ORIGINAL

IN THE SUPREME COURT OF OHIO

Rumpke Sanitary Landfill, Inc., *et al.*	:	Supreme Court Case No. 2011-0181
	:	
Appellees,	:	On Appeal from the
	:	Hamilton County Court of Appeals
v.	:	First Appellate District
	:	
Colerain Township, Ohio, *et al.*	:	
	:	Court of Appeals
Appellants.	:	Case No. C090223

BRIEF OF APPELLANTS, COLERAIN TOWNSHIP, OHIO; COLERAIN TOWNSHIP BOARD OF TRUSTEES; BERNARD A. FIEDELDEY, TRUSTEE; KEITH N. CORMAN, TRUSTEE; AND JEFF RITTER, TRUSTEE

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STATEMENT OF FACTS[1]

Rumpke Sanitary Landfill, Inc. ("Rumpke") owns and operates a 509± acre sanitary landfill in Colerain Township, Hamilton County, Ohio. Colerain Township is Ohio's largest township with more than 60,000 residents residing in an urban environment. (T.d. 78, ¶5, Supp. 2, Roschke Aff.). Colerain Township has adopted its own zoning pursuant to its comprehensive plan. The plan and zoning resolution provide for different zoning districts for an integrated community of residential, commercial and industrial uses, including sanitary landfills. The Rumpke landfill has been subject to and complied with zoning for more than forty (40) years. In March 2006, Rumpke filed an application with Colerain Township to rezone 350 acres to allow a massive "eastern expansion" of its existing 509± acre landfill, increasing its size nearly 70%. (T.d. 78, ¶14, Supp. 4, Roschke Aff.). After extensive public hearings, the Colerain Township Board of Trustees ultimately denied the request for rezoning for the expansion prompting Rumpke to file this action claiming among other things that it has ***become*** a privately owned 'public utility' that is now exempt from township zoning under R.C. 519.211. Rumpke seeks to expand its landfill in Colerain Township without any land use limitations or local regulation. In furtherance of these goals, Rumpke has purchased additional properties beyond the 350 acre 'eastern expansion' area for yet additional landfill.

[1] References to the record in this case are as follows: "T.d." followed by a number refers to the docket number in the common pleas court transcript of docket and journal entries followed by a brief description of the document. "App. T.d." followed by a number refers to the court of appeals docket number. "Supp." refers to the Supplement filed with this court followed by the page number and "Appx.") refers to the Appendix filed with this Appellants' Brief on the Merits.

Background

This case is best understood within the context of the history of the landfill, the facts that gave to Rumpke's filing of this action and the nature of the proceedings below. Colerain Township has been the host community for Rumpke's sanitary landfill for more than 60 years. (T.d. 41, p. 48, Rumpke Depo.; T.d. 78, ¶6, Supp. 2, Roschke Aff.). The solid waste facility was established before there was any zoning and has been subject to and regulated by local zoning since zoning was initially adopted more than 40 years ago – first by Hamilton County and then by Colerain Township. (T.d. 78, ¶7, Supp. 2, Roschke Aff.) Over the years Rumpke has secured various zoning amendments to expand its landfill to almost 500 acres through zoning applications and ensuing litigation. Each time Rumpke has expanded its solid waste facility, it has sought a local zoning change.[2] When a zoning change has been denied, Rumpke has filed one or more lawsuits against the local zoning authority (initially Hamilton County and then Colerain Township) challenging its actions. *Id.*

In 1999, Colerain Township denied a request from Rumpke to rezone 138 acres to allow a southern expansion" of the landfill. (T.d. 78, ¶10, Supp. 3, Roschke Aff.). Rumpke sued the township claiming the township's zoning resolution was unconstitutional as applied to its property and constituted a taking without just compensation. It never claimed it was a "public utility" exempt from zoning. In 2000, Colerain Township entered into a consent decree agreeing to allow the 138 acre southern expansion subject to the settlement agreement that was reached. (T.d. 78, Supp. 3-4, Roschke Aff.)[3] The township believed, that with the settlement it had agreed

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[2] T.d. 59, pp. 14-15, 17, Errata Sheet, Kinsey Depo.; T.d. 78, ¶9, Supp. 3, Roschke Aff.

[3] *Rumpke Sanitary Landfill, Inc., et al. v. Colerain Township, Ohio, et al.*, Hamilton County Court of Common Pleas Case No. A007121 (the 138 acre 'southern' expansion).

to the final expansion of the Colerain Township landfill.[4] Paragraph 27 of the Terms and Conditions of the Consent Decree for the 186 acre southern expansion states (emphasis added):

> The total acreage within the "EF" District shall be maintained at a maximum of 509 acres. **The acreage to be used for the actual disposal of solid waste (limit of fill) shall be maintained at a maximum of 333 acres within the limit of the waste footprint, as shown on the Preliminary Development Plan** and as defined presently or hereafter by the Ohio Environmental Protection Agency.

Just six years later, Rumpke again requested rezoning, this time for an additional 350 acre "eastern expansion" which is the subject of this action.[5] After filing its zoning application, Rumpke requested the Hamilton County Solid Waste Management District ("HCSWMD") to pass a resolution supporting the expansion and recognizing the importance of the Rumpke landfill in the single county solid waste management district.[6] The HCSWMD conducted a review and issued a staff report finding the Rumpke Landfill was not essential to the HCSWMD. (T.d. 62, Ex. 4, Ingram Depo.). The report concluded that closure of the Rumpke landfill would not affect funding for the district or capacity planning until at least 2021 and the District had adequate time to plan for alternative disposal and adopt alternative funding mechanisms authorized under Ohio law. *Id.* In the absence of the Rumpke landfill, waste would be collected and disposed of through transfer stations, a common practice in the solid waste industry.

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[4] (T.d. 78, Supp. 1, Roschke Aff.; Consent Decree, Supp. 13, ¶27).

[5] Rumpke disputes that there was any agreement that the southern expansion was the "final expansion" of the landfill. Based on the settlement, Colerain Township filed a motion for summary judgment in the trial court below claiming the previous Consent Decree barred Rumpke from the proposed 350 acre expansion. The Townships' motion was denied by the trial court. The court of appeals affirmed.

[6] (T.d. 41, pp. 159-161, Rumpke Depo.; T.d. 43, pp. 166-167, Riddle Depo.). The HCSWMD is responsible for preparing a plan for solid-waste management and providing for the 'safe and sanitary management of solid wastes' within Hamilton County. R.C. 3734.52.

(T.d. 78, p. 60 ¶15, Supp. 32, Greenberg Aff.). The HCSWMD declined to issue any statement of support for the proposed expansion. (T.d. 62, pp. 15-16, Ingram Dep.).

Course of Proceedings

After Colerain Township denied Rumpke's rezoning request for the 350-acre eastern expansion Rumpke again sued Colerain in this case for declaratory judgment, mandamus and money damages asserting that the township zoning resolution was unconstitutional and constituted a taking without just compensation. (T.d. 2). Rumpke amended its complaint to include a new claim that it had become a "public utility" and is not subject to the township zoning under R.C. 519.211. (T.d. 11). The parties hired opposing experts, conducted extensive discovery taking many depositions with Rumpke producing thousands of pages of documents. Rumpke filed a motion for summary judgment claiming there were no material facts in dispute and it was a public utility. (T.d. 65). Colerain opposed.

Colerain Township filed motions for summary judgment on two grounds: (1) Rumpke was not a public utility under R.C. 519.211 *as amended*;[7] and (2) Rumpke was barred from any further expansion by the 2000 southern expansion Consent Decree. (T.d. 37, 45). The trial court, without opinion, granted Rumpke's motion for summary judgment and denied Colerain's motions for summary judgment. (T.d. 86, Appx. 9). Colerain Township appealed. The First District Court of Appeals, as an expedited appeal, affirmed the decision of the trial court by judgment entry without opinion. (App. T.d. 21, Appx. 4).

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[7] Rumpke challenged the constitutionality of the amendment of R.C. 519.211 with a one subject rule challenge to the exclusion of Colerain Township. This Court declared the amendment to R.C. 519.211(A) that prevented private landfills from receiving public utility exemption from township zoning violated the single subject rule and was unconstitutional. *Rumpke Sanitary Landfill Inc. v. State of Ohio,* 2010-Ohio-6037. This Court found that Colerain Township had no standing in that single subject challenge.

Rumpke Sanitary Landfill and its Operations

Rumpke Sanitary Landfill, Inc. is the owner of the 509± acre landfill located on Hughes Road in Colerain Township Ohio, referred to herein as "Rumpke landfill."[8] RSL is a wholly owned subsidiary of Rumpke Consolidated Companies Inc. ("Rumpke Consolidated"). (T.d. 74, p. 7, Biedron Depo.). Rumpke Consolidated is a private corporation with eight wholly-owned subsidiaries operating in the solid waste industry.[9] Rumpke Consolidated is a vertically integrated company that provides solid waste services including disposal at company owned and/or operated landfills (including the Rumpke landfill), solid waste hauling services, and other related services in five regions throughout portions of Ohio, Indiana, Kentucky and West Virginia. (T.d. 75, p. 19-20, Wehrman Depo.). As a practical matter, all the affiliated consolidated companies operate as a single business. They are a single reporting entity making intercompany (accounting) transactions in lieu of payments among the subsidiaries and file a single tax return. (T.d. 74, p. 10-11, Biedron Depo.). Many of the contracts for landfill services at RSL are actually with Rumpke Consolidated or other affiliated companies, and not the landfill itself.

RSL operates the Rumpke landfill (the 'hole in the ground' if you will) and essentially sells space for the permanent disposal of solid waste. Solid waste is the 'commerce' of the landfill. The more 'solid waste' or trash the landfill receives, the more money it makes. It is in

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[8] Rumpke Consolidated Companies, Inc. owns nine additional landfills in the Ohio/Indiana/Kentucky region which are not being referred to herein unless specifically identified. (T.d. 75, pp. 38-39, Wehrman Depo.; T.d. 62, Exhibit 4, Ingram Depo.).

[9] Subsidiaries include Rumpke Sanitary Landfill, Inc., Rumpke of Ohio, Inc., Rumpke of Indiana, Inc., Rumpke of Kentucky, Rumpke of West Virginia, Rumpke Waste, Inc., Rumpke Transportation Company, LLC, Residential Refuse Removal, Inc. and Anderson Township Landfill, Inc. (T.d. 75, p. 16-17, Wehrman Depo.).

its business interest to accept as much solid waste for permanent storage as possible. The Rumpke landfill has chosen to be open to the general public. No law or regulation requires it to be open, provide service or accept waste. RSL "customers" haul their own solid waste to the landfill. RSL has few individual Hamilton County residents who are themselves customers of the landfill.

Rumpke's landfill has four major types of customers that make up almost all of its business. Approximately 70% of the waste that comes into the landfill is from Rumpke-affiliated haulers. This includes trucks from Rumpke Consolidated's waste hauling company and various Rumpke family independent contractors. (T.d. 41, pp. 95-96, Rumpke Depo.). Ten percent (10%) of the waste comes from a few municipalities that haul their own waste to Rumpke's landfill. *Id.* This includes Cincinnati, Cheviot and Lockland. (T.d. 41, p. 88, Rumpke Depo.). Another 10% of the waste comes from competing hauling companies. (T.d. 41, p. 96, Rumpke Depo.). The final 10% comes from large "industrials" that have independent arrangements for hauling. *Id.*

Rumpke discriminates in the rates that it charges these various customers. *All* Rumpke-affiliated haulers disposing of waste at the landfill are charged a preferential flat rate of $15.00 per ton.[10] Rumpke refers to these as "internal loads" that result in Rumpke Consolidated intercompany (accounting) transfers.[11] (T.d. 74, p. 12, Biedron Depo.). This $15.00 per ton rate represents the landfill cost of plus a profit of around 7%, determined by Rumpke Consolidated to

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[10] T.d. 41, p. 73, Rumpke Depo.; T.d. 43, pp. 99-100, Riddle Depo.; T.d.75, pp. 28-29, Wehrman Depo.).

[11] No money actually changes hands among the Rumpke affiliated companies. (T.d. 74, p. 12, Biedron Depo.).

be "reasonable."[12] (T.d. 75, p. 29, Wehrman Depo.; T.d. 41, p. 73, Rumpke Depo.). Rumpke uses its preferred hauling rates to secure a commerce (a "waste stream") for the landfill.

Different rates are charged to the non-Rumpke affiliated landfill customers for the disposal of solid waste in the landfill. Non-Rumpke haulers, municipalities, and industries contract with RSL or the Consolidated Companies directly, and their agreed rate is set by whatever RSL determines is a fair return at the time. (T.d. 41, p. 108, Rumpke Depo.). Arguably a rate designed to get the bid or contract. Generally, this is a 20% profit above the $15.00 internal rate (which itself includes a markup). *Id.* RSL has contracts with three municipalities who haul their own solid waste to the landfill, all of whom pay different disposal rates. The City of Cheviot pays approximately $41.00 per ton for waste disposal. (T.d. 78, Ex. A, Supp. 55, Ackley Aff.). Adjusting for the governmental fees, this is a 105% markup on RSL's internal landfill disposal costs. The Village of Lockland pays $30.25 per ton, a 51% markup over the internal cost of disposal after adjustment. (T.d. 78, Ex. B, Supp. 49, Ackley Aff.). The City of Cincinnati pays a sliding scale per ton on solid waste disposed of at the landfill, from $28.50 per ton (42% markup) to $24.50 per ton (22% markup). (T.d. 78, Ex. A).

Industrial contract rates are set on a case by case basis, widely vary and are adjusted periodically. (T.d. 41, p. 108, Rumpke Depo.). There is also a "gate rate" that is charged 'per yard' of waste at the Rumpke landfill for the few non-contract 'general public' customers who use the landfill services. (T.d. 75, p. 79-80, Wehrman Depo.). The 'gate rate' is set by the regional vice president of Rumpke in communication with the RSL landfill manager. *Id.* The

[12] The larger profit on the internal load is captured by the Rumpke hauler, who marks up the price on the hauling service to its individual customers, who actually generate the waste stream. (T.d. 41, pp. 109, 111, Rumpke Depo.).

rate is set taking into account what competitor landfills and transfer stations are charging for public drop off and disposal. (T.d. 74, p. 35-40, Biedron Depo.).

Rumpke's local government contracts for hauling and disposal are competitively bid as required by statute and rates are established by the awarded bid. *See* R.C. 505.27(A). Internal landfill rates are established by Rumpke Consolidated during its annual budget process and are based on landfill costs. (T.d. 75 p. 34–38, Wehrman Depo.; T.d. 74, p. 18-20, Biedron Depo.). The rates are adjusted at the discretion of the company. *Id.* External landfill rates (e.g. not preferred internal company rates) are established by the service area's management team (separate from Rumpke Consolidated) who 'negotiate their own local deals.' (T.d. 74, p. 37, Biedron Depo.). Hauling rates supposedly do not affect or influence the landfill disposal rates. (T.d. 75, p. 40, Wehrman Depo.).

The Rumpke landfill receives a significant amount of the solid waste generated in Hamilton County, but certainly not all of it. The HCSWMD recognizes that the Rumpke landfill receives 80% of the solid waste generated within the district that is landfilled. (Supp. 98, HCSWMD Plan, III-2). Only about 48% of the total waste received at the landfill is generated in Hamilton County. (T.d. 43, p. 145, Riddle Depo.). If the landfill is not expanded, it will be required to close. The HCSWMD anticipates that the Rumpke landfill will close in 16 years (from its initial 2006 planning year) and assures that district solid waste will be managed and disposed of through 2021. (HCSWMD Plan, Supp. 76; T.d. 76, ¶14, Greenberg Aff.; Supp. 31-32). The District projects available capacity throughout its 15 year planning period and well beyond without the Rumpke landfill. *Id.* The State Plan projects that Ohio currently has more than 30 years of capacity to meet the needs of its residents. (Appx. 34).

There are also other landfill services and disposal sites available in the area. Landfills that are competitors of Rumpke landfill include: Bavarian Landfill in Walton, Kentucky; Stony Hollow Landfill in Montgomery County, Ohio; the Waste Management Transfer station in Evendale, Hamilton County, Ohio; and Epperson Landfill in Williamstown. Kentucky. (T.d. 41, p. 114, 123, Rumpke Depo.). Rumpke also has landfills in Pendleton County, Kentucky, Medora County, Indiana, and Brown County, Ohio. (Supp. 95, HCSWMD Plan).

Landfills are permanently located on one place. While convenient perhaps, the Rumpke landfill is not essential. There are alternative waste disposal options available to Hamilton County. No one particular solid waste disposal facility is "essential." Tom Winston, the chief of the southwest office of the Ohio EPA and Rumpke expert witness, testified that as long as waste is disposed of in a safe, compliant facility somewhere, no particular disposal facility is "essential." (T.d. 77, pp. 17, 58-59, Winston Dep.). Rumpke witnesses, including their vice president, environmental compliance director, and landfill manager all acknowledged that there are multiple alternative disposal sites available within (Evendale) and outside of Hamilton County to accept Hamilton County waste.[13]

Hamilton County Solid Waste Management District

The Hamilton County Solid Waste Management District ("HCSWMD") is a single county district formed under Ohio law after the adoption of H.B. 592 in 1988. (T.d 78, ¶12, Supp. 31, Greenberg Aff.). The HCSWMD comprehensively plans for the management of solid waste generated within Hamilton County, as it is required by law to do. It has jurisdiction over all of the incorporated and unincorporated territory in Hamilton County for the purposes of

[13] T.d. 41, Rumpke Dep. p. 114; T.d. 42, Roberts Dep. pp. 35-37; T.d. 43, Riddle Dep. p. 144.

implementing its solid waste management plan. R.C. 3734.52. As part of its planning, the HCSWMD is required to provide contingencies to assure that there is sufficient landfill capacity within or outside Hamilton County to dispose of the solid waste generated within the county. (T.d 78, ¶8, 10, Supp. 30-31, Greenberg Aff.) and R.C. 3734.52. In 2006, the HCSWMD adopted a solid waste management plan for a 15 year planning period, from 2006-2021. As part of the planning process, it studied various items of concern in the District and released Issue Papers to address those items. (T.d 78, ¶12, Supp. 31, Greenberg Aff.).

One issue of concern was the forecasted closure of the Rumpke landfill. (Supp. 258, HCSWMD Plan). Throughout the state of Ohio, landfills that reach their permitted capacity close. Emergency closures are rare events, even when an unexpected landfill emergency occurs such as the 1996 landslide and fire at the Rumpke landfill or the ongoing fire at the countywide landfill in the Stark-Tuscarawas-Wayne Solid Waste Management District. (T.d. 78, ¶11, Supp. 31, Greenberg Aff.). Landfill closure is an anticipated event and part of the ongoing solid waste planning process and waste management in Ohio. (T.d. 78, ¶11, Supp. 31, Greenberg Aff.).

There are many SWMDs in Ohio that do not have landfills located within their SWMDs. Typically, SWMDs without landfills rely upon transfer stations to accept, aggregate and transport solid waste, sometimes for significant distances, to landfills throughout Ohio and in neighboring states. This is a common practice in Ohio and throughout the country. The HCSWMD Issue Paper 1 concludes that both CSI and Waste Management (two private solid waste firms) were in the process of developing or expanding solid waste transfer stations. (Supp. 258, HCSWMD Plan). The HCSWMD expects that these expansions would enable haulers operating in the HCSWMD to aggregate and transport solid waste to landfills outside

Hamilton County and located within the Watershed Area. (T.d. 78, ¶15, Supp. 32, Greenberg Aff.).

The HCSWMD adopted an "open market plan" which allows political subdivisions and waste generators to decide where their solid waste will be disposed. (T.d. 78, ¶13, Supp. 29, Greenberg Aff.). Although the HCSWMD could designate where all solid waste generated within the HCSWMD must be delivered, it has chosen not to do so. In fact, the HCSWMD Policy Committee (the statutorily defined preparer of a SWMD Plan) specifically chose not to designate the Rumpke Landfill (Supp. 76, HCSWMD Plan), even though Rumpke asked that its sanitary landfill be recognized as a crucial part for the long term plan.[14] In the eyes of HCSWMD, Rumpke's landfill is not critical or crucial to the waste disposal plan of Hamilton County. *Id.*

The HCSWMD has no direct or indirect control over the operation of Rumpke landfill, its customers or its rates and charges, or any other landfill within the HCSWMD. *Id.* The HCSWMD has chosen not to control the area that the Rumpke Landfill can take waste from (source of generation) and nor does it direct that the Rumpke Landfill take all waste generated within the HCSWMD. (T.d. 78, ¶13, Supp. 31, Greenberg Aff.).

Rumpke's area of operation, its landfill rates or whether it is open or closed, takes Hamilton County waste or not, is not controlled by the HCSWMD. There is no public agency that controls or regulates Rumpke's rates or relationships with its customers. If Rumpke landfill is a public utility, there will be no regulation of its land use either.

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[14] T.d.78, ¶13, Greenberg Aff.; Supp 76, HCSWMD Plan.

STANDARD OF REVIEW

This matter comes before this Court following motions for summary judgment in the trial court and a judgment entry following review of summary judgment motions from the court of appeals. This Court's review of cases decided on summary judgment is *de novo*, governed by the standard set forth in Civ.R. 56. *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶24, citing *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶8. Summary judgment should only be entered in favor of the moving party if "'(1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party.'" *New Destiny Treatment Ctr., Inc. v. Wheeler, supra* quoting *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 and *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241.

This Court has held that when determining the legal question of whether a private business entity can prove it is a "public utility" exempt from township zoning, the court must "comprehensively determine the merits." In this case, the court must decide if Rumpke landfill has met sufficient "public utility" factors to prove it is indeed a "public utility." *A&B Refuse Disposers, Inc. v. Ravenna Township Board of Trustees* (1992), 64 Ohio St.3d 385, 389. The courts below erred in failing to hold a hearing to comprehensively establish and then review and determine the facts and the public utility legal factors and in declaring Rumpke Sanitary Landfill, Inc. a public utility exempt from township zoning. They also erred in failing to find that Ohio law precludes public utility status of this private landfill that does not have uniform and fair

rates, is not regulated by any governmental agency as to its rates or customer relationships, pays no public utility taxes, is not a "designated" facility by the solid waste management district and which uses its own private trash hauling businesses to establish a need for its landfill. The Rumpke landfill in Colerain Township is not a private "public utility" and cannot meet sufficient public utility attributes to be a common law public utility.

ARGUMENT

The General Assembly granted Ohio townships authority to regulate the use of unincorporated land within the township through zoning in Ohio Revised Code Chapter 519. It also limited the authority of townships to impose zoning regulations on "public utilities." R.C. 519.211 provides, in part:[15]

> (A) Except as otherwise provided in division (B) or (C) of this section, sections 519.02 to 519.25 of the Revised Code confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad,

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[15] This Court declared the amendment to R.C. 519.211(A) in italics below unconstitutional as violating the single subject rule in *Rumpke Sanitary Landfill Inc. v. State of Ohio,* 2010-Ohio-6037. The court also found that Colerain Township had no standing in that case. The portion of the statute declared unconstitutional is not quoted or addressed in Appellants' Brief.

> (A) Except as otherwise provided in division (B) or (C) of this section, sections 519.02 to 519.25 of the Revised Code confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad, for the operation of its business. ***As used in this division, "public utility" does not include 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, that has been issued a permit under Chapter 3734. of the Revised Code or a construction and demolition debris facility that has been issued a permit under Chapter 3714. of the Revised Code.***

> whether publicly or privately owned, or the use of land by any public utility or railroad, for the operation of its business.

R. C. 519.211 does not define what constitutes a "public utility" for the purposes of determining qualification for the exemption from township zoning.[16] For over 40 years, Rumpke applied for and was granted expansions to its landfill in Colerain Township.[17] The absence of that definition gives rise to this case and its primary question: has Rumpke's "solid waste" landfill in Colerain Township ***become*** a "public utility" which, after more than 40 years of zoning regulation, ***is now exempt*** from all township zoning? If exempt, the solid waste landfill can expand from its current 509 acres throughout Colerain Township and beyond, without any zoning limitation on the land that can be used for a landfill or any protection of its neighboring properties.[18] If found to be exempt, Rumpke can expand onto residential, commercial and other zoned areas with impunity. It would be "exempt" from local regulation while at the same time not paying any public utility taxes or be subject to regulation by the Public Utilities Commission of Ohio. The result – Rumpke benefits and other development in Colerain Township stops.

The Rumpke landfill has not become a public utility for two reasons. First, the General Assembly did not intend for privately owned solid waste landfills to be 'public utilities' exempt from township zoning as evidenced by various statutory provisions relating to solid waste. The

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[16] R.C. 303.211 provides an identical limitation on the powers of counties to regulate public utilities through zoning.

[17] Rumpke filed rezoning applications with Colerain Township. Since the applications were contrary to the township's comprehensive plan and did not fit with an expanding commercial base, they were denied. In 2007 for the first time, Rumpke claimed it was a public utility except for zoning. Rumpke has continued to purchase land securing its landfill for further expansions.

[18] OEPA environmental restrictions and regulations will apply. There will be no limitation on land use, setbacks, buffers, or other regulations on the use of land or restrictions on its impact on the community or compatibility with surrounding properties.

legislature effectively disqualified private 'solid waste' landfills from common law public utility status. Second, even if this Court determines a privately owned solid waste landfill could be a common law "public utility," the Rumpke landfill does not meet sufficient common law attributes to qualify as a public utility exempt from Colerain Township zoning.

Proposition of Law No. I:

A private sanitary landfill is not exempt from township zoning regulations under the comprehensive statutory framework of solid waste disposal and township zoning.

In determining the qualification of Rumpke's Colerain Township sanitary landfill's as a 'public utility,' this Court should first examine whether the General Assembly has recognized that private sanitary landfills are not public utilities.[19] If Ohio's solid waste and township zoning regulations and statutes effectively preclude private landfills from being 'public utilities,' a landfill cannot become a public utility exempt from township zoning through judicial declaration. Solid waste management and township zoning are strictly statutory and no interpretation of R.C. 519.211 or common law determination of whether the landfill is a 'public utility' is necessary or permitted. The idea of a "public utility" as an exception to township zoning should be strictly construed. It has the potential of negatively impacting the overall township plan of development.

[19] At least not without rate and service regulation by a public authority similar to those publically owned landfills are required to follow.

A. **The General Assembly Has Adopted a Comprehensive Plan for the State, Regional and Local Regulation of Solid Waste That Includes Township Zoning.**

Since this Court's decision in *A&B Refuse Disposers, supra*,[20] the General Assembly has adopted a comprehensive statutory framework establishing statewide solid and hazardous waste policies, programs and regulations for waste management and disposal throughout the Ohio. The statutes and regulations within this framework pervade the state and its regional, county and local political subdivisions. The court must look not only to interpreting R.C. 519.211, but also at the effect of the comprehensive solid and hazardous waste legislation adopted by the General Assembly in 1988 and codified in R.C. Chapters R.C. 343 and 3734 and other relative statutes involving solid waste to determine whether Rumpke's private landfill is a public utility in Ohio.[21] Such a review shows it is not.

Appellee, Rumpke Sanitary Landfill, Inc. is privately owned by and integrally operates within Rumpke Consolidated Companies, Inc.[22] ("Rumpke Consolidated").[23] While the courts

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[20] *A & B Refuse Disposers* and its holding will be discussed later in this brief.

[21] The General Assembly enacted comprehensive reform to solid waste management and disposal in the state of Ohio effective June 24, 1988 with the adoption of Am. Sub. H.B. No. 592 ("H.B. 592"), 142 Ohio Laws, Part III, 4418. *See Danis Clarkco Landfill Company v. Clark County Solid Waste Management District,* (1995), 73 Ohio St.3d 590, 596, 1995-Ohio-301 for a comprehensive discussion of the solid waste statutory framework in the state of Ohio. *See also St. Marys v. Auglaize Cty Bd. of Cty. Commrs.,* 115 Ohio St.3d 387, 2007-Ohio-5026. Under H.B. 592, solid waste management districts were required to be formed and SWMD Plans adopted no later than December 24, 1991. T.d. 76,¶7-10, Supp. 30-31, Greenberg Aff.

[22] Rumpke Consolidated operates hauling, landfill and other solid waste and miscellaneous services without separation or distinction other than accounting entries. The company uses its collection entity to collect solid waste to deliver to its landfill. The combined companies put in combined bills to govern controls. By charging their hauling company less to dispose of waste than other haulers, Rumpke is able to fit the two together to give a superior price advantage. (T.d. 41, p. 22, Rumpke Depo.) These facts will be more fully addressed in Proposition of Law Number 2.

below did not make the distinction, only the landfill (hole in the ground) claimed "public utility" status. The other affiliated Rumpke companies, including the solid waste haulers) did not claim to be common law "public utilities." Thus, the "landfill" statutes and issues are addressed here.

There is no single body with authority over all aspects of the planning, siting, construction, regulation and use of landfills in Ohio. The General Assembly has divided select responsibilities among various public authorities.

Statewide, the Ohio Environmental Protection Agency (OEPA) uniformly regulates the environmental effects of all solid and hazardous waste landfills. R.C. Chapter 3734. It is the permitting and regulatory authority for the environmentally safe design, construction, operation and closure of landfills. R.C. 3734.05. The OEPA has siting criteria for landfills based strictly on various environmental, health and safety concerns such as locating a landfill safe distances from ground water resources, residential water supply wells, mines and quarries, water tables and aquifers. R.C. 3734.02; OAC Chapter 3745-27. OEPA siting criteria does not consider matters reserved to local zoning such as comprehensive planning, transportation systems and impacts, compatibility of land uses, buffering, and general (non-environmental) health, safety and welfare concerns. OEPA does not regulate the uses next to landfills or the distance of the landfill from other uses. The OEPA has no authority over a landfills rates, services, or charges. It cannot require any landfill to remain open or accept waste from any person generated in or outside the

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[23] At the outset, it must be noted that for proposition of law number 1, Appellant, Colerain limits its arguments to sanitary landfills. State and local solid and hazardous waste regulations are more comprehensive than the planning for and regulation of landfills.

state of Ohio and has no authority to enforce the proclamation or assurance of any landfill that it will remain open to the public or even to establish or review rates.[24]

In addition to the environmental regulation of landfills, the director of environmental protection is responsible for developing a statewide plan for the management of solid waste in Ohio with the advice of the solid waste management advisory council. R.C. 3734.50, *et seq.* The 'State Plan' must implement the General Assembly's solid waste policy adopted in H.B. 592 and codified in R.C. 3734.50. It is the state policy to reduce the reliance on landfills for the disposal of solid waste, to ensure that solid waste is managed in the most appropriate manner at environmentally sound facilities, and to ensure that effective and practical solutions to reduce Ohio's generation and disposal of solid wastes are implemented. R.C. 3734.50(A) – (H). The State Solid Waste Management Plan does not identify any landfill as a public utility or make any one of the 41 licensed 'municipal' solid waste landfill facilities more important that any other, regardless of its location or the amount of waste it receives.[25]

The General Assembly has provided that for regional management of solid waste through select political subdivisions established in H.B. 592 and codified in R.C. Chapter 343. These regional solid waste management units are either solid waste management districts or regional solid waste management authorities (collectively "SWMDs"). R.C. Chapter 343, R.C 343.01, 343.011. Every county (which includes the incorporated and unincorporated areas within it) is required to belong to a solid waste management 'district' or 'authority.' R.C. 3734.52(A).

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[24] T.d. 51, 52, p. 93-94, Jones Depo.

[25] T.d. 77, Winston Depo. 2009 State Solid Waste Management Plan, Appx. 34. "Municipal Solid Waste" refers to a specific type of landfill, not the political subdivision in which it is located. Appx. 34.

SWMDs are required to adopt and implement a plan for the local management of solid waste. SWMDs and have jurisdiction over all incorporated and unincorporated area within their territory.[26] R.C. 343.01, 343.011, 3734.52(A), 3734.53–3734.56. One of the primary requirements of the SWMD plan is for the SWMD to secure access to a solid waste management facility with sufficient capacity to accept disposal of all of the district's solid waste for ten years. R.C. 3734.53(A). *See St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5206, ¶59.

The General Assembly granted SWMDs powers beyond simply adopting and implementing a solid waste plan. SWMD's have rulemaking powers for the management of solid waste collection and facilities within the district. R.C. 3734.53(C), 343.01(G). They have the power to contract for solid waste services, designate facilities to receive any solid wastes generated within the district, own, lease or contract for the operation of solid waste collection systems and landfills, appropriate land, and issue bonds. R.C. 343.01 and 343.011, *et seq.*

The SWMDs also have the obligation to reduce the waste being landfilled and provide for recycling, hazardous waste disposal and community education. (T.d. 76, Memo. Opp., Greenberg Aff. ¶9). They have the power to levy fees on all solid waste generated from or disposed at a facility within the SWMD. R.C. 3734.573 and 3734.57(B)(1) – (3). Landfills owned by SWMDs have a public rate-making process, provide uniform rates and services indiscriminately and are required to be open to the public. (T.d. 76, Supp. 40, Long Aff.). Here,

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[26] These SWMDs cover the entire state. Some are comprised of a single county , while others include multiple counties in cooperation. Hamilton County is a single Solid Waste Management District. Ohio's 88 counties are currently organized into 52 solid waste districts. *See* 2009 State Solid Waste Management Plan, p. 2, Appx. 51-52.

the HCSWMD does not own any landfills and has not designated Rumpke or any other facility to receive waste from Hamilton County. SWMDs have no authority to regulate a private landfill's rates, services, or charges or adopt rules requiring a private landfill to remain open or accept waste. SWMDs may choose to allow for a 'free market system' without designations or contracts by the SWMD with any landfill, as is the case in Hamilton County.

Finally, the General Assembly has contemplated and provided for the local regulation of sanitary landfills and provision of solid waste services by cities, counties and townships. Townships regulate the location and impact of sanitary landfills through local zoning.[27] R.C. Chapter 519. The land use regulation by townships is distinct from the statewide regulation of solid waste environmental impacts and management by the OEPA or the regional authority for the safe and sanitary management and disposal of solid wastes by SWMDs for solid waste generated in their district. The only way Rumpke escapes local zoning that applies to other sanitary landfills is by claiming it is a "public utility."

Township zoning is for the purpose of public health and safety, convenience, comfort, propriety or general welfare and must be accomplished in accordance with a comprehensive

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[27] Appellants recognize that township's authority to zone landfills is at the core of Appellees' case. However, courts have routinely upheld the authority of local governments to control sanitary landfills through zoning. *See Rumpke Waste, Inc. v. Henderson* (1984), 591 F.Supp. 521 (S.D. Ohio W.D.); *A&B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 385; *Newbury Disposal, Inc. v. Newbury Twp. Trustees* (1968), 15 Ohio St.2d 113; *Atwater Twp. Trustees v. B.F.I. Willowcreek Landfill* (1993), 67 Ohio St.3d 293; *Clarke v. Warren Cty.*, 150 Ohio App.3d 14, 2002-Ohio-6006; *Families Against Reily/Morgan Sites v. Butler Cty. Bd. of Zoning Appeals* (12th Dist. 1989), 56 Ohio App.3d 90; *Hulligan v. Columbia Twp. Bd. of Zoning Appeals* (1978), 59 Ohio App.2d 105, 108; *Danis Clarkco Landfill v. Trustees of German Twp.* (S.D. Ohio 1997), 1997 U.S. Dist. LEXIS 21081 and 21081 and *Scioto Haulers, Inc. v. Circleville Twp. Zoning Bd. of Appeals* (Sept. 18, 1981), Pickaway App. No. 80 CA 8 (1981 WL 6023), unreported.

plan. R.C. 519.02. It allows for planning, predictability of land uses, protection of properties from neighboring land uses, and reliability for future development. Zoning is especially critical for sanitary landfills because they are one of the most intense and permanent uses of land. Landfills have significant adverse affects on adjacent properties with very limited beneficial end use. Sanitary landfills generate intense odors, blasting, dust, heavy truck traffic, orphan trash, and scenic blight marring the land. Landfills decrease surrounding property values and increase potential accident, health and environmental hazards. The environmental siting regulations of the OEPA do nothing to protect surrounding properties or the local government from a landfill's intense use of land. The realities are simple: if a private landfill company is excepted from zoning, no other beneficial business will locate nearby because expansion is not related to land use. Colerain Township has adopted a comprehensive land use plan and zoning regulations for all land uses, including landfills. It has in place a plan for protecting compatible land uses. As the host community of one of the country's largest landfills, it has considerable experience on the many issues arising from and the development challenges around the landfill.

The General Assembly has provided for solid waste management by a mixture of the state, regional SWMDs and local governments plans, goals, regulation of need and zoning. Providing Rumpke an "exception" zoning eliminates one of the essential elements of the plan: It has also authorized SWMDs and local governments, including townships, to own and operate the public solid waste collection and disposal services. The landfills of these political subdivisions are open to the public, have uniform reasonable rates set in a public rate making process, treat all customers the same and may levy uniform fees throughout their jurisdictions. They are not profit driven, but service oriented. There is "public" oversight in a "public" utility which is totally

lacking in this case with Rumpke, a private operation whose main objective is to have a regional monopoly. Local governments regulate the location of landfills through zoning, as Colerain Township has since the initial adoption of zoning by the township.

B. **The General Assembly Did not Exempt Private Sanitary Landfills from Township Zoning as Public Utilities.**

The General Assembly has recognized and provided for the application of township zoning to sanitary landfills in its overall regulation of solid waste. A common law 'public utility' exemption is precluded. When providing for the licensing and permitting of all solid waste facilities, the General Assembly only exempted hazardous waste facilities from zoning. R.C. 3734.05(E) provides:

> (E) ***No political subdivision of this state shall require any additional zoning or other approval***, consent, permit, certificate, or condition for the construction or operation of a hazardous waste facility authorized by a hazardous waste facility installation and operation permit issued pursuant to this chapter, nor shall any political subdivision adopt or enforce any law, ordinance, or rule that in any way alters, impairs, or limits the authority granted in the permit.

There is no similar zoning exemption for solid waste sanitary landfills.

The General Assembly further provides that SWMDs could allow temporary relief from zoning. R.C. 343.01(G)(4) permits the SWMD[28] to adopt and include rules in its solid waste management plan:

> (4) ***Exempting the owner or operator*** of any existing or proposed solid waste facility provided for in the plan or amended plan ***from compliance with any amendment to a township zoning resolution*** adopted under section 519.12 of the Revised Code or to a county rural zoning resolution adopted under section 303.12

[28] The Hamilton County Solid Waste Authority did not adopt rules preventing zoning from applying to solid waste facilities in its District.

> of the Revised Code that rezoned or redistricted the parcel or parcels upon which the facility is to be constructed or modified and that became effective within two years prior to the filing of an application for a permit required under division (A)(2)(a) of section 3734.05 of the Revised Code to open a new or modify an existing solid waste facility

If private solid waste facilities were "public" utilities, there would be no need to exempt any of them from zoning. The General Assembly created these select 'solid waste facility' exemptions because landfills are subject to zoning.

The legislature has also distinguished between public and private solid waste facilities and disposal. Solid waste services and facilities owned and operated by political subdivisions must fix 'reasonable rates or charges' through a public process. R.C. 343.08. There is no requirement for rate setting or even the reporting of rates by private facilities.[29] Similarly, if a township chooses to contract exclusively with a private entity for solid waste services, the contract must be competitively bid, because there is no regulation of the rates charged by private solid waste service providers, including landfills. R.C. 505.27(A)(2). Though ignored below, regulation of rates is a universal element of a public utility. Rumpke is not regulated as to the rates it charges. An essential element of a "public utility" is the obligation to duty to provide the service to customers equally. Thus, it is the duty of the SWMD to assure capacity for the disposal of solid waste generated in the district for the next ten years and reduce reliance on landfills as set out in the statute. R.C. 3734.53(A), 3734.50(A). There is no statutory or other obligation of any private landfill, including Rumpke, to provide the general public, or anyone, with landfill services.

[29] There is nothing "public" about Rumpke. It is a closely held, private corporation with an integrated financial statement, unregulated as to rates, unregulated as to duty, unlimited in its expansion without public oversight.

The General Assembly has established a comprehensive statutory framework of solid waste disposal and recognized that landfills are subject to zoning. Private sanitary landfills are thus prevented from avoiding township zoning regulations by asserting they exempt as a 'public utility.'

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.

If this Court determines that the General Assembly did not preclude a private sanitary landfill from being a public utility by its regulation of solid waste management and disposal, the court must consider whether Rumpke's private landfill is a 'public utility' within the meaning of R.C. 519.211. Since R.C. 519.211 provides no definition of 'public utility,' Ohio courts have developed a flexible rule in determining what is a public utility by identifying various attributes of utilities, none of which are controlling. *Washington Twp. Trustees v. Davis,* 95 Ohio St.3d 274, 2002-Ohio-2123.

It was Rumpke's burden below, and now before this Court on its *de novo* summary judgment review, to offer sufficient evidence on the public utility factors "so that the court can **comprehensively determine the merits**" of Rumpke's claim that it is a public utility. *New Destiny Treatment Ctr., supra* at ¶24; *A & B Refuse Disposers, Inc.* at 389. "Absent sufficient facts as to pertinent attributes, that [public utility] claim must fail." *Id.* at 389 and Syllabus. All factual elements must be viewed in a light most favorable to the non-movant party – here, Colerain Township. If there is a disputed issue of fact, summary judgment can not be sustained. If, as a

matter of law, Rumpke proves it possesses sufficient attributes of a public utility, it will relieve itself from any zoning control by Colerain Township pursuant to R.C. 519.211. If it does not, it will remain subject to Colerain Township zoning.

The determination of whether Rumpke's landfill in Colerain Township is a common law public utility is a mixed question of law and fact.[30] *Marano v. Gibbs* (1989), 45 Ohio St.3d 310, 311. Each case must be determined on its own facts. *Indus. Gas Co. v. Pub. Util. Comm.* (1939), 135 Ohio St. 408, 413. Whether Rumpke "is operating as a public utility is determined by the character of the business in which it is engaged." *Indus. Gas Co. v. Pub. Util. Comm.,* at syllabus para. 1 (a regulated public utility cannot divest itself of public utility status by selectively exercising its duties). Accordingly, the public utility status of Rumpke's private landfill must be examined within the context of the solid waste industry in Ohio and the Hamilton County Solid Waste Management District.

This Court has considered 'public utilities' in the solid waste industry in two notable cases. In 1992, the court found a sanitary landfill was not a public utility exempt from township zoning in *A & B Refuse, supra.* The *A&B* court did not 'foreclose the characterization of a privately operated solid waste disposal facility as a public utility' but it "caution[ed] the owners and operators of such facilities that public utility status, while exempting these facilities from local zoning restrictions, invites even greater governmental regulation and control the is currently experienced in this industry." *Id* at 390. The *A&B Refuse* court did not consider H.B. 592 or

[30] This matter comes before this Court following motions for summary judgment in the trial court. While Appellants have asserted throughout the case that there are contested issues of fact and that summary judgment was not appropriate, this Court did not accept jurisdiction of Appellants' proposed Proposition of Law No. 3 on that issue.

SWMDs. Comprehensive solid waste management control just beginning to be implemented at the time of the decision.

Fifteen years later, when the court was able to view the controversy in light of the new regulatory scheme, this Court found that a solid waste management district was a public utility, not a private landfill. .[31] *St. Marys v. Auglaize Cty Bd. of Cty. Commrs.,* 115 Ohio St.3d 387, 2007-Ohio-5026. The attributes of a public utility identified and applied by this Court in *A&B Refuse* and *St. Marys* were similar. In the syllabus in *A&B Refuse*, the court stated (emphasis added):

> The determination of whether a particular entity is a public utility for the purpose of exemption from local zoning restrictions requires a consideration of several factors related to the "public service" and "public concern" characteristics of a public utility.

Factors identified by this Court that relate to the "public service" characteristics the landfill must prove are that it provides: **(1)** an essential good or service to the general public; **(2)** that the general public has a legal right to demand or receive; and **(3)** the good or service is "in fact" "provided to the public" "indiscriminately and reasonably." *A&B Refuse* at 387 and *St. Mary's* at 396. "Public concern" factors include **(1)** the good or service being provided; **(2)** competition in the local marketplace (and the landfill's monopolistic[32] or ogopolistic position in the marketplace) and **(3)** the regulation of by governmental authorities, including "state regulation

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[31] The determination that the SWMD was a 'public utility' in *St Marys, supra,* was not for the purposes of exemption from local zoning. It was for qualification of the SWMD under R.C. 5705.44 for a "public utility" exception to the certification of the availability of public funds. R.C. 5705.41. However, the same criteria to determine public utility attributes were applied in both *A&B Refuse* and *St. Marys.*

[32] While Rumpke argues being a "monopoly" is a good aspect of being a public utility, it ignores an important fact: Monopolies are only allowed to exist where there is public oversight that offsets the public harm of limiting competition. Oversight on rates, requirements of service and limitation of area of service are but a few of the considerations.

* * * to protect members of the public from disparate treatment in the acquisition of an essential public service." *A&B Refuse* at 389, 388, *St. Mary's* at 397-398. When these factors are comprehensively examined, as the case law requires, Rumpke cannot prove that the landfill has sufficient characteristics to be declared a public utility exempt from Colerain Township zoning and did not prove it (as a matter of undisputed fact or law) below.

The trial court did not render an opinion or make any comprehensive determination of public utility attributes of the Rumpke landfill. It simply issued a seven line "Final Entry Granting and Denying Summary Judgments" ruling Rumpke's "motion for summary judgment is granted, holding that Rumpke Sanitary Landfill is a public utility, not subject to the zoning restrictions of Colerain Township." (Appx. 9). The court of appeals conducted an expedited review and by judgment entry without separate opinion found five 'facts' to support its determination that "[a]s 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." (Appx. 4-8).

The court of appeals paid lip service to the correct law but failed to make the required comprehensive review. It made findings that were not supported by the record and failed to weigh and consider <u>all</u> of the evidence or construe the evidence most strongly in favor of Colerain Township. The appeals court also failed to recognize the character of the solid waste industry, the authority of the Hamilton County Solid Waste Management District and the significance of the District's plan. Ultimately, the court of appeals misapplied the law, countenanced the short changing of the process, found facts not in the record and, contrary to the facts on the record and applicable law, upheld the trial court and improperly declaring the Rumpke landfill was a public utility.

This Court must now thoroughly review the "public service" and "public concern" attributes of Rumpke Sanitary Landfill, *de novo,* and determine whether the landfill has sufficient characteristics to be declared a public utility.

A. **The Rumpke Landfill Does Not Have The Necessary 'Public Service' Characteristics of a Public Utility**

An examination of the "public service" characteristics of a public utility begins with a determination of whether Rumpke's landfill is providing "an essential good or service." This Court has recognized that collecting and disposing of garbage is necessary to protect public health. *St. Marys at* 396, ¶60.[33] A part of an "essential" service is need. If you do not need, it is not essential. In this case, the HCSWMD, under its statutory duty, determined that in Hamilton County and outside the county, there is disposal capacity available for at least 15 years. The State Plan determined Ohio has sufficient solid waste capacity for at least 30 years. Rumpke was not the only available facility that could economically provide for the waste stream. Often, waste is transferred to other jurisdictions using transfer stations, recycling sites, etc. While Rumpke landfill may be convenience to some jurisdictions and in fact, specified by Rumpke hauling contracts, it is not essential to waste disposal.

Certainly, the Rumpke landfill provides a site for solid waste disposal in Ohio and in Hamilton County. It is in its business interest to do so. However, providing a solid waste disposal site alone is not sufficient for a landfill to become a public utility. If that were true all

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[33] Here the public utility statutes is only for the landfill or "hole in the ground." The purpose is to exempt the hole in the ground from zoning to allow it to expand. While Rumpke does collect solid waste in order to garner the market for its landfill, its collection company is not claiming to be a public utility for purposes of exemption.

landfills would be public utilities. They are not. *See A&B Refuse, supra.* To the contrary, landfills (including Rumpke) have historically been subject to local zoning without public utility exemption.

Rumpke must prove that other utility characteristics are present. The general public must have the legal right to demand or receive the service from Rumpke and Rumpke must 'in fact' provide the service to the public indiscriminately and reasonably. Rumpke cannot meet either of these attributes.

1. The General Public Does Not Have the Legal Right to Dispose of Solid Waste at the Rumpke Landfill and There Is No Statute Or Regulation That Prohibits Rumpke from Withdrawing Its Landfill Services.

There is no statute or regulation giving any person or entity the right to demand that solid waste disposal services from Rumpke. Rumpke claimed, and the court of appeals found, that it met this common law utility attribute because it 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 is has the capacity to do so." (Appx. 7). This Court has held that a business that proclaims its services are "open to the public" does not satisfy the public utility attribute that the general public has the legal right to demand and receive its services. *Marano v. Gibbs, supra* at 45, *A&B Refuse, supra* at 289.

Rumpke's own witnesses, Chris Jones, a former Director of the OEPA, and Tom Winston, the district chief of the southwest district office of the OEPA (that includes Hamilton County), both acknowledged that the OEPA could not require the Rumpke landfill to accept solid waste from the general public, nor could the OEPA prevent Rumpke from terminating its services at will. (T.d. 50, 51, p. 94, Jones Depo.). Neither was aware of any other political

subdivision or agency that had those powers and there are none. *Id.* There is no means to enforce the self-serving proclamations of Rumpke that they promise to remain open to the public and those statements do not make the Rumpke landfill a public utility, whether or not they were made under oath. Being able to expand at will is worth quite a few unenforceable pledges.

Rumpke also attempted to create this public utility attribute by asking the HCSWMD to "designate" its landfill as necessary for the disposal of waste from within the district. *See* R.C. 343.01, 343.013-.015 (T.d. 4, p. 175-176, Riddle Depo.). Rumpke hoped to secure an agreement with the district for the landfill to accept all waste generated in the county and then argue it was covered by the public utility blanket of the HCSWMD. The HCSWMD refused. (Supp. 36, p. 4, HCSWMD Plan Supp. 31 ¶13, Greenberg Aff.). To the extent the public has the legal right to demand and receive solid waste services, it is the statutory and regulatory obligation of SWMDs or the local government, including townships, which are required to assure those services, not any single privately owned landfill. R.C. 3734.53(A) and 303.27. Rumpke landfill cannot create for itself a legal obligation to provide solid waste services when the legislature has not. Simply promising to be open to the public is insufficient.

The court of appeals also found that "Rumpke is legally required to dispose of all of the city of Cincinnati's solid waste." (Appx. p. 4, Appeals Court Judgment Entry). The award of a contract for landfill services is not a public utility attribute. A contractual obligation is not the type of "legal right to demand" requirement referred to in *A & B Refuse* and *St. Mary's*. This court has rejected the assertion that a contractual obligation to provide services is tantamount to a "legal right to demand" such services by the public. See *Pittsburgh & Conneaut Dock Co. v. Limbach* (1985), 18 Ohio St.3d 320 and *Inland Refuse Transfer Company v. Limbach* (1990), 53

Ohio St.3d 10, 12. Any exclusive contract Rumpke landfill has with any local government must be competitively bid. *See* R.C. 505.27(A)(2). The contract is for a limited duration and there is no assurance that Rumpke would be awarded the next contract if it were bid again upon the expiration of its term.

The court of appeals finding that one contract with a single municipality is sufficient to satisfy a public utility attribute is troubling. Almost every landfill could satisfy this requirement just as they could promise to remain open to the public and accept qualifying solid waste (as long as there was a local government is hauling its own trash). Appellee Rumpke pointed to a single contract in an attempt to satisfy this attribute because in reality, the landfill has few contracts to provide services directly to the public or even with local governments providing trash services to their residents. Most contracts for trash services are with Rumpke related hauling companies for the collection of trash, not separately with Rumpke landfill for its disposal. Furthermore, this single contract represents less than six percent (6%) of all solid waste disposal at the landfill.[34] Rumpke must do more than show that it has a contract to provide services to a single city that hauls waste to the landfill. It must show that the members of the public have some independent legal claim to require Rumpke to provide and continue provide its services if Rumpke tried to withdraw them. Rumpke has not identified any such independent legal right, and there is none.

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[34] As *Amici*, individual counties and townships point out in their Motion for Reconsideration at p. 2, the City of Cincinnati's waste disposal contract with the Rumpke landfill requires Rumpke to dispose of solid waste collected by the City of Cincinnati's Department of Public Services. (Supp. 60). The amount of solid waste collected by the City of Cincinnati was 102,850 tons per year. (Supp. 128, HCSWM Plan). The total annual amount of solid waste disposed at Rumpke's landfill from all of its customers was 1,890,000 tons. (T.d. 70, Ex. A, p. 1-6, Riddle Aff.).

One of the chief tests on the use of the landfill as a public utility "is whether or not the public may enjoy [landfill services] as a right, or by permission of the owners." *Freight, Inc. v. Bd. of Twp. Trustees of Northfield Center Twp.* (1958), 107 Ohio App. 288, 292. The public has no right to landfill services from Rumpke's private landfill. Rumpke has no statutory or regulatory obligation to provide them and it cannot create a legal obligation with unilateral sworn statements promising to be open to the public or contracts with select customers. Rumpke did not (and cannot) prove that the general public has the right legal right to demand and receive its landfill services. Rumpke does not meet this attribute of a public utility.

2. Rumpke Does Not Provide Landfill Services Indiscriminately and Reasonably.

It is undisputed that Rumpke landfill does not charge uniform rates at the landfill. Rumpke Consolidated haulers are 'charged' $15.00 per ton of solid waste disposed at the landfill. These 'internal loads' are 'paid for' by accounting entries among the various Rumpke Consolidated Companies. There is no separate invoicing or money transfers. (T.d. 75, p. 28-29, Wehrman Depo.). This $15.00 per ton rate represents the cost for the landfill to provide the service plus a mark up of approximately 7%. (T.d. 75, p. 29, Wehrman Depo.; T.d. 41, p. 73, Rumpke Depo.). The municipalities of Cincinnati, Cheviot and Lockland all haul their own waste to the landfill and each pays a different contract rate. Lockland pays $30.25 per ton, Cheviot pays approximately $41.00 per ton, and Cincinnati pays on a sliding scale ranging from $24.50 to $28.50 per ton.[35] (T.d. 76, Supp. 48-75).

[35] The only municipal waste contracts used were the three contracts with the landfill itself. All other competitively bid municipal and local government contracts were with Rumpke

The landfill costs to other Rumpke customers disposing of waste at the landfill are billed and collected by Rumpke Consolidated and vary from customer to customer. They are set by whatever Rumpke determines it thinks it can charge at the time based on market conditions. (T.d. 41, p. 108, Rumpke Depo.). Rumpke Consolidated increases the landfill rates whenever it subjectively determines a rate increase is necessary. Decisions on rate increases are privately made by the private company in its sole discretion. (T.d. 41, p. 43, Rumpke Depo.). There is no public oversight. There is no public disclosure. Because Rumpke is privately held, there are no public financial filings with the SEC or other public body.

Rumpke simply does not provide landfill services indiscriminately. Its rates are non-uniform and highly discriminatory. For its own companies, one rate is charged based on the cost of providing the service. For others, variable rates are charged based on market conditions. It is profit motivated. Since Rumpke is not a "public utility," there is no legal requirement that Rumpke charge uniform rates or even report its rates to any governmental authority. There is also no government regulation or oversight of the rates the landfill charges. Colerain Township acknowledges that, as long as Rumpke is operating as a private enterprise, it can charge whatever rates it chooses. Colerain Township does not object to these private business practices. However, as a "public utility" in the business of providing the "general public" with "essential services" it must be indiscriminate. Rumpke cannot have it both ways -- unregulated as to rates and duties but exempt from regulations. Rumpke simply cannot meet the public utility criteria of providing its services indiscriminately and reasonably.

Consolidated Companies and had a hauling component to them. The contracts did not distinguish the $15 per ton rate being charged the Rumpke hauler.

The operation of Rumpke Consolidated Companies and rates charged by the Rumpke landfill stand in stark contrast to a publicly owned landfill, which operate as traditional public utilities in an open, pubic environment. (T.d. 78, Supp. 37, Long Aff). Publicly owned landfills must set reasonable uniform rates following public hearings and are required to be open and available to the general public. R.C. 343.08(c). "These rates are set considering the cost of service rather than based solely on market conditions." *St. Marys* at ¶66. Public landfills are operated under Ohio public records and open meetings acts (the sunshine law) and their meetings, rates and records are open for public participation and inspection. R.C. 3734.52, 343.01, 343.011, 143.43 and 121.22. They are run by public officials who are publicly accountable. (T.d. 78, Supp. p. 37, Long Aff). Uniform "reasonable rates" based on the cost of providing service are set by the board following rate hearings. (T.d. 78, Supp. 38, ¶7-8 Long Aff). All services are provided to each class of customer uniformly and each customer can demand the service. (T.d. 78, Supp. 38, ¶9, 11, Long Aff).

Although the township and county zoning statutes would permit an exemption from zoning for a 'public utility' "whether publicly or privately owned," in Ohio, privately owned sanitary landfills do not operate under the same rules or with the same public disclosure, duties or accountability as public landfills or the public officials that own and operate them. R.C. 519.211. Public landfills are required to be indiscriminately open to the public and charge reasonable rates set in a public process. They have the common law attributes of a public utility. As a private landfill, Rumpke is not required to provide its services indiscriminately or reasonably, and it does not. As a result it cannot meet one of the necessary 'public service' attributes of a common law public utility.

B. **<u>The Rumpke Landfill Does Not Qualify as a Matter of Public Concern.</u>**

The public concern factors of a common law public utility determination relate to marketplace monopolies of essential services and the guarantee that those services will continue to be provided to the public at a reasonable rate. Public utilities are legally sanctioned monopolies. *Richard A. Berjian, D.O., Inc. v. Ohio Bell Telephone Co.* (1978), 54 Ohio St.2d 147. Monopolies are not favored in Ohio. *See* R.C. Chapter 1331, Monopolies. Monopolies prevent competition and are only permitted to exist when there are regulations in place to protect the public. Common law 'public concern' factors include a consideration of the good or service being provided, competition in the local marketplace, and the governmental regulations in place to "protect the members of the public from disparate treatment in the acquisition of an essential public service." *A&B Refuse* at 389, 388, *St. Mary's* at 397, 398. A business entity that becomes a matter of public concern must have sufficient regulations in place to protect the general public and guarantee the general public an essential service at a reasonable and uniform rate.

Without question, Rumpke landfill has a dominant market position in the disposal of solid waste in southwest Ohio. It is a huge 509± acre landfill that can accept large volumes of solid waste each day. The Rumpke landfill receives 80% of the solid waste generated within the district that goes to a landfill. (T.d. 76, ¶14; Supp. 31-32, Greenberg Aff.). The Rumpke landfill does not, however, "provide virtually all residents and businesses of Southwest Ohio" its services as the court of appeals erroneously found. Rumpke witnesses testified there are at least four landfills that compete with the Rumpke landfill as well as a transfer station in Hamilton county. There is no governmental oversight or regulation of the rates and services to all these

customers and no legal guarantee of landfill service to Southwest Ohio, or any other area. Contrary to the court of appeals' decision, Rumpke's hole in the ground is not the only cost-effective alternative to its services. (App. T.d. 21, p. 4). This finding is contrary to the HCSWMD Plan and studies and the testimony of Rumpke officials.

1. Rumpke's Landfill is not a Necessity or the Only Alternative[36] And Should Not Be Perpetuated by An Exemption From Zoning.

It is the responsibility of the HCSWMD to assure there is capacity available for the disposal of all solid waste generated in Hamilton County and, if necessary, secure access to a solid waste facility for disposal services. R.C. 3734.52, 3734.53(A), *St. Marys at* ¶59. As part of its mandatory planning process, the HCSWMD reviewed the local solid waste disposal market to determine what steps, if any, it needed to take to assure that all solid waste generated within the district could be safely disposed. Rumpke urged the HCSWMD to designate its landfill to receive all solid waste generated in the district. It also asked the HCSWMD to support its request for rezoning in the township to allow its proposed 350 acre expansion claiming there was no other cost-effective alternative to its services, as determined by the court of appeals. (T.d. 41, pp. 159-161, Rumpke Depo.; T.d. 43, pp. 166-167, Rumpke Depo.). The HCSWMD refused.

Instead of supporting the expansion and designating the Rumpke landfill, the HCSWMD reviewed the solid waste circumstances of the district and determined that there were other landfills with capacity available to serve the district that were not cost prohibitive. The HCSWMD identified 33 permitted and operating solid waste disposal facilities within 200 miles of Hamilton County, including 16 in Ohio, 9 in Indiana, and 8 in Kentucky, including 15 landfills used by generators of Hamilton County solid waste. (Supp. 193, HCSWMD Plan; T.d. 76, ¶16, Supp. 32, Greenberg Aff.).

[36] Rumpke uses its consolidated companies to create a dominant present in the market by charging lower disposal rates at its landfill for its affiliates.

Even Rumpke's own witnesses, including their vice president, environmental compliance director, and landfill manager, acknowledged that there are multiple alternative disposal sites available outside of Hamilton County to accept Hamilton County waste. (T.d. 41, p. 114, Rumpke Depo.; T.d. 42, pp. 35-37, Roberts Depo.; T.d. 43, p. 144, Riddle Depo.).

The HCSWMD Plan estimated the Rumpke landfill in Colerain Township would reach capacity and close in 16 years, and even with anticipated closures, there was sufficient capacity at other landfills to meet the disposal needs of the district. (Supp. 193, HCSWMD Plan; T.d. 76, ¶14, Supp. 31-32, Greenberg Aff.). The HCSWMD did a study to determine the increase in costs to district waste generators if the Rumpke landfill closed and determined the increase in cost would be approximately between $1.25 and $2.13 per household, per month. This equates to, at most, a $25.56 increase per year. (Supp. 76, HCSWMD Plan). Given these facts, the HCSWMD chose not to designate the Rumpke facility, support the landfill expansion, or enter into a contract with any hauler or landfill to assure the availability of solid waste disposal for waste generated in the district. Rather, the HCSWMD adopted an "open market" Solid Waste Management Plan which allows political subdivisions and waste generators to decide where their waste will be disposed since several permitted and operating landfills are available. (Supp. 203, HCSWMD Plan; T.d. 76, p. 4 ¶13, Supp. 32, Greenberg Aff.). In other words, the HCSWMD determined that the Rumpke landfill was not a monopoly as to landfill space.

It is a simple fact that landfills reach capacity and close. New landfills are then established to take their place, or solid waste is redirected to existing landfills with available capacity. Rumpke Consolidated alone owns nine additional landfills in the Ohio/Indiana/Kentucky region. (T.d 75, pp. 38-39, Wehrman Depo.). If Rumpke's landfill in Colerain Township closed, Rumpke Consolidated would divert solid waste to these facilities. (T.d 75, p. 90-91, Wehrman Depo.). It is the responsibility of SWMDs to plan for these closures and assure that capacity is available. They

can designate, contract, or enter governmental agreements, build public landfills, issue public debt and exercise eminent domain powers to assure the collection and disposal of solid waste generated in the district. The 509± acre Rumpke landfill has a limited life and will eventually reach its capacity. The HCSWMD has planned for that eventuality and expects it. HCSWMD staff studied the possible closure and concluded district waste would be safely disposed of without the Rumpke landfill.[37] The court of appeals' finding that Rumpke is the only available and cost effective landfill in the region is directly contrary to the findings of the HCSWMD and HCSWMD Plan and is not supported by the record.

Appellee Rumpke's own officials testified that the Rumpke landfill is not a monopoly. (T.d. 41, p. 118, 122, Rumpke Depo.). In fact, they asserted below that even though there is no regulation of their prices, they will be reasonable because they must remain competitive in the market place. If there is a market place with competition, by definition they are not a monopoly. Appellee Rumpke admits that the ***location of the landfill in Colerain Township*** gives it a "competitive advantage" in the marketplace. (T.d. 41, p. 115, 118, Rumpke Depo.). Unlimited expansion of the landfill, free from township zoning, would not only insure Rumpke's competitive advantage, but it may actually create the unregulated monopoly anticipated by the court of appeals. This Court should not promote the formation of an unregulated monopoly by declaring Rumpke a common law public utility and relieving it of the zoning restrictions that will continue to apply to its competitors in the region and permitting it to not pay public utility taxes. Such a declaration will guarantee that Colerain Township is the host community for what will surely become the country's largest landfill and most intensive

[37] HCSWMD staff also concluded that closure of the Rumpke landfill would not effect funding for the district or capacity planning until at least 2021, and that this timeframe would allow the District adequate time to plan for alternative disposal and adopt alternative funding mechanisms authorized under Ohio law. The report also stated that in the absence of Rumpke, waste would be collected and disposed of through transfer stations, a common practice in the solid waste industry. (T.d. 76, ¶15, Supp. 32, Greenberg Aff.).

and pervasive land uses in Ohio in perpetuity. It will also stifle any economic growth or development with the uncertainty of the expansion of the landfill and its ever increasing negative impacts on the area's quality of life.

2. Private Sanitary Landfills are Not Regulated as a Public Utilities.

One of the primary characteristics of a public utility is the regulation of its relationship to its customers – to guarantee services and regulate rates. "A public utility is bound to serve to the extent of its capacity that need the service and are within the field of its operations, at reasonable rates and without discrimination." *Industrial Gas Co., supra* at syllabus para. 2. A public utility cannot divest itself of this duty. *Id.* at syllabus, para. 4. This legal duty to serve also prohibits a public utility from picking out the good portions of a particular territory or industry, serving only select customers under contract, and refusing service to the other, less lucrative users.[38] *Id.* at syllabus, para. 2. None of those public utility characteristics are present in this case. In short, there is nothing to legally prevent Rumpke landfill from closing and terminating its services at any time in its sole discretion or choosing to serve only the most lucrative customers and obtaining unlimited exposure unregulated by zoning is only step one.

Unlike many public utilities such as water, sewer, electricity and gas, landfills do not have a limited 'service area' or 'field of operations.' They are somewhat unique in that they receive qualifying waste from haulers who may originate anywhere – within or outside of Ohio. There is no requirement that a landfill provide services to waste generated in Ohio, communities

[38] It is undisputed that unlike public landfills, there is no public regulation of the rates of the Rumpke landfill, or any other private landfill. There is no legal requirement that a private landfill like Rumpke's rates be reasonable, no legal duty for the landfill to remain open to the general public, no duty to accept qualifying solid waste indiscriminately and no obligation to charge uniform rates.

near the landfill or even a host community where the landfill is located, like Colerain Township. Though the court of appeals found Rumpke provides service to 'virtually all residents and businesses of Southwest Ohio, even if true, it has no legal duty to continue to do so. While *A&B Refuse* and *St. Marys* seem to require that the "substantial part of the public" being served is local or regional, it is not certain.

Solid waste is commerce and Ohio cannot prohibit landfills in the state from receiving and disposing of solid waste generated in other states. *See C & A Carbone, Inc. v. Town of Clarkston, N.Y.* (1994), 511 U.S. 383, 114 S.Ct. 1677. While it seems logical to assume that a closer distance means more affordable costs, distance is not a factor affecting the costs <u>of the landfill</u>. A landfill is stationary. Distance affects the costs of solid waste haulers – who are not at issue in this case except and to the extent that Rumpke related hauling companies get different landfill rates than other non-affiliated haulers. Rumpke could choose at any time to receive more lucrative solid waste imported from other states to the exclusion of Ohio solid waste generators and their local communities – because it has no regulated relationship with them. If granted common law public utility status in Ohio, any private landfill could expand such an operation without limitation and assure expanded waste streams in perpetuity.

Although this possibility of extension of solid waste may seem remote, the proliferation of solid waste imported from other states was the driving force in the General Assembly's adoption of H.B. 592 in 1988. (Appx. 59). The 2009 State Plan acknowledges that Ohio is attractive as a destination for out-of-state waste because "Ohio has ample permitted MSW (municipal solid waste) landfill disposal capacity to receive the waste, with a little more than 30 years of capacity remaining at the end of 2007. More important than capacity are Ohio's relatively low disposal, or tipping fees." *Id.*

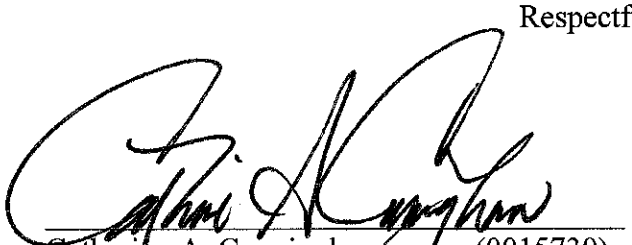
The requirement that the relationship between the customer and business entity be regulated to meet the "public concern" factor of a common law public utility avoids this consequence. A business entity should not get relief from local government zoning regulation without having the legal duty to provide uniform services and rates for all similar and qualifying waste at the landfill. Without such regulation, Rumpke landfill does not qualify as a matter of public concern.

CONCLUSION

The General Assembly has recognized local zoning control as an integral part of the regulation of sanitary landfills in Ohio and thus private landfills do not qualify as "public utilities" exempt from township zoning under R.C. 519.211. Assuming, *arguendo,* this Court finds a private landfill could qualify for a "public utility" exemption from local zoning, the Rumpke landfill in Colerain Township does not meet sufficient attributes to be declared a common law public utility. Having a dominant market share, contracting its services, and pledging to remain open to the public alone are not sufficient characteristics of a 'public utility.' The landfill must also have an obligation imposed by law to provide its services to the general public without price discrimination on its service or prices. The Rumpke landfill must be legally prohibited from terminating its services to the general public, whether or not it has a private contract. The General Assembly requires publically owned landfills to have all of the attributes of a 'public utility.' Rumpke's landfill does not have the characteristics of a "public utility" landfill.

Colerain Township respectfully requests that this Court find that private sanitary landfills are not public utilities in Ohio and reverse the decision of the courts below as a matter of law. Alternatively, Colerain Township request that this Court find that Rumpke Sanitary Landfill, Inc. is not a public utility and is not exempt from Colerain Township zoning, and reverse the lower courts decision and declaration that Rumpke Sanitary Landfill in Colerain Township is a public utility.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following parties via regular U. S. mail, postage pre-paid, on this 11th day of October, 2011:

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