" but for contractual obligations it has voluntarily entered is not a public utility. *Id.* at 323. Rumpke could close its landfill tomorrow, and neither Cincinnati nor any other governmental authority could force its continued operation. At most, the record in this case demonstrates merely that Rumpke has no present plans to close, but in no way detracts from the reality that Rumpke is entirely free to close at any time. The unilateral ability to cease landfill operations is a hallmark of an unregulated business that does not possess sufficient attributes to be deemed a public utility.

**D. Because the public has no right to demand any service from Rumpke, let alone non-discriminatory service, its landfill cannot be a public utility.**

One of the most important attributes of a public utility is devotion of an essential good or service to the general public, which has a legal right to demand or receive the good or service. *A&B Refuse* at 387. As it relates to public utilities, the public's right to receive the good or service means considerably more than operating a business with the intention of serving everyone who is willing to pay for the service, as Rumpke contends it does. *Id.* at 389 (holding that the fact that services are "open to the public does not render the service a public utility"); *Franklin Twp. v. Meadows* (1998), 130 Ohio App.3d 704, 720 N.E.2d 1011 (evidence that business offered services to "absolutely anybody" was inadequate to show public's right to demand service). In order to be a public utility, the business must be subject to governmental controls that legally require the business to provide services to members of the public or, if the services are not performed, gives members of the public legal recourse to compel the business to

render the service. See *Castle Aviation, Inc. v. Zaino* (Jan. 14, 2005), BTA No. 2003-M-146, 2005 Ohio Tax LEXIS 40, *aff'd*, *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420; *City of Englewood v. Miami Valley Lighting, LLC*, 182 Ohio App.3d 58, 2009-Ohio-1631, 911 N.E.2d 913, at ¶ 32.

In discussing the degree of legal obligation to provide service that must exist in order to be a public utility, the Board of Tax Appeals in *Castle Aviation* quoted *Marion Air Service, Inc. v. Bowers* (Dec. 20, 1962), BTA No. 49695, 1962 Ohio Tax LEXIS 1, as follows:

From the testimony and evidence presented in the record before us, it is apparent that the appellant has not shown that any member of the general public has, or had, such a legal right to require that the appellant furnish airplane transportation service to him upon request. Whether the appellant furnished such service and how much it charged for it depended entirely upon the appellant, without reference to any legal right that a member of the general public might demand that the service be furnished upon payment of a charge set by the regulatory agency which issued the license to the appellant. The appellant could refuse, at its whim, to contract with any members of the general public and the refused person would have no recourse, in court, to compel the appellant to render the desired service.

*Castle Aviation*, 2005 Ohio Tax LEXIS 40, at \*18-19. This quote perfectly transfers to Rumpke's disposal services. There is nothing in the Revised Code, Rumpke's landfill operating permits and licenses, or Rumpke's contract with Cincinnati that legally obligates Rumpke to provide solid waste disposal to members of the public.

While Rumpke proclaims it is happy to take anyone's money in exchange for disposing of their garbage, Rumpke remains free to withhold these services from any person, at any time, just like any other business. Rumpke's business model is identical to the business analyzed in *Inland Refuse*, in that Rumpke is only obligated to provide service to the customers with which it voluntarily contracts, and is otherwise free to withhold services from anyone else. *Inland Refuse* at 11-12. Therefore, just like in *Inland Refuse*, this Court should find the public does not have the legal right to demand service from Rumpke, and therefore Rumpke is not a public utility.

**E. The Rumpke landfill is not subject to the requisite level of government regulation and control to be classified as a public utility.**

The only governmental oversight of Rumpke's landfill that was referenced in the lower court's decision was the limited responsibility exercised by the Ohio Environmental Protection Agency and the Hamilton County Solid Waste Management District relative to Rumpke's landfill. See Appendix 1 at 4. Ohio EPA regulates all businesses in Ohio to prevent pollution of the environment. Solid waste management districts have narrow regulatory responsibility within their jurisdictions to provide for the "safe and sanitary management of solid waste ... within the district," and to meet the recycling and waste minimization objectives of the State's Solid Waste Management Plan. R.C. 3734.52(A) and 3734.53(A). Neither Ohio EPA nor any solid waste management district possess broad PUCO-like power to control the relationship between Rumpke and its customers that is necessary for Rumpke to qualify as a public utility.

In order to be classified as a public utility, a business' services must be so important to the public interest that the government imposes special regulation and control of the business' relationship with its customers. *Castle Aviation*, 109 Ohio St.3d 290 at 294-95. In connection with traditional public utilities, the PUCO exercises comprehensive regulatory power concerning all aspects of a utility's business operations and its relationship with the public, including the power to fix rates, the territory where service may be provided, the manner of providing service, and the safety of operations. *Id.* Neither Ohio EPA nor the Hamilton County Solid Waste Management District regulates Rumpke's business relationship with the public. This Court has previously opined that the limited function that Ohio EPA and solid waste management districts exercise concerning private solid waste facilities does not rise to the level of government control that is necessary for a business' operations to be a matter of public concern. *A&B Refuse* at 389

(“the public concern with environmental regulation is separate and distinct from the public concern involved in the regulation of public utilities”); *Inland Refuse* at 12.

Put simply, Ohio law does not provide for any PUCO-like entity that comprehensively regulates any private landfill’s business relationship with the public. No entity controls the rates Rumpke charges for its disposal services. The City of Cincinnati’s contract with Rumpke specifies the price the City will pay for Rumpke’s disposal of solid waste collected and delivered by the City’s solid waste department, but that is a specially negotiated price that Rumpke provides only to Cincinnati under the terms of the contract. See Appendix 2. The disposal rates negotiated by the City do not apply to any other entity, or even to individual residents of the City who choose to take their waste directly to Rumpke’s landfill.<sup>2</sup> The Court in *Inland Refuse* specifically stated that the waste company’s negotiated contract disposal rates with the City of Cleveland, which applied only to the City, contradicted Inland’s claim of public utility status. *Inland Refuse* at 12. Rumpke has likewise failed to demonstrate the requisite level of control to sustain its assertion of public utility status.

The lower court was mistakenly influenced by Rumpke’s assertion that it made “sworn” statements to Ohio EPA and the solid waste management district, “pledging” to remain open and accept any qualifying waste so long as it has the capacity to do so. Appendix 1 at 4. The lower court was wrong to give these statements any weight in reaching its decision. Ohio EPA is only concerned with the prevention of pollution, and solid waste districts do not exercise any power to permit or license the operation of solid waste facilities. Thus, neither Ohio EPA nor the

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<sup>2</sup> By Rumpke’s own admission, it is free to set its rates and charges for the services it provides, and its rates and charges are not uniform or non-discriminatory. See *Colerain’s Memorandum in Opposition to Rumpke’s Motion for Summary Judgment*, filed November 19, 2008 in the Hamilton County Court of Common Pleas at 24, citing Rumpke Depo. at 73, 108; Riddle Depo. at 99-100; and Wehrman Depo. at 28-29.

Hamilton County Solid Waste District possess any legal authority to require Rumpke to make such a pledge as a condition to operate a landfill, let alone to enforce Rumpke's compliance with such a pledge. A hypothetical equivalent would be if Procter & Gamble, in a permit application to Ohio EPA, pledged to continue making and selling Ivory soap to anyone who wants to buy it. Such a pledge is a meaningless gesture, because Ohio EPA and the solid waste district cannot require the pledge as a condition for P&G to operate, and cannot enforce the pledge if P&G does not comply. Rumpke's so-called "pledge" has no value in demonstrating that its landfill is a public utility. Rumpke's landfill is not subject to governmental regulation or control that is sufficient to deem it a public utility.

**F. The accidental marketplace position of Rumpke's landfill is not grounds for awarding it the preferential status of a public utility.**

The lower courts found that Rumpke's landfill occupies a monopoly position in the Southwest Ohio waste disposal market. Appendix 1 at 4. However, in order to gain public utility status, a monopoly must arise either from special privileges granted by the government, or from the absence of competition due to oppressive machinations. E. Freund, *THE POLICE POWER* (1904), ¶ 377, p. 387. Neither of these conditions exists with regard to Rumpke. The record contained evidence of numerous other available landfills that can serve the Southwest Ohio market.<sup>3</sup> Further, the City of Cincinnati's contract preserves the City's right to utilize other solid waste disposal providers. See Appendix 2 at 13. What the lower court mischaracterized as a monopoly is better characterized as a substantial degree of marketplace dominance in an

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<sup>3</sup> It is precisely because no one has a legal entitlement to use Rumpke's landfill that the Hamilton County Solid Waste Management Plan (See *Rumpke's Motion for Summary Judgment* filed October 31, 2008, in the Hamilton County Court of Common Pleas Ex. E, p. VI-5, Table VI-4) lists no less than eleven different sanitary landfills "currently used by the District" that provided written assurance of available disposal capacity to accept solid waste generated in Hamilton County.

otherwise open and competitive market. The mere fact that a large portion of area waste generators 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* at 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. In this case, the lower court rulings have the perverse effect of rewarding Rumpke for its anti-competitive, monopoly-seeking conduct. Ohio law disfavors the perpetuation of such monopolies. See the *Valentine Act*, R.C. 1331.01 et seq. Rumpke's marketplace position fails to support its status as a public utility.

#### **IV. CONCLUSION**

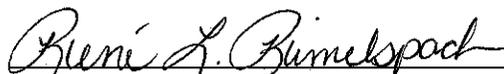
If this Court approves the public utility standard Rumpke advocates in this case, the practical effect is that all privately owned landfills in Ohio that contract with political subdivisions for solid waste disposal will be public utilities exempt from township zoning under R.C. 519.211, as there will be no meaningful distinction left. Amici curiae township trustees, county commissioners, and solid waste management district board members believe that the operation of Rumpke's landfill is indistinguishable from the operation of all non-governmentally owned and operated landfills in Ohio. If Rumpke's landfill is a public utility, then all private landfills are public utilities, a line this Court has consistently refused to cross in the past. If the

lower court decisions stand, townships across Ohio can anticipate being targeted for new and expanded landfills, because locally developed land use zoning plans will be irrelevant. Private landfill owners and developers will be able to ignore the burdens landfills impose on the quality of life for those who live and work close by, in contrast to publicly owned landfills, whose operators must continue to answer to the public.

The lower courts concluded that Rumpke's landfill is a public utility simply because it is large and widely used, trivializing the standard set forth by this Court in *A&B Refuse*. Moreover, local zoning and land use regulations are the legitimate and appropriate exercise of the police power that safeguards the public interest from overzealous private landfill expansion. For these reasons, amici curiae request that this Court reverse the lower court's decision finding that Rumpke's landfill is a public utility.

Respectfully submitted,

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*Lorain County, Medina County, Miami County, Monroe Township, New Russia Township, North Central Ohio Solid Waste Management District, Ottawa-Sandusky-Seneca Joint Solid Waste Management District, Richland Township, and Stark-Tuscarawas-Wayne Joint Solid Waste Management District*

**CERTIFICATE OF SERVICE**

I hereby certify that copy of the foregoing *Amici Curiae Brief Bokescreek Township, Carroll-Columbiana-Harrison Joint Solid Waste Management District, Erie County, Lake Township, Logan County, Lorain County, Medina County, Miami County, Monroe Township, New Russia Township, North Central Ohio Solid Waste Management District, Ottawa-Sandusky-Seneca Joint Solid Waste Management District, Richland Township, and Stark-Tuscarawas-Wayne Joint Solid Waste Management District, in Support Of Appellants Colerain Township, Ohio, et al.'s Merit Brief* was mailed this 11<sup>th</sup> day of October, 2011, to:

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## APPENDIX

1. Judgment Entry, Hamilton County Court of Appeals (December 17, 2010)
2. Agreement between Cincinnati and Rumpke (December 21, 2005)

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

<p>RUMPKE SANITARY LANDFILL, INC.,</p>	<p>:</p>	<p>APPEAL NO. C-090223 TRIAL NO. A-0703073</p>
	:	
<p>CLAIRE A. STEPANIAK,</p>	<p>:</p>	<p><i>JUDGMENT ENTRY.</i></p>
<p>CHARLES M. STOEPPPEL and JOHN J. STOEPPPEL, Trustees of the Henry and Lillian Stoeppel Family Living Trust dated November 5, 1997, Family Trust Share and Survivor's Trust Share,</p>	<p>:</p>	
	:	
<p>STATE OF OHIO ex rel. RUMPKE SANITARY LANDFILL, INC.,</p>	<p>:</p>	
	:	
<p>STATE OF OHIO ex rel. CLAIRE A. STEPANIAK,</p>	<p>:</p>	
	:	
<p>and</p>	<p>:</p>	
	:	
<p>STATE OF OHIO ex rel. CHARLES M. STOEPPPEL and JOHN J. STOEPPPEL, Trustees of the Henry and Lillian Stoeppel Family Living Trust dated November 5, 1997, Family Trust Share and Survivor's Trust Share,</p>	<p>:</p>	
	:	
<p>Plaintiffs-Appellees,</p>	<p>:</p>	
	:	
<p>vs.</p>	<p>:</p>	
	:	
<p>COLERAIN TOWNSHIP, OHIO, COLERAIN TOWNSHIP TRUSTEES, BERNARD A. FIEDELDEY, Trustee, <u>KEITH N. CORMAN, Trustee,</u></p>	<p>:</p>	
	:	
<p>and</p>	<p>:</p>	
	:	
<p>JEFF RITTER, Trustee,</p>	<p>:</p>	
	:	
<p>Defendants-Appellants.</p>	<p>:</p>	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court.<sup>1</sup>

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.<sup>2</sup>

The function of summary judgment is to determine from the evidentiary materials whether triable factual issues exist, regardless of whether the facts are complex.<sup>3</sup> Civ.R. 56(A) makes summary judgment available to “[a] party seeking to recover upon a claim \* \* \*.”<sup>4</sup> 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

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> See *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258.

<sup>3</sup> See *Gross v. Western-Southern Life Ins. Co.* (1993), 85 Ohio App.3d 662, 666-667, 621 N.E.2d 412.

<sup>4</sup> See *Robinson v. B.O.C. Group*, 81 Ohio St.3d 361, 367, 1998-Ohio-432, 691 N.E.2d 667.

most favorable to the nonmoving party, that reasonable minds can only come to a conclusion adverse to that party.<sup>5</sup>

“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.”<sup>6</sup> R.C. 519.211 was “intended to exempt public utilities providers from regulation by township zoning boards and boards of zoning appeals.”<sup>7</sup> 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.”<sup>8</sup>

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.<sup>9</sup> 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.’ ”<sup>10</sup>

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

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<sup>5</sup> See *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

<sup>6</sup> *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).

<sup>7</sup> *Campanelli v. AT&T Wireless Servs., Inc.*, 85 Ohio St.3d 103, 107, 1999-Ohio-437, 706 N.E.2d 1267.

<sup>8</sup> *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 556, 2000-Ohio-470, 721 N.E.2d 1057.

<sup>9</sup> *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.

<sup>10</sup> 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.

to demand or receive this good or service.”<sup>11</sup> The entity must also demonstrate that it provides its service to the public “indiscriminately and reasonably.”<sup>12</sup> And the provider must have an obligation to provide the good or service that cannot be arbitrarily or unreasonably withdrawn.<sup>13</sup>

Next the public utility must “conduct its operations in such a manner as to be a matter of public concern.”<sup>14</sup> Factors considered in reaching this determination include the nature of the services provided, competition in the local marketplace, and regulation by a government authority.<sup>15</sup>

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.

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<sup>11</sup> *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.

<sup>12</sup> *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, ¶57, citing *S. Ohio Power Co. v. Pub. Util. Comm.* (1924), 110 Ohio St. 246, 143 N.E. 700, paragraph two of the syllabus.

<sup>13</sup> See *St. Mary’s v. Auglaize Cty. Bd. of Commrs.* at ¶57

<sup>14</sup> *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.

<sup>15</sup> See *id.*

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.<sup>16</sup> 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

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<sup>16</sup> See *Rumpke Sanitary Landfill, Inc. v. State* at ¶18.

## AGREEMENT

THIS AGREEMENT, made and entered into by and between the City of Cincinnati, an Ohio municipal corporation, hereinafter referred to as "City of Cincinnati", and Rumpke Sanitary Landfill, Inc., hereinafter referred to as "Rumpke";

WITNESSETH:

WHEREAS, the City of Cincinnati is committed to non-incineration methods of solid waste disposal; and

WHEREAS, the City of Cincinnati has the need from time to time for additional landfill disposal capacity; and

WHEREAS, in order to obtain such services the City of Cincinnati's Department of Public Services on September 30, 2005 issued a Request for Proposals for such landfill disposal services; and

WHEREAS, Rumpke timely submitted a Request for Proposal; and

WHEREAS, Rumpke's Request for Proposal was selected one of the "Most Advantageous" to the City of Cincinnati;

NOW, THEREFORE, it is mutually agreed as follows:

### **Section 1. DEFINITIONS**

#### **A. DISPOSAL**

"Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, emitting, or placing of any waste material into or on any land, except if the disposition or placement constitutes temporary storage or treatment.

#### **B. DISPOSAL RATES**

"Disposal Rates" means the unit prices for the disposal of Waste Materials which the City

of Cincinnati will pay to Rumpke pursuant to the terms and conditions of this Agreement.

The Disposal Rates shall be expressed in the following manner:

Solid Waste	Price per ton
Special Waste	Price per ton
Construction and Demolition Debris	Price per cubic yard
Scrap Tires	Price per tire

**C. LANDFILL**

“Landfill” means Rumpke Sanitary Landfill, Inc., at 10795 Hughes Road, Colerain Township, Hamilton County, Ohio.

**D. SCRAP TIRES**

“Scrap Tires” shall be as defined in Section 3734.01(Z) Ohio Revised Code, as well as applicable OEPA regulations.

**E. SOLID WASTE**

“Solid Waste” shall be as defined in Section 3734.01(E) Ohio Revised Code, as well as applicable OEPA regulations.

**F. SPECIAL WASTES**

“Special Wastes” means the nonhazardous waste requiring handling other than that normally used for municipal solid waste, such as contaminated soils, sludges, municipal wastewater treatment waste, empty containers, or other material.

**G. TAXES, SURCHARGES, OR FEES**

“Taxes, Surcharges, or Fees” means taxes, surcharges, or fees which are imposed by federal, state, or local governments on the disposal of Waste Materials, on either a per ton or per cubic yard basis. Such taxes, surcharges, or fees shall include those currently in effect or as may be imposed in the future. Such taxes do not include income or earnings taxes, real estate taxes, personal property taxes, or intangible taxes, and such taxes are

specifically excluded. Fines, penalties, or settlements in lieu of fines or penalties are specifically excluded.

#### **H. TON**

“Ton” means the actual, measured weight of Solid Waste and Special Wastes delivered to the Landfill by or for the City of Cincinnati. Such wastes shall be weighed at the scales located at the Landfill. In the event such scales are temporarily inoperable, a substitute weighing facility acceptable to both parties may be used or a temporary method acceptable to both parties of estimating the weight of such wastes may be used, based upon converting the rated volume capacity of the incoming vehicles to tons. For purposes of a temporary estimation calculation, the estimated weight shall be based upon the maximum average load customarily carried by each vehicle less the actual unloaded weight of the vehicles based upon previous weights of the vehicle on the scales of the Landfill. In the event that a City vehicle has no previous weight history, the estimated weight shall be based upon the maximum average load customarily carried by vehicles of the same type as such vehicle less the actual unloaded weight of vehicles of the same type.

#### **I. WASTE MATERIALS**

“Waste Materials” means Solid Waste, Special Wastes, Construction and Demolition Debris, and Scrap Tires.

### **Section 2. LANDFILL DISPOSAL SERVICES**

#### **A. DISPOSAL**

Rumpke shall, subject to the terms and conditions set forth herein, accept and dispose of all Waste Materials delivered by or for the City of Cincinnati to the Landfill.

#### **B. LANDFILL/TIPPING SITE OPERATING HOURS/DELIVERY TIMES**

The City of Cincinnati requires landfill/tipping site operating hours to accommodate the following collection operations:

1. Routine collection activity, Monday through Friday, between the hours of approximately 7:00 a.m. and 5:00 p.m.
2. Approximately nine Saturdays per year will be required because of a holiday occurring during the routine five-day work week. In those cases where Saturday deliveries to the Landfill would be needed, the City of Cincinnati will provide Rumpke twenty-four (24) hours advance notice by telephone of such deliveries.
3. In the event of an emergency or special circumstances, including severe weather, requiring Waste Disposal services, Rumpke shall accept delivery of such Waste Materials at the Landfill at times other than stated above.
4. Rumpke shall designate in writing, initially, and from time to time, a person or persons who can be contacted by telephone by the City of Cincinnati on a twenty-four (24) hour per day, seven (7) days per week basis. Such persons shall have the authority from Rumpke to open the Landfill and accept Waste Materials for Disposal.

**Section 3. COMPENSATION AND METHOD OF PAYMENT**

**A. Compensation**

The City of Cincinnati agrees to pay Rumpke in accordance with the fee schedules contained in and attached hereto, marked EXHIBIT A, and by this reference made a part hereof

**B. Method of Payment**

The City of Cincinnati will make payment to Rumpke monthly or as otherwise specifically agreed upon by the parties, upon submission of Rumpke's standard invoice, setting forth, among other items, the agreement number, the type of waste, the tons or cubic yards, and the amount due for the month, and any other information required by the Director of Finance of the City of Cincinnati.

**C. Taxes, Surcharges, or Fees**

The City of Cincinnati agrees that Rumpke may pass through to the City of Cincinnati, and the City of Cincinnati agrees to pay on each ton of Solid Waste it delivers to the Transfer Station, any Taxes, Surcharges, or Fees that might be imposed by federal, state or local governments that are in addition to the Taxes, Surcharges, or Fees identified by Rumpke in its Pricing proposals set forth in EXHIBIT A.

**Section 4. TERM**

The initial term of the Agreement shall commence on January 1, 2006 and expire on December 31, 2010; the Agreement may be extended, at the City of Cincinnati's sole discretion, on January 1, 2011 for a thirty-six month period.

**Section 5. WASTE REDUCTION/MINIMIZATION**

Nothing in the Agreement shall restrict the rights of the City of Cincinnati to practice source separation for the recovery and recycling of any material, or the right of the City of Cincinnati to sponsor, encourage, or require source separation, or the right of the City of Cincinnati to otherwise minimize the amount of solid waste generated within the City or disposed at the landfill or tipping site. Nothing in the Agreement shall require the City of Cincinnati to dispose of any minimum amount of Waste Materials at the Landfill.

**Section 6. TEST AND EVALUATION/PILOT PLAN**

Nothing in the Agreement shall restrict the right of the City of Cincinnati, at the City of Cincinnati's sole discretion, to initiate or participate in experimental or pilot solid waste and recycling collection, processing, treatment, or disposal systems at various times and in various parts of the city.

**Section 7. LANDFILL OPERATIONS**

**A. Requirements**

Rumpke will operate and maintain the Landfill as a licensed sanitary landfill and will provide

all labor, equipment, fire protection equipment, and other facilities required to provide the services contemplated by the Agreement.

**B. Access**

Rumpke will provide suitable and unobstructed ingress and egress to the Landfill. Access roads shall be maintained in satisfactory condition, regardless of weather conditions.

**C. Priority**

Rumpke shall not delay the flow and operation of the City's vehicles and employees.

**Section 8. COMPLIANCE WITH LAWS AND REGULATIONS**

Rumpke shall operate and maintain the Landfill in accordance with all federal, state, and local laws, rules, and regulations now in effect or hereafter enacted during the Agreement.

**Section 9. PERMITS AND LICENSES**

Rumpke shall, at its sole cost and expense, obtain and maintain throughout the term of the Agreement all permits, licenses, and approvals necessary or required for it to perform the work and services described, including a current permit/license authorizing Rumpke to operate a solid waste disposal facility.

**Section 10. CLOSURE AND POST-CLOSURE CARE**

Rumpke shall maintain by escrow account and/or by other methods acceptable to the City of Cincinnati, the financial assurances needed to fully cover closure and post-closure costs. In addition, Rumpke shall obtain environmental impairment liability insurance satisfactory to the City of Cincinnati to cover any necessary environmental remediation action resulting from the operation of the Landfill.

**Section 11. SUBCONTRACTING**

None of the work or services covered by the Agreement shall be subcontracted without the prior

written approval of the City of Cincinnati. Any work or services subcontracted hereunder shall be specified by written contract or agreement and shall be subject to each provision of the Agreement.

**Section 12. ASSIGNMENT**

Rumpke shall not assign any interest in the Agreement, and shall not transfer any interest in the same, whether by assignment or novation, without prior written consent of the City of Cincinnati.

**Section 13. INDEMNIFICATION AND HOLD HARMLESS**

Rumpke agrees to indemnify, defend and hold harmless the City of Cincinnati, its officers, employees, and agents from and against any and all liability, claims, demands, actions or suits, of whatsoever character or kind, arising or resulting from, or in any way connected with, Rumpke's performance, its operations, its agents, employees or subcontractors, or the failure of Rumpke to comply with the provisions and requirements of all applicable permits, licenses, laws, or regulations.

**Section 14. INSURANCE**

Rumpke shall obtain and maintain throughout the term of the Agreement, at Rumpke's sole cost and expense, not less than the insurance coverage set forth in EXHIBIT B, entitled "INSURANCE," attached hereto and incorporated herein by this reference. All insurance will be by insurers acceptable to the City of Cincinnati and authorized to do business in the State of Ohio.

**Section 15. SMALL BUSINESS ENTERPRISE PROGRAM**

- A. The Agreement is subject to the provisions of the Small Business Enterprise Program contained in Chapter 323 of the Cincinnati Municipal Code. Section 323-99 of the Cincinnati Municipal Code is hereby incorporated into this Agreement.
- B. Details concerning this program can be obtained from the Office of Contract Compliance, Two Centennial Plaza, 805 Central Avenue, Suite 130, Cincinnati, Ohio 45202, (513) 352-3144.

RSL005021

- C. Rumpke shall use utilize best efforts to recruit and maximize the participation of all qualified segments of the business community in subcontracting work, including the utilization of small, minority, and women business enterprises. This includes the use of practices such as dividing large contracts into smaller contracts when economically feasible.

**Section 16. EQUAL EMPLOYMENT OPPORTUNITY PROGRAM (Non Construction)**

The Agreement shall be subject to the provisions of the Equal Employment Opportunity Program of the City of Cincinnati, contained in Chapter 325 of the Cincinnati Municipal Code. Section 325-9 of the Cincinnati Municipal Code is hereby incorporated by reference into the Agreement.

**Section 17. LIVING WAGE PROVISIONS**

The Agreement is subject to the Living Wage provisions of the Cincinnati Municipal Code. The provisions require that, unless specific exemptions apply or a waiver is granted, all employers (as defined) under service contracts shall provide payment of a minimum wage to employees (as defined) of \$8.96 per hour with health benefits (as defined) or otherwise \$10.50 per hour. Such rate shall be adjusted annually pursuant to the terms of the Municipal Code. Under the Living Wage provisions, the City of Cincinnati shall have the authority, under appropriate circumstances, to terminate the Agreement and to seek other remedies.

**Section 18. REPORTS, INFORMATION, AND AUDITS**

- A. Rumpke shall provide to the driver of each vehicle delivering Waste Materials by or for the City of Cincinnati a receipt for each load indicating the type of Waste Materials received and the quantities expressed in the corresponding unit of measurement, as described in EXHIBIT A of this Agreement.
- B. Rumpke, at such times and in such form as the City of Cincinnati may require, shall furnish the City of Cincinnati such reports as may be requested pertaining to the work or services

undertaken pursuant to the Agreement, and any other matters covered by the Agreement.

Rumpke shall, upon reasonable notice, permit the City of Cincinnati or any of its representatives or auditors access to the Landfill for purposes of determining compliance with the terms and conditions of this Agreement.

**Section 19. INDEPENDENT CONTRACTOR**

Rumpke shall perform all work and services described herein as an independent contractor and not as an officer, agent, servant, or employee of the City of Cincinnati. Rumpke shall have exclusive control of and the exclusive right to control the details of the services and work performed hereunder and all persons performing the same and shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors, and subcontractors, if any. Nothing herein shall be construed as creating a partnership or joint venture between the City of Cincinnati and Rumpke. No person performing any of the work or services described hereunder shall be considered an officer, agent, servant, or employee of the City of Cincinnati, nor shall any such person be entitled to any benefits available or granted to employees of the City of Cincinnati.

**Section 20. LAW TO GOVERN**

The Agreement is entered into and is to be performed in the State of Ohio. The City of Cincinnati and Rumpke agree that the law of the State of Ohio shall govern rights, obligations, duties, and liabilities of the parties to the Agreement and shall govern the interpretation of the Agreement.

**Section 21. WAIVER**

A waiver of any breach of any provision of the Agreement shall not constitute or operate as a waiver of any other breach of such provision or of any other provisions, nor shall any failure to enforce any provision hereof operate as a waiver of such provision or of any other provision.

**Section 22. AMENDMENT**

RSL005023

The Agreement may be modified or amended only by a written agreement duly executed by the parties hereto or their representatives.

**Section 23. ENTIRETY**

The Agreement and the Exhibits attached hereto contain an entire agreement between parties as to the matters contained herein. Any oral representations or modifications concerning the Agreement shall be of no force and effect.

**Section 24. SEVERABILITY**

The Agreement shall be severable. If any part of parts of the Agreement shall for any reason be held invalid or unenforceable by a court of competent jurisdiction, all remaining parts shall remain binding and in full force and effect.

**Section 25. GUARANTEE**

Rumpke Sanitary Landfill, Inc.'s corporate parent, Rumpke Consolidated Companies, Inc., guarantees the performance of Rumpke Sanitary Landfill, Inc. and of all Rumpke Sanitary Landfill, Inc.'s obligations under this Agreement.

**Section 26. DEFAULT, CURE, AND REMEDY**

A. In the event Rumpke defaults in the performance of any of the covenants, guarantees, warranties, or promises to be kept, done, or performed by Rumpke under the terms of the Agreement, the City of Cincinnati shall notify Rumpke in writing of the nature of such default. Any additional costs or damages to the City of Cincinnati resulting from such default shall be paid in full by Rumpke, and the City of Cincinnati may withhold any payments to Rumpke for the purpose of set-off until such time as the exact amount of costs or damages due the City of Cincinnati from Rumpke is determined. Within five (5) days following such notice, Rumpke shall:

1. Correct the default.
2. In the case of a default not capable of being corrected in five (5) days, Rumpke shall commence correcting the default within five (5) days of the City of Cincinnati's notification thereof and thereafter correct the default with diligence.

**B.** If Rumpke fails to correct the default as provided above, the City of Cincinnati, without further notice, shall have the following rights and remedies which the City of Cincinnati may exercise singly or in combination and such rights and remedies provided by law:

1. The right to declare the Agreement together with all rights granted Rumpke hereunder terminated, effective upon such date as the City of Cincinnati shall designate.
2. The right to contract with others to perform the services required to be performed by Rumpke under the Agreement.
3. The right to demand that the Guarantor take over the performance of the Agreement.
4. The right to demand the Surety to secure performance of the Agreement.

**Section 27. TERMINATION**

The City of Cincinnati may terminate the Agreement at any time for any reason upon thirty (30) days written notice to Rumpke. In the event of termination not due to the fault of Rumpke, Rumpke shall be paid Rumpke's compensation for services performed up to the termination date. Section 26 of the Agreement will govern the rights and responsibilities of the City of Cincinnati and Rumpke in the event of termination of the Agreement due to the fault of Rumpke.

**Section 28. PERFORMANCE SURETY**

RSL005025

Prior to commencement of performance under the Agreement, Rumpke shall deliver to the City

of Cincinnati a performance surety in the principal sum of One Million Dollars (\$1,000,000.00) to guarantee the performance of its obligations under the Agreement. The company issuing such surety shall be authorized to do business in Ohio unless this requirement is specifically waived by the City of Cincinnati, and the form of the surety itself shall be subject to approval by the City of Cincinnati.

**Section 29. CERTIFICATION AS TO NON-DEBARMENT**

Rumpke certifies that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in the transaction covered by the Agreement. Rumpke acknowledges and agrees that if he or it or its principals is/are presently debarred then he/it shall not be entitled to compensation under the Agreement and that he/it shall promptly return to the City of Cincinnati any funds received pursuant to the Agreement. In such event, any materials received by the City of Cincinnati pursuant to the Agreement shall be retained as liquidated damages.

**Section 30. NOTICES**

The Agreement requires that all notices be personally served or sent by certified mail, postage prepaid and return receipt requested, addressed to the parties as follows:

To City of Cincinnati

Superintendent of Operations, Department of Public Services  
City of Cincinnati  
3320 Mill Creek Road  
Cincinnati, OH 45223

To Rumpke

William J. Rumpke, President  
Rumpke Sanitary Landfill, Inc.  
10795 Hughes Road  
Cincinnati, Oh 45251

RSL005026

**Section 31. NON-EXCLUSIVE AGREEMENT**

This is a non-exclusive agreement. The City of Cincinnati may procure the same or other similar services from other contractors at any time during the term of the Agreement.

IN WITNESS WHEREOF, the City of Cincinnati and Rumpke have executed this Agreement on this 21<sup>st</sup> day of December, 2005.

RECOMMENDED BY:

CITY OF CINCINNATI

Daryl Brock  
Daryl Brock  
Director of Public Services

By: David E. Rager  
David E. Rager  
City Manager

APPROVED BY:

RUMPKE SANITARY LANDFILL, INC.

Rochelle Thompson  
Contract Compliance

By: William J. Rumpke  
William J. Rumpke, President  
Federal Tax I.D. 31-0814745

APPROVED AS TO FORM:

GUARANTOR

Christa Zimmerman  
Assistant City Solicitor

RUMPKE CONSOLIDATED COMPANIES, INC.  
By: William J. Rumpke  
William J. Rumpke, President

CERTIFIED DATE 12-21-05

FUND/CORP 050 252 2006 725

AMOUNT 2,943,750.00

William E. Miller  
DIRECTOR OF FINANCE

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V. QUESTIONNAIRE

This QUESTIONNAIRE, required to be completed by the Offeror, shall become an obligation to be fulfilled by the Offeror as part of the Agreement.

A. NAME AND LOCATION OF LANDFILL

The name of the landfill is:

Rumpke Sanitary Landfill

The location of the landfill is:

10795 Hughes Road, Cincinnati, Ohio 45251

(Address, city, state, zip code)

B. OWNERSHIP OF LANDFILL

Is site owned or leased by Offeror? Owned

If leased:

1. Who is owner (name and address)? \_\_\_\_\_

2. Date when lease expires: \_\_\_\_\_

C. EXISTING TIPPING SITE (IF TRANSFER STATION)

The name of the transfer station is: N/A

The location of the transfer station is: \_\_\_\_\_  
(Address, city, state, zip code)

Is site owned or leased by Offeror? \_\_\_\_\_

If leased:

1. Who is owner (name and address)? \_\_\_\_\_

2. Date when lease expires: \_\_\_\_\_

Amount, in tons, of the transfer station's authorized (in the permit/license) maximum daily waste receipt: \_\_\_\_\_

Amount, in tons, of the transfer station's current average daily waste received: \_\_\_\_\_

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Please enclose scale drawings showing the transfer station site, the transfer station floor plan, access to and from the transfer station from the public right of way, and traffic patterns

D. STATE PERMITS/LICENSES

Provide copy of permit(s) approval/license(s) to operate sanitary landfill and, if applicable, transfer station. Permit(s)/license number(s) is/are:

OEPA Solid Waste ID #31-00-01

OEPA Solid Waste Facility License/Hamilton County - No. 1 (Attachment #1)

E. LANDFILL CAPACITIES

Amount, in tons, of the authorized (in the permit/license) maximum daily waste receipt: 10,000

Amount, in tons, of the current average daily waste received: 7,100

Amount of currently existing state-permitted landfill capacity remaining (in years):  
19.4 Years

Amount of additional state-permitted landfill capacity projected, based upon planned expansion(s) (in years):  
No expansion pending.

Date when planned expansion(s) is expected to receive state approval (month/year):  
No expansion pending.

F. WEEKEND AND HOLIDAY WORK

Advance notification of required Saturday, Sunday or Holiday Work. Contractor would require 24 hours advance notice.

Holidays on which the Holiday rate would apply. Please list name and/or date of each:  
No premium is expected for delivery of waste on holidays.

G. EXCLUDED WASTESTREAM

The Offeror proposes to not accept or dispose at its landfill, or if applicable, its transfer station, any of the following waste:

See attached Rumpke Landfill Waste Restrictions (Attachment #2).

H. PRICING

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The City shall pay to the Contractor, as complete payment for acceptance and disposal of solid waste and other materials delivered to its landfill by or for the City of Cincinnati, at the

**ALTERNATE PROPOSAL**

(Based on an initial term of five years, and, at the City of Cincinnati's sole discretion, one additional three-year extension.)

<b>WASTE MATERIALS</b>	<b>Solid Waste* 0-200 Tons/Day (\$/Ton)</b>	<b>Solid Waste* 0-300 Tons/Day (\$/Ton)</b>	<b>Solid Waste* 0-350 Tons/Day (\$/Ton)</b>	<b>Solid Waste* Over 350 Tons/Day (\$/Ton)</b>	<b>Special Wastes (\$/Ton)</b>	<b>Construction &amp; Demolition Debris (\$/Cubic Yard)</b>	<b>Scrap Tires (\$/each)</b>
<b>PROPOSED DISPOSAL RATE</b>	\$28.50	\$26.50	\$26.50	\$24.50	\$30.00	\$12.00	\$3.50- Car Tires \$7.50- Truck Tires

\* Solid Waste Tons/Day shall be calculated by dividing the total number of tons of Solid Waste delivered during a month by the number of days on which Solid Waste was delivered during the month by or for the City of Cincinnati. The quotient shall be rounded to the nearest whole number.

Itemize and indicate the amounts of all taxes, surcharges, or fees on disposal that are currently in place, as included in the amounts above:

State of Ohio Surcharge:	\$3.50 Per Ton
District Surcharge (Hamilton County):	\$1.00 Per Ton
Local Surcharge (Colerain Township):	\$ .25 Per Ton

In the event that Rumpke incurs increased surcharge fees as a result of imposition of new governmental regulations not in effect at the time of acceptance of said contract and which regulate the payment of fees for disposal, the above quoted per unit rates will be adjusted by an amount commensurate with the increased surcharge fees.

**I. ESCALATOR**

The payment from the City of Cincinnati to Contractor may be adjusted effective January 1 of each year of the term and any extensions of this Agreement, beginning in January 1, 2007, by the lower of:

100% per cent of the percentage change in the Consumer Price Index - All Urban Consumers for the Metropolitan Cincinnati Area;

or

Three per cent.