

ORIGINAL

In the  
Supreme Court of Ohio

RUMPKE SANITARY LANDFILL,  
INC., et al.,

Plaintiffs-Appellees

v.

COLERAIN TOWNSHIP, OHIO,  
et al.,

Defendants-Appellants

Case No.: 2011-0181

On Appeal from the Hamilton County  
Court of Appeals, First Appellate District

Court of Appeals Case No.: C-090223

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**MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF  
DEFENDANTS-APPELLANTS COLERAIN TOWNSHIP, ET AL.**

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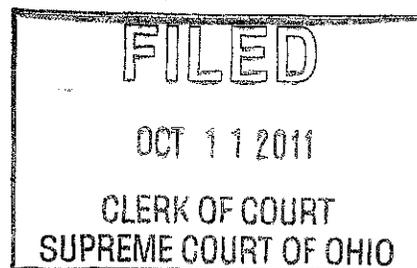
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## INTRODUCTION

The licensing and permitting of solid waste facilities is a complex process governed by R.C. Chapter 3734 and related regulations. The process requires solid waste facility specifications to be submitted to the Ohio EPA for approval, and also to the county board of health where the facility will be located. R.C. 3734.05(A)(2)(a). When deciding to grant or deny a permit-to-install such a facility, the Ohio EPA *must* evaluate “the construction, operation, closure . . . and post closure care of the facility.” Ohio Adm.Code 3745-27-02(G)(1). In addition, the Ohio EPA *may* “take into consideration the social and economic impact . . . that may be a consequence of the issuance of a permit to install.” Ohio Adm. Code 3745-27-02(G)(2). The Ohio EPA, however, has typically left consideration of these socio-economic impacts to local governments. And for obvious reasons. Local governments are best situated to identify and evaluate local impacts, and local governments are empowered to use zoning regulations, among other tools, to address these concerns.

Upholding the decision below would shift the burden of accounting for those local concerns almost entirely to the Ohio EPA, which is neither required to make such determinations nor best positioned to do so. Such a mandate would strain the limited resources of the Ohio EPA and eliminate the distinct, but complementary role that both Ohio EPA regulations and local zoning regulations play in the installation and chartering of solid waste facilities. See *Sites v. Butler Cty. Bd. of Zoning Appeals* (1989), 56 Ohio App.3d 90, 93, 564 N.E.2d 1113, 1118; *Hulligan v. Columbia Twp. Bd. of Zoning Appeals* (1978), 59 Ohio App.2d 105, 392 N.E.2d 1292.

The Court should preserve the State-local model for regulating solid waste facilities and reverse the decision below. First, the permitting, licensing, and siting of solid waste facilities

requires both State *and* local oversight. Second, Rumpke is not a “public utility” and is therefore not exempt from local zoning regulations.

### **STATEMENT OF AMICUS INTEREST**

Because the State of Ohio, through the Ohio EPA, plays an instrumental role in the permitting, licensing and overall regulation of solid waste disposal facilities—and because its role is connected to the role played by local governments—it has a substantial interest in whether, and to what extent, those facilities are subject to local government zoning regulations.

If this Court upholds the decision below, the long-standing collaborative State-local approach will be destroyed. Local governments will be severely limited in their ability to control, or even influence, where a solid waste facility can be located within their jurisdictions. The burden will shift to the Ohio EPA to evaluate complex and local socio-economic and zoning decisions—considerations that the local governments are best situated to address.

It is in the best interests of the State, local governments, and the people of Ohio for the Court to preserve the State-local model for regulating solid waste facilities.

### **STATEMENT OF THE CASE AND FACTS**

The State of Ohio adopts the Statement of the Case and Facts submitted by Plaintiffs-Appellants Colerain Township, et al., in their Memorandum in Support of Jurisdiction.

### **ARGUMENT**

**Amicus Curiae State of Ohio’s Proposition of Law No. 1: *The permitting, licensing, and locating of solid waste facilities requires both State and local oversight.***

The process for siting, permitting, and licensing solid waste disposal facilities involves two authorities: (1) the Ohio EPA, which protects the environment from the adverse environmental effects related to the collection and disposal of solid waste, see R.C. Chapter

3734; and (2) local governments, which, through local zoning laws, protect the health, safety and welfare of their residents. These zoning laws allow local governments to regulate the use of land, control the location of landfill facilities, and to protect surrounding properties from unduly adverse consequences arising from their proximity to such facilities. See R.C. Chapters 519, 303, 717. The Ohio General Assembly, Ohio courts, local governments, and the Ohio EPA have for decades embraced this cooperative approach to solid waste management. See, e.g., *Sites*, 56 Ohio App.3d 93 (Ohio EPA regulations and local zoning acts are deemed harmonious for the purpose of protecting the health, safety, welfare and property of the citizens of the state of Ohio.); *Hulligan*, 59 Ohio App.2d 107-108 (citing *North Sanitary Landfill v. Bd. of Cty. Commrs.* (1976), 52 Ohio App.2d 167, 172); 1988 Ohio Atty.Gen.Ops. No. 231.

The collaborative approach is also evident in the regulations governing the Ohio EPA's process in granting or denying solid waste facility permit applications. As stated previously, the Ohio Administrative Code states that the director of the Ohio EPA *shall* "evaluate whether the construction, operation, closure . . . [and] post closure care of the facility is capable of all appropriate regulatory requirements for protecting surface water, ground water, and air." Ohio Adm.Code 3745-27-02(G)(1). The Code also states that the director *may* "take into consideration the social and economic impact . . . that may be a consequence of the issuance of a permit to install." *Id.* at 3745-27-02(G)(2).

The Ohio EPA's discretion to consider, or not consider, the socio-economic impacts of proposed facilities is long standing. Ohio courts have routinely found that the Ohio EPA "is not required to consider such factors." *Citizens to Protect Environment, Inc. v. Universal Disposal* (1988), 56 Ohio App.3d 45, 52, 564 N.E.2d 722; *Rings v. Nichols* (1983), 13 Ohio App.3d 257, 260, 468 N.E.2d 1123; *Independence v. Maynard* (1985), 25 Ohio App.3d 20, 25, 495 N.E.2d

444.<sup>1</sup> Historically, the Ohio EPA has generally opted not to evaluate the socio-economic impacts of these facilities; and instead has deferred to local government to make those evaluations. There are three key reasons for that approach.

First, it leaves the evaluation of social and economic consequences to the entities best suited to make those determinations—local governments, which have intimate knowledge of the specific needs and characteristics of the community. Second, by leaving local socio-economic considerations to local governments, the Ohio EPA can focus its limited resources on its statutory obligations to evaluate the environmental impacts of proposed facilities. Third, leaving the consideration and regulation of social and economic factors to local governments preserves Ohio’s comprehensive solid waste facility framework by maintaining the distinct but harmonious regulatory roles of the Ohio EPA and local governments.

If this court upholds the decision below, the State-local framework of permitting, licensing, and siting of solid waste facilities would effectively be destroyed. Accordingly, the Court should reverse the decision below and rule that the permitting, licensing, and locating of solid waste facilities requires both State and local oversight.

***Amicus Curiae State of Ohio’s 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 right of the public to demand and receive its services and there is no statutory or regulatory requirement that services be provided indiscriminately.***

The question of whether a particular entity is a public utility is a mixed question of law and fact, and each case must be determined on its own facts. *City of St. Marys v. Auglaize Cty.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561 at ¶54-55.

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<sup>1</sup> The Ohio Administrative Code sections referenced in these opinions, while numbered differently from the current version of the Code, are nearly identical in all other respects.

An entity asserting public utility status must demonstrate “a devotion of an essential good or service to the general public which has a legal right to demand or receive this good or service . . . [and] demonstrate that it provides its good or service to the public “indiscriminately and reasonably.”” *Trs. of Wash. Twp. v. Davis*, 95 Ohio St.3d 274, 2002-Ohio-2123, 767 N.E.2d 261, at ¶17. Additionally, an entity must show that it “conducts its operations in such a manner as to be a matter of public concern.” *Id.* at ¶18. Factors considered for this purpose are the goods or services provided, the competition in the local marketplace, and the existence and degree of governmental regulation. *Id.* Rumpke fails to satisfy these factors and therefore is not a public utility.

The Rumpke Sanitary Landfill does not provide a service that the general public has a legal right to demand. No statute or rule gives any person the right to demand that Rumpke, or any solid waste facility, accept its solid waste or to demand continuing provision of the service. Rumpke could choose to close its facility at any time, and the customers who currently rely on its services would have no recourse. Ohio courts have found that the obligation to continually provide service is not something that an entity should be able to “arbitrarily or unreasonably withdraw[.]” See *A&B Refuse v. Bd. of Ravenna Twp.* (1992), 64 Ohio St.3d 385, 387-88 (citing *Freight, Inc. v. Northfield Ctr. Bd. of Twp. Trustees* (1958), 107 Ohio App. 288, 292-93, 158 N.E.2d 537 (holding that one public-utility factor is “whether such use of its services cannot be denied or withdrawn at the whim of the owners.”)).

Moreover, Rumpke should not be considered a public utility because no legal mechanism exists to ensure that Rumpke will provide services reasonably and without discrimination. While Rumpke has submitted affidavits to the courts below stating that its current business practice and future intention is to keep the landfill open and accessible to all, there is no statute, regulation, or

governmental oversight in place to ensure this promise. Rumpke can discriminate among and between landfill customers without constraint, which is common practice of privately owned and operated landfills.

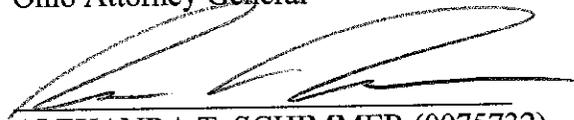
Because of the inability of the public to legally demand continued services and Rumpke's ability to discriminate in the provision of its services, Rumpke does not merit public utility status.

### CONCLUSION

For the foregoing reasons the State of Ohio respectfully urges the Court to reverse the decision of the Hamilton County Court of Appeals.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief of Amicus Curiae State of Ohio

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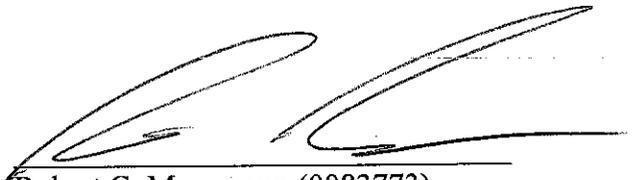
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