

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Appellee Rumpke Sanitary Landfill, Inc.'s Merit Brief

Joseph L. Trauth, Jr. (0021803)
 Thomas M. Tepe, Jr. (0071313)
 Charles M. Miller (0073844)
 Barrett P. Tullis (0082531)
 Keating Muething & Klekamp PLL
 One E. 4th Street, Suite 1400
 Cincinnati, Ohio 45202
 Tel: (513) 579-6400
 Fax: (513) 579-6457
 jtrauth@kmklaw.com
 ttepe@kmklaw.com
 cmiller@kmklaw.com

*Attorneys for Appellee,
 Rumpke Sanitary Landfill, Inc.*

Catherine A. Cunningham (0015730)
 Richard C. Brahm (0009481)
 Aaron M. Glasgow (0075466)
 Brahm & Cunningham
 145 E. Rich Street
 Columbus, Ohio 43215
 Tel: (614) 228-2030
 Fax: (614) 228-1472
 ccunningham@plankbrahm.com
 rbrahm@plankbrahm.com
 aglasgow@plankbrahm.com

James E. Reuter (0011414)
 3025 W. Galbraith Road
 Cincinnati, Ohio 45239
 Tel: (513) 521-8400
 Fax: (513) 521-8401
 jereuter@aol.com

*Attorneys for Appellants,
 Colerain Township, et al.*

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Barry H. Zimmer (0031131)
4540 Cooper Road, Suite 300
Cincinnati, Ohio 45242
Tel: (513) 721-1513
Fax: (513) 287-8623
barry@zimmerlawfirm.com

*Attorneys for Appellees, The Henry and Lillian
Stoempel Family Trust, Family Trust Share and
Survivor's Trust Share*

Matthew J. DeTemple (0023294)
Ohio Township Association
6500 Taylor Road, Suite A
Blacklick, Ohio 43004
Tel: (614) 863-0045

*Attorney for Amici Curiae, Ohio Township
Association and Coalition of Large Ohio
Urban Townships*

Dirk P. Plessner (0039358)
Albin Bauer, II (0061245)
Rene L. Rimelspach (0073972)
One Seagate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699
Tel: (419) 241-6000
Fax: (419) 247-1777
dpplessner@eastmansmith.com
abauer@eastmansmith.com
rrimelspach@eastmansmith.com

*Attorneys for Amici Curiae Crawford
county, Logan County, Lorain County,
Miami County, Wood County, and New
Russia Township, Ohio*

Michael DeWine (0009181)
Attorney General of Ohio
Alexandra T. Schimmer (0075732)
Solicitor General
Robert C. Moorman (0083773)
Nicholas J. Bryan (0079570)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, OH 43215

Attorneys for Amicus Curiae Ohio EPA

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	3
A. Procedural Posture.....	4
B. Statement of Undisputed Facts.....	5
II. ARGUMENT.....	8
Counter Proposition of Law I: Township Zoning Regulation is not an aspect of “the comprehensive statutory framework of solid waste disposal.”.....	12
1. The Comprehensive Regulatory Framework.....	14
2. OEPA Regulation.....	17
3. Solid Waste Management District Oversight.....	18
Counter Proposition of Law II: <i>A&B Refuse</i> should be reaffirmed.....	21
1. Rumpke Provides an Essential Service.....	21
2. Colerain has not disputed one material fact, and reasonable minds can only come to one conclusion when applying the legal standard to the facts.....	22
III. CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases

<i>A&B Refuse Disposers, Inc. v. Bd. Of Ravenna Twp. Trustees</i> (1992), 64 Ohio St.3d 385 .. passim	
<i>Broughton v. Cleveland</i> (1957), 167 Ohio St. 29	22
<i>Campanielli v. AT & T Wireless Serv., Inc.</i> (1999), 85 Ohio St.3d 103	10
<i>Center Township Bd. of Township Trs. v. Valentine</i> , 6 th App. No. WD-99-65, 2000 Ohio App. LEXIS 5177	11
<i>Con Ed Co. of NY v. Hoffman</i> (1978), 43 NY 2d 598.....	18
<i>Haning v. Pub. Util. Comm.</i> , 86 Ohio St. 3d 121, 1999 Ohio 90; 712 N.E.2d 707.....	1
<i>In Re: The Appeal of Laidlaw Waste Systems (Bellefontaine), Inc.</i> (1989), Logan County C.P. No. CV89-06-0086	11
<i>Johnson's Markets, Inc. v. New Carlisle Dept. of Health</i> (1991), 58 Ohio St.3d 28, 567 N.E.2d 1018.....	13
<i>Marano v. Gibbs</i> (1989), 45 Ohio St.3d 310	9
<i>Nextel Partners, Inc. v. Town of Fort Ann</i> (2003), 766 N.Y.S.2d 712	1
<i>Plain Township v. Kania</i> (1998), 1998 WL 78789	11, 12
<i>Southern Ohio Power Co. v. Public Utilities Com.</i> (1924), 110 Ohio St. 246, 143 N.E. 700.....	10
<i>State ex rel. Moore Oil Co. v. Dauben</i> (1919), 99 Ohio St. 406, 124 N.E. 232	13
<i>Symmes Twp. Bd. of Tr's v. AT & T Wireless PCS, Inc.</i> (2000), 87 Ohio St.3d 549.....	9
<i>Terry v. Sperry</i> , 130 Ohio St.3d 125, 2011 Ohio 3364 __ N.E.2d __	13
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256	1

Statutes

R.C. Chapter 3734.....	14, 17, 26
R.C. Chapter 519.....	11
R.C. 343.014(A).....	19
R.C. 343.01(C).....	19
R.C. 343.014(A).....	19
R.C. 343.019(G)(1).....	19
R.C. 343.04	19
R.C. 3734.02	17
R.C. 3734.02(A).....	15
R.C. 3734.02(I).....	15
R.C. 3734.05	6
R.C. 3734.05(A)(2)(e).....	15
R.C. 3734.07	17
R.C. 3734.09	17
R.C. 3734.10	15, 17
R.C. 3734.101	17
R.C. 3734.501	15
R.C. 3734.52	15
R.C. 3734.52(E).....	16
R.C. 3734.53(C)(2)	15
R.C. 3734.53(C)(4)	14

R.C. 3734.57 15
R.C. 519.211 passim

Other Authorities

OAC § 3745-27-07 17
OAC § 3745-27-07(H)(4)(b)..... 17
OAC § 3745-27-08 17
OAC § 3745-27-02(G)(2) 17
OAC § 3745-28..... 14
OAC § 3745-28..... 14
OAC § 3745-29..... 14
OAC § 3745-30..... 14

INTRODUCTION

Common Law Public Utility. This case turns on the definition of this term. This Court has previously defined the term, and provided a multi-factor analysis for lower courts to apply when deciding whether an entity is a Common Law Public Utility. Thus, there is little for the Court to do here other than reaffirm its prior holdings and state that the lower courts in this case properly applied the factors. This Court often states that it isn't an error correction court—there is no error here to correct. There is no need for the Court to hear the merits of this case, unless it intends to overturn its prior holdings. Overturning *A&B Refuse Disposers, Inc. v. Bd. Of Ravenna Twp. Trustees* is precisely what Appellant seeks. (1992), 64 Ohio St.3d 385. Appellant fails to offer a compelling argument to overturn *A&B Refuse*. Appellant doesn't claim to have met any of the *Galatis* factors. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph 1 of the syllabus (“A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.”)

Instead, Appellant argues ‘common law public utility’ should be redefined as only a statutory public utility or a governmentally owned utility.¹ This is nonsensical. Appellants butcher both ‘common law’ and ‘public utility.’ Common law means just that. Common law does not mean statutory. Public Utility has never meant governmentally owned. Electric companies, natural gas companies, telephone companies, trucking companies are routinely

¹ “Common law public utility” is a term the Court uses when discussing public utilities under R.C. 519.211. See, e.g., *Haning v. Pub. Util. Comm.*, 86 Ohio St. 3d 121, 128, 1999 Ohio 90; 712 N.E.2d 707. Other States employ the same term and similar analysis. *Nextel Partners, Inc. v. Town of Fort Ann* (2003), 766 N.Y.S.2d 712 (applying “New York’s common-law public utility exception” to permit the construction of a cellular tower);

private entities. Appellant's definition not only seeks to overturn *A&B Refuse* but also R.C. 519.211 which expressly states a public utility can be "publicly or privately owned." This Court will not read words out of a statute. Appellant's call for contortion of the definition of 'common law public utility' is not cause to overturn *A&B Refuse*.

Alternatively, Appellant asks the Court to revisit *A&B Refuse* on the theory that the regulatory oversight scheme for landfills has become more onerous since that decision, thereby undermining the need for common law public utility status for landfills. The problems with this counterintuitive argument are threefold. First, the "new" oversight, enacted in 1988, existed four years prior to the 1992 *A&B Refuse* decision—Appellant must think the Court slow. Second, additional regulation not considered in *A&B Refuse* is a factor *supporting* a finding of common law public utility status under the *A&B Refuse* factors—Appellant attempts to turn the test on its head. Third, to the extent that "new" governmental bodies are providing additional regulatory oversight of landfill siting, the need for duplicative regulation from a township is decreased, not increased.² Accordingly, Appellant's call to overturn this Court's long standing, correctly decided, precedent and re-write R.C. 519.211 from the bench must be rejected.

What remains is an appeal of the First District's affirmance of the trial court's determination that Rumpke is a common law public utility. If the Court is inclined to review for error correction, a review of Appellant's Brief reveals that the Township does not allege one material fact is in dispute. There is no error to correct.

This case is procedurally unique. This is the second case the Court has accepted between the parties relating to the expansion of the Rumpke landfill. Between the two cases, Rumpke has prevailed five times (twice at the trial court and court of appeal, and the first time here). A total

² OEPA acknowledges its siting powers in its amicus brief, but begs the Court to relieve it of its duties to exercise them.

of five justices have voted *not* to hear this case. Yet, because these votes did not all occur together, the case has been briefed on the merits. The briefing has proven the inclination of the Court not to hear this case correct. There is no legal question to answer.

STATEMENT OF THE CASE

Three Colerain Township trustees are unreasonably and illegally attempting to deny millions of Ohioans access to a needed and essential service – the safe and efficient disposal of solid waste. If there were ever a case of an essential service deserving of common law public utility status, it is Rumpke Sanitary Landfill.³ R.C. 519.211 was intended to prevent township trustees from abusing their zoning powers to deny citizens of needed services that are not otherwise readily available.

Plaintiff-Appellee Rumpke Sanitary Landfill, Inc. (“Rumpke”) operates a sanitary landfill in Colerain Township, Ohio. Rumpke’s landfill is unquestionably the most important landfill in all of southwest Ohio. It began in the 1940s and its current operation is on 400 plus acres on the east side of S.R. 27 between S.R. 27 and I-275. The proposed expansion is on Rumpke owned land east of the current landfill. The Hamilton County Regional Planning Commission unanimously recommended that the expansion occur. Despite Rumpke’s necessity to all of southwest Ohio, Defendant Colerain Township Board of Trustees (“Colerain”) have attempted to use their zoning power in an effort to deny southwest Ohio residents and businesses access to Rumpke’s waste disposal service. Rumpke must expand its landfill or be forced to close. In an effort to work with Colerain, Rumpke sought zoning approval to expand, but was illegally denied

³ R.C. 519.211(A) states “section 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.” R.C. 519.211(A), emphasis added.

a zone change by the Colerain Trustees. Rumpke brought this declaratory judgment action asking the Court to recognize Rumpke's existing status as a common law public utility for zoning purposes exempt from township zoning regulations.

The trial court correctly ruled Rumpke is a common law public utility because undisputed evidence proved that waste disposal is an essential service and Rumpke's monopolistic position in the waste disposal market make its operations a matter of great public concern. Despite the voluminous records and extensive discovery, Colerain was unable to place one material fact in dispute. Applying the legal standard of what constitutes a common law public utility, reasonable minds could only conclude that Rumpke is a common law public utility. The trial court correctly granted summary judgment to Rumpke.

A. Procedural Posture

Rumpke filed a complaint in the Hamilton County Court of Common Pleas seeking a declaration that it was a common law public utility, or, in the alternative, that Colerain's zoning of 350 acres of real estate under its control was unconstitutional and resulted in a taking of private property without just compensation. T.d. 11, (Plaintiff's Amended Verified Complaint ¶ 3). The trial court bifurcated the claims and heard the common law public utility claim first. T.d. 24, (Case Management Order).

Rumpke's common law public utility claim is the only issue before this Court. Rumpke moved for summary judgment on its common law public utility claim. T.d. 65, (Plaintiff's Motion for Summary Judgment). The trial court was not persuaded by Colerain's far flung theories of the case and granted Rumpke summary judgment on its common law public utility claim by applying undisputed facts to clear legal precedent. T.d. 86, (Entry Granting and Denying Summary Judgment). Colerain appealed the decision of the trial court. T.d. 93, (Notice of Appeal).

The First District Court of Appeals affirmed in a well-reasoned 5 page judgment entry explaining how Rumpke met the factors necessary to be a public utility. The First District correctly concluded:

Here, from the evidence before the trial court, when construed most strongly in favor of Colerain, we conclude that no genuine issues of material fact remain as to whether (1) Rumpke provides virtually all residents and businesses of Southwest Ohio a vital and essential service-the sanitary disposal of solid wastes in a facility licensed under R.C. Chapter 3734; (2) Rumpke operates in a monopolistic position with no other cost-effective alternative to its services; (3) Rumpke is legally required to dispose of all of the city of Cincinnati's solid waste; (4) Rumpke has pledged, in sworn statements to the Hamilton County Solid Waste Management District and the Ohio Environmental Protection Agency, that it will remain open and will accept any qualifying solid waste so long as it has the capacity to do so; and (5) the disposal of solid waste is an essential public necessity. Therefore, Rumpke provides an essential public service, and its operations are a matter of public concern. As a matter of law, Rumpke was entitled to the trial court's declaration that it is a public utility for purposes of R.C. 519.211.

Opinion at 4.

This court initially declined to accept jurisdiction over this matter in a 4-3 vote. On reconsideration, three votes changed and the matter was accepted, also by a 4-3 vote. Thus, a total of 5 justices have voted not to hear the case. The matter is now being briefed on the merits, where the issue for review is whether the Court will overturn *A&B Refuse* and cases following *A&B Refuse*. There is no cause to do so.

B. Statement of Undisputed Facts

Colerain's Merit Brief continues a trend developed in its trial briefs by alleging there are a myriad of disputed facts, yet failing to specifically cite even one material fact in dispute. Instead, Colerain argues incorrect legal standards and skews undisputed facts. The reality is that

there are no material facts in dispute and Rumpke is entitled to summary judgment as a matter of law.

The facts of this case are simple and undisputed. Rumpke provides virtually all residents and businesses of southwest Ohio a vital and necessary service – the safe, sanitary, and efficient disposal of solid waste. T.d. 11, (Plaintiff's Amended Verified Complaint ¶¶ 1-5). Rumpke's ability to provide this service is limited by its size and various Ohio Environmental Protection Agency ("OEPA") permits. T.d. 46, (Jeff Rumpke Aff. ¶ 4). When Rumpke's landfill is full, it must close. R.C. 3734.05. Because no other landfill of sufficient capacity is located within a reasonable distance to southwest Ohio, this presents the public with a major and costly problem. T.d. 46, (Jeff Rumpke Aff. ¶ 4). Quite simply, there is no cost effective alternative to Rumpke for the safe and efficient disposal of solid waste from individuals and businesses in southwest Ohio.

Rumpke is seeking to expand its current landfill on an adjacent 350 acres of property located between Hughes Road, Interstate I-275, and Buell Road, in Colerain Township, Hamilton County, Ohio (the "Property"). T.d. 11, (Plaintiff's Amended Verified Complaint ¶ 3). The Property is contiguous to its existing landfill and is owned by Plaintiffs. T.d. 11, (Plaintiff's Amended Verified Complaint ¶¶ 3-4). The Property is hemmed in by the existing landfill to the west, Interstate-275 to the South, an existing Hamilton County owned park to the east, and Buell Road to the north. T.d. 11, (Plaintiff's Amended Verified Complaint ¶ 3). The seven member Hamilton County Regional Planning Commission *unanimously approved* the expansion plan. Colerain's notion that declaring Rumpke a common law public utility will grant Rumpke a license to expand forever without regulation is absurd and a complete misstatement of the law and facts of this case.

The Property's current zoning does not allow a sanitary landfill use and Rumpke's efforts to work with the Township to rezone the Property have failed. T.d. 11, (Plaintiff's Amended Verified Complaint). Left with no other option, Rumpke was forced to commence litigation seeking common law public utility status.⁴

This case boils down to a few fundamental points. Rumpke safely disposes over 87%, 89%, and 78% of all waste generated within Hamilton, Butler, and Warren Counties, respectively. T.d. 68, (Jeff Rumpke Dep. 204:22-25), T.d. 65, (Plaintiff's Motion for Summary Judgment, Exhibit G). According to the most recent census data, 1,383,197 Ohioans reside in these three counties and comprise 12% of the total population of the State.⁵ Under its contract with the City of Cincinnati, Rumpke is legally required to dispose of every piece of solid waste generated within the City of Cincinnati. T.d. 20, (Riddle Aff. ¶4). Rumpke has further made sworn statements to numerous governmental agencies, including the OEPA, that it will accept all qualifying solid waste brought to its landfill for disposal. *Id.* Rumpke's service – the safe and efficient disposal of sanitary waste – is unquestionably necessary. Combining this essential service with the fact that Rumpke's monopolistic position in the waste disposal marketplace make its operations a matter of great public concern, it is obvious to see why the trial court recognized that Rumpke was a common law public utility exempt from township zoning regulations. Rumpke provides an essential public service and its monopolistic position in the 3-county, 1.4 million resident marketplace makes its operations a matter of great public concern.

⁴ Colerain asserts that Rumpke's claim of R.C. 519.211 public utility status is somehow lessened because this is the first time Rumpke has sought such a designation. Whether Rumpke sought R.C. 519.211 public utility status in the past has absolutely no relevancy to any of the characteristics of a public utility established by this Court.

⁵ 2010 U.S. Census. Hamilton County, (pop.) 802,374.

<http://quickfacts.census.gov/qfd/states/39/39061.html>. Butler County, (pop.) 368,130.

<http://quickfacts.census.gov/qfd/states/39/39017.html>. Warren County, (pop.) 212,693

<http://quickfacts.census.gov/qfd/states/39/39165.html>. Ohio, (pop.) 11,536,504. *Id.*

Its regulation by the Ohio EPA, the Hamilton County Solid Waste District and the Hamilton County Board of Health provide all of the controls necessary to protect the general public.

II. ARGUMENT

In July 2011, a mere four months before this brief was submitted, this Court restated the foundations of analyzing exemptions from restrictive zoning resolutions:

Ohio townships have no inherent or constitutionally granted police or zoning power. Accordingly, the zoning authority possessed by townships in the state of Ohio is *limited* to that which is *specifically conferred* by the General Assembly.

In addition, all zoning decisions, whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily *construed in favor of the property owner*. *Restrictions* on the use of real property by ordinance, resolution or statute *must be strictly construed*, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed. Furthermore, *exemptions from restrictive zoning provisions are to be liberally construed*.

Terry v. Sperry, 130 Ohio St.3d 125, 2011-Ohio-3364, ___ N.E.2d ___, ¶18-19 (punctuation and citations omitted)(emphasis added). Common Law Public Utility status is an exemption that must be liberally construed.

Colerain has continually misstated the applicable legal principles of what constitutes a common law public utility throughout this case. Colerain's basic argument is that because Rumpke is neither publicly owned nor regulated by PUCO, Rumpke is not a public utility. This illogical interpretation of R.C. 519.211 would render the statute meaningless. The General Assembly adopted R.C. 519.211 for the exact scenario present in this case – three township trustees attempting to use their zoning power to deny an entire region of the state of a needed and essential service provided by a private entity. Because Colerain has continually misstated what a

common law public utility is, it is important that this Court be presented with a proper analysis, which is why we provided the extensive quote from Terry.

R.C. 519.211 states that an Ohio township has no authority with 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 public or privately owned*, or the use of land by any public utility or railroad, for the operation of its business.” R.C. 519.211(A), emphasis added. R.C. 519.211 does not define the term “public utility,” though it expressly states a public utility can be privately owned. Colerain’s notion that Rumpke cannot be a common law public utility because it operates as a for profit private entity is a direct contradiction to the text of R.C. 519.211.

Rather than establishing a rigid definition of what constitutes a common law public utility, the Court has identified common characteristics shared by public utilities. *A&B Refuse v. Ravenna Twp.* (1992), 64 Ohio St.3d 385, 387-388, see also *Marano v. Gibbs* (1989), 45 Ohio St.3d 310. Determining an entity’s common law public utility status is not an element based test but instead involves the examination of certain characteristics identified by the courts. The Ohio legislature intended this to be a flexible standard so that vital services remain available to the general public. Further, an entity need not possess all of the characteristics identified by this Court to be deemed a public utility. *Id.* However, the two most common characteristics of a public utility are that it provides a public service and that its operations are a matter of public concern. *Id.* The common law public utility exemption “ensures that public utilities will be able to construct the facilities required to serve the public interest across the state without undue interference from township zoning regulations.” *Symmes Twp. Bd. of Tr’s v. AT & T Wireless PCS, Inc.* (2000), 87 Ohio St.3d 549, 556.

When reviewing whether an entity provides a public service, a court will consider (1) whether the entity provides an essential service; (2) whether the public has a legal right to demand the service; (3) whether the entity provides the service indiscriminately and reasonably; and (4) and whether the entity has an obligation to provide the service which cannot be arbitrarily or unreasonably withdrawn. *A&B Refuse* (1992), 64 Ohio St.3d at 387. Although not required, Rumpke overwhelmingly possesses all of the characteristics of a common law public utility. See *Campanielli v. AT & T Wireless Serv., Inc.* (1999), 85 Ohio St.3d 103, 106 (a R.C. 519.211 public utility is not required to possess all of the public utility characteristics identified in *A&B Refuse*). As Colerain requests this Court overturn this longstanding precedent, it is critical to understand just how longstanding it is. The test has remained virtually unchanged for 87 years. *Southern Ohio Power Co. v. Public Utilities Com.* (1924), 110 Ohio St. 246, 143 N.E. 700, paragraph 2 of the syllabus (“To constitute a ‘public utility,’ the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state.”)

When reviewing whether an entity’s operations are such that its methods of business become a public concern, a court will examine (1) the good or service provided; (2) competition in the local marketplace; and (3) applicable governmental regulation. *A&B Refuse* (1992), 64 Ohio St.3d at 387. Public utilities typically operate in a monopolistic position in the marketplace. *Id.* A public utility is not required to be a true monopoly, but will generally possess a major portion of its industry’s market share. *Id.* The government regulation factor examines to what extent the government protects the general public from the public utility’s monopolistic position in the marketplace. *Id.* Because public utilities provide necessary services under monopolistic

circumstances, the government retains sufficient checks on their power to guarantee the public has continued access to the public utility's necessary service. *Id.* This is a purposely flexible standard and "in a case where the business enterprise serves such a substantial part of the public that its . . . methods of operation become a public concern, it can be characterized as a public utility." *Id.* at 388.

Private entities that provide far less an essential services than Rumpke's waste disposal service, and possesses fewer of the characteristics of a public utility identified by *A&B Refuse* have been declared R.C. 519.211 public utilities by Ohio courts. In *Center Township Bd. of Township Trs. v. Valentine*, the Wood County Court of Common Pleas held a privately owned construction and demolition debris landfill ("C & D Landfill") a common law public utility. *Center Twp. Bd. of Twp. Trs. v. Valentine* (Oct. 13, 1999), Wood County C.P. No. 97-CV-534, 6th App. No. WD-99-65, 2000 Ohio App. LEXIS 5177. The Logan County Common Pleas court declared a privately owned sanitary landfill a common law public utility. *In Re: The Appeal of Laidlaw Waste Systems (Bellevue), Inc.* (1989), Logan County C.P. No. CV89-06-0086 unreported. The court stated that "it is apparent . . . that solid waste facilities are a matter of public concern . . ." *Id.* at 3. The court held that Laidlaw Waste System's landfill was a "public utility within the meaning of R.C. 519.211, and it is ordered that the zoning provisions of Chapter 519 of the Code do not . . . confer any power upon the Appellee Township Board to prohibit the use of its lands or erection of structures thereon . . ." *Id.* at 4-5.

The Sixth District Court of Appeals affirmed the Wood County Court of Common Pleas' decision finding a trucking business was a common law public utility. *Plain Township v. Kania* (1998), 1998 WL 78789, *5. Kania argued his trucking business was a common law public utility because the trucking services were "essential to those who need them, even if they are not

essential to all citizens.” *Id.* at *3. Kania admitted that his trucking business was not a monopoly, but the Sixth District confirmed such a finding was not an absolute requirement (emphasizing that *A&B Refuse* only lists characteristics of a public utility and not requirement elements). *Id.* at * 5. Kania’s trucking business possessed far fewer public utility characteristics than Rumpke does, yet the Sixth District still found the company a common law public utility. *Id.* at *5-*6.

Colerain attempts to reverse nearly a century old common law test based upon contradictory propositions of law. First, Colerain acknowledges that there is “a comprehensive statutory framework of solid waste disposal,” of which Colerain claims to be a part. After writing 9 pages explaining the comprehensive state, regional and county regulation of Rumpke’s business, Colerain’s second proposition of law argues there is not sufficient regulation of Rumpke’s business for Rumpke to be a common law public utility. But because of the “comprehensive statutory framework of solid waste disposal” that Colerain admits exists, it is forced to argue for the abandonment of the longstanding common law test as the only means by which Colerain could undue the correct application of existing law the lower courts have made to the existent facts.

Counter Proposition of Law No.I:

Township Zoning Regulation is not an aspect of “the comprehensive statutory framework of solid waste disposal.”

Colerain argues that R.C. 519.211 must yield to “a *comprehensive* statutory framework establishing *statewide* solid and hazardous waste *policies, programs and regulations* for waste management and disposal *throughout Ohio.*” (Appellant Merit Brief at 16)(emphasis added). What Colerain fails to understand is that R.C. 519.211 is a part of the regulatory framework. It prevents NIMBY zoning resolutions from interfering with the statewide scheme. Colerain is a

square peg attempting to squeeze into a round hole. Colerain's argument demonstrates that the lower courts got it exactly right.

Colerain begins with three false statements. First, it states that "Solid waste management and township zoning are strictly statutory and no interpretation of R.C. 519.211 . . . is necessary or permitted." (Appellant Merit Brief at 15). This assertion is made without citation. The Revised Code must be read in *pari materia*. *Johnson's Markets, Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St.3d 28, 567 N.E.2d 1018, 1025 ("all statutes which relate to the same general subject matter must be read in *pari materia*.") Colerain's attempt to read R.C. 519.211 out of the Revised Code gives away the weakness of its position and must be rejected.

Second, and also without citation, Colerain argues, "the *idea* of a 'public utility' as an exception to township zoning should be strictly construed." (Appellant Merit Brief at 15). Colerain's labeling R.C. 519.211 as an "idea" that the Court created of whole cloth demonstrates Colerain's contempt for the statutory law. Its statement of its view of how zoning law ought to be, is in direct conflict with this Court's explicit pronouncements on the matter. "Exemptions from restrictive zoning provisions are to be liberally construed." *Terry v. Sperry*, 130 Ohio St.3d at ¶19. Although *Terry* is a very recent case, this isn't new law. *Terry* relied upon 92 year old syllabus law: "Exemptions from such restrictive provisions are for like reasons liberally construed." *State ex rel. Moore Oil Co. v. Dauben* (1919), 99 Ohio St. 406, 124 N.E. 232, paragraph one of the syllabus. Colerain's zoning powers are strictly construed in favor of Rumpke. Rumpke's property rights are not construed in favor of Colerain Township. Colerain's flippant rejection of well established real property law permeates its brief. Its failure to note controlling precedent is remarkable.

For its third misstatement of the law in two paragraphs, Colerain claims that the solid waste regulatory framework has become “comprehensive” only after *A&B Refuse* was decided. (Appellant Merit Brief at 16). As a result of the “new” regulation, Colerain claims Rumpke is *less* entitled to public utility status. (Id.) The facts are wrong; the argument, backwards. The comprehensive regulatory framework—and it is comprehensive—existed prior to *A&B Refuse*. Colerain cites a law enacted in 1988, four years prior to *A&B Refuse*. While it is true that *A&B Refuse* did not discuss the statewide regulatory framework—and this Court should—that framework strengthens Rumpke’s claim to public utility status because heightened regulation is a factor that weighs in favor of finding Rumpke to be a common law public utility.

1. **The Comprehensive Regulatory Framework**

Revised Code Chapter 3734., Ohio Administrative Code Chapters 3745-28, 3745-28, 3745-29, and 3745-30, and oversight by a hierarchy of State entities, form a comprehensive regulatory structure for the disposal of solid waste in Ohio. The statute that is designed to prohibit NIMBY local zoning decisions interfering with the provision of public services to Ohioans is part of that framework.⁶

Ohio landfills are primarily regulated by the Ohio EPA. *See* R.C. Ch. 3734. In addition to OEPA, landfills are also subject to regulation by standing committees of both houses of the

⁶ It is ironic that the amici SWMDs—none of which are from Southwest Ohio—feign alarm that “if the judgment below is allowed to stand, reasonable and locally developed land use regulations throughout Ohio will be vulnerable to attack by other private landfills.” (Amici Brief at 2). The irony here is that under certain circumstances the SWMDs themselves can exempt private landfills from zoning compliance. *See* R.C. 3734.53(C)(4). The amici SWMDs are free to elect not to use their powers. But the existence of the powers demonstrates that the General Assembly recognizes that local zoning authority over landfills must be checked. R.C. 519.211 is one of those checks. And it is important to remember that the Hamilton County Regional Planning Commission unanimously approved the expansion, and Hamilton County SWMD has not opposed it.

General Assembly,⁷ County Boards of Commissioners,⁸ Solid Waste Management Districts (“SWMD”),⁹ and County Boards of Health.¹⁰

The regulation is not limited to environmental protection. Rather, nearly every aspect of landfill operations are regulated. The penalties for noncompliance is not limited to administrative actions. The regulators have the authority to enjoin, take over, or terminate landfill operations—the regulatory death penalty. R.C. 3734.10. They also have the authority to criminally prosecute the operators for regulatory violations. *Id.* Any landfill creation or expansion is subject to a public hearing. R.C. 3734.05(A)(2)(e). Landfills are subject to a myriad of regulatory fees paid to the State, Solid Waste District, county, and township. R.C. 3734.57 *et seq.*

Rumpke is regulated for nuisance, which is defined to include “unreasonably interfere[nce] with the comfortable enjoyment of life or property by persons living or working in the vicinity of the facility”. R.C. 3734.02(I). The OEPA, Board of County Commissioners, County Board of Health, and SWMD may all review and reject a potential landfill site based upon the potential effect on “persons living or working in the vicinity of the facility.” R.C. 3734.02(A) (“the facilities will be *located*, maintained, and operated, and will undergo closure and post-closure care, in a sanitary manner *so as not to create a nuisance*”). The township,

⁷ R.C. 3734.501 (“The standing committees of the house of representatives and senate that are primarily responsible for considering environmental matters shall conduct an annual review of solid waste management in this state.”)

⁸ R.C. 3734.53(C)(2) (local rules may require “the submission of general plans and specifications for the *construction, enlargement, or modification of any such facility to the board of county commissioners* or board of directors of the district for review and approval as complying with the plan or amended plan of the district”)

⁹ R.C. 3734.52

¹⁰ R.C. 3734.09 (“The board of health of a health district in which a solid waste facility or an infectious waste treatment facility is located, or the director of environmental protection, may *suspend, revoke, or deny a license for the facility for violation of any section of this chapter or any rule adopted under it.*”)

county and solid waste management district amici acknowledge Rumpke is regulated “concerning hours of operation, and safe and efficient operation of the landfill, are derived from Rumpke’s operating permits and licenses from Ohio EPA and the local health department.” (Amici Brief at 5-6).

There is also a statutory requirement that the Rumpke landfill be fully utilized. The SWMD “*shall* provide for the *maximum feasible utilization* of solid waste facilities that were in operation within the district”. R.C. 3734.52(E). This provision requires the Hamilton County SWMD to ensure that the utilization of the Rumpke facility is maximized. This makes sense. Once an appropriate location for a landfill is found, the State has taken the policy position that the facility should be utilized to its maximum potential as a means of limiting the proliferation of many small landfills throughout a SWMD. It is better to regulate a single, large, stable, sophisticated operator, than to regulate several small, unsophisticated operations.

Through the Revised Code, the General Assembly has provided for regulatory oversight of landfill location, design, operation, permitting, closure and post-closure handling. Oversight powers have been provided to two General Assembly committees, the OEPA, counties, SWMDs, and local boards of health. Each has the power to close a landfill or have criminal charges filed for regulatory violations. Oversight is detailed and includes the hours of operations and the amount of waste a facility may receive and process. A complicated regulatory fee structure is imposed upon landfills to shoulder the cost of the regulation.

Landfills are environmental businesses. Thus, the OEPA is the primary regulator. However the regulations are substantive and far more extensive than the environmental regulations that apply to every business in the State. Landfills are substantively—not just environmentally—regulated by the OEPA, SWMDs, and local health boards.

2. OEPA Regulation

The Revised Code contains an entire Chapter regulating solid waste and other types of wastes. Among the myriad regulatory provisions of Chapter 3734, are sections providing for: the inspection and licensing of landfills (R.C. 3734.02); inspection of facilities and enforcement by the State of Ohio (R.C. 3734.04); inspection and certification by local boards of health (R.C. 3734.07); suspension, denial or revocation of operating licenses (R.C. 3734.09); and enforcement via injunctions (R.C. 3734.10) and/or private civil actions (R.C. 3734.101).

Chapter 3745-27 of the Ohio Administrative Code contains some 78 separate administrative regulations governing the operation, permitting, application, record keeping, monitoring, and closure of sanitary landfills. Every aspect of the operation of a landfill is regulated, from before its beginning until long after its end. The regulation begins long before a landfill is operational. The exhaustive siting restrictions contained in Ohio Administrative Code 3745-27-07 alone comprise five pages. No landfilling may occur within 1,000 feet of a residence 300 feet from any property line. OAC § 3745-27-07(H)(4)(b) and (c).¹¹ Siting restrictions also protect parks, surface water, water supplies, natural areas, and aquifers. OAC § 3745-27-07. In its amicus brief, OEPA admits that it has the authority to “take into consideration the social and economic impact . . . that may be a consequence of the insurance of a permit to install.” (OEPA amicus brief at 3 [quoting OAC 3745-27-02(G)(2).])

Even after the exhaustive siting requirements are met, extensive and demanding design and construction requirements ensure the protection of human health and the environment. *See, e.g.* OAC § 3745-27-08. These State regulations complement the Federal CERCLA Subtitle D

¹¹ Colerain’s claims that “OEPA does not regulate the uses next to landfills or the distance of the landfill from other uses” are simply false. (Appellant Merit Brief at 17).

requirements and federal regulations created thereunder, which like the Ohio regulations are enforceable either by the government, or affected individuals through citizens suits.

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

OEPA must enforce setback requirements. OEPA is empowered to consider the social and economic impact of a landfill. These are the very powers Colerain claims to exclusively possess. Critically important to the Court's consideration of whether Colerain should be permitted to prevent an expansion of a landfill that serves the entire Southwest Ohio region, is that we are discussing the *expansion* of an existing facility between the current landfill and an interstate highway. This case is not about thwarting a township's ability to prevent the establishment of a landfill. The 400+ acre Rumpke Sanitary Landfill already exists where it began in the 1940s, decades before any zoning existed. Thus, any marginal changes, if any, to permitting the landfill to continue to serve Southwest Ohio are minimal. In the case of an expansion of an existing public utility facility, the need for local zoning control is eliminated. *Con Ed Co. of NY v. Hoffman* (1978), 43 NY 2d 598, 611 ("The question here is not one of siting a plant, but simply the need to modify the existing facility. . . [W]here the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced.") All necessary site review can be performed by OEPA.

3. **Solid Waste Management District Oversight**

The most demanding and very local form of regulation is the Solid Waste Management District. Colerain acknowledges that a SWMD has "powers beyond simply adopting and implementing a solid waste plan. SWMDs have rulemaking powers for the management of solid waste collection and facilities within the district." (Appellant Merit Brief at 19)

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

Knowledge of these very comprehensive State and local regulations disarm Appellants’ doomsday argument that absent NIMBY zoning constraints, landfills will unstopably expand. Ohio counties can regulate away this trumped-up and unfounded fear.

In its final effort to claim the statewide and regional regulation of Rumpke is not enough, Colerain makes the counterfactual argument that “no other beneficial business will locate nearby because expansion is not related to land use.” First, it must be noted that Colerain proffered no evidence of this kind into the record. Thus, the argument must be ignored. The most likely reason Colerain failed to offer evidence below is because the facts are to the contrary. Just 1,000 feet south of Rumpke’s existing landfill is Colerain Towne Center, which contains a Wal-Mart,

Dick's Sporting Goods, Hobby Lobby, Jo-Anne Fabric, Sears Outlet, Petsmart, and other stores. During the pendency of this action, Greater Cincinnati Dental Labs has relocated from elsewhere in Colerain Township to a new headquarters building it has constructed just across the street from the main entrance to the landfill.

* * *

Colerain's detailed (if biased) review of the statewide and regional regulation of Rumpke's landfill demonstrates that Rumpke operates under strict regulatory oversight. Landfills are subjected to detailed, onerous regulation by OEPA, SWMD, and counties. These regulations include selecting location and maintaining operations in a manner that does not create a nuisance to persons nearby. Regulations run the gamut from setback requirements to odor controls to hours of operation, to daily waste acceptance volumes. The regulations are enforceable by multiple entities using fines, closure orders, injunctions or even criminal sanctions. There is a comprehensive regulatory fee structure to ensure the landfills carry the cost of their regulation. This regulation weighs in favor of Rumpke's common law public utility status.

The zoning exemption granted Rumpke under R.C. 519.211 works hand and glove with the regulatory oversight to ensure that Southwest Ohio has access to a safe, sanitary, and properly sited solid waste landfill. Reading R.C. 519.211 out of existence and abandoning a century's old precedent will greatly harm the "*comprehensive* statutory framework establishing *statewide* solid and hazardous waste *policies, programs and regulations* for waste management and disposal *throughout Ohio*," that Colerain admits exists. (Appellant Merit Brief at 16)(emphasis added).

Counter Proposition of Law No. II:

***A&B Refuse* should be reaffirmed.**

Colerain attempts to significantly alter the longstanding test for determining whether an entity is a common law public utility. Colerain wishes the law be that the company, not the service be essential. Colerain wishes that rates be regulated, not just fair. Colerain wishes that a public utility must be a true monopoly, not just in “monopolistic or oligopolistic position,” as *A&B Refuse* states. Colerain wishes that an entity be a PUCO public utility or a governmental entity before it can qualify for common law public utility status—in direct contravention of the text of R.C. 519.211. Colerain’s desired rewriting of the law should be rejected.

1. Rumpke Provides an Essential Service

Colerain has continually misstated a fundamental point of the test established by this Court in *A&B Refuse* by asserting Rumpke is not a common law public utility because it has not been “designated” by the Hamilton County Solid Waste Management District (the “HCSWMD”). Colerain’s argument is that because the HCSWMD does not require waste be disposed of at Rumpke, Rumpke is not essential and cannot be a common law public utility. Colerain cites no legal authority holding a landfill must be designated by a solid waste management district, but nonetheless relies on this point as the foundation of its argument.

As stated above, one of the multiple factors analyzed in determining whether an entity is a common law public utility is whether the entity provides an essential service. *A&B Refuse*, 64 Ohio St. 3d at 385. This factor analyzes the *service* provided and not the entity providing the service. As an example, the energy provided by Duke Energy, a classic PUCO public utility, is the essential service provided. It is not essential that the energy come from Duke. It is the service that must be essential, not the service provider. While Rumpke’s monopolistic position in the waste disposal marketplace makes its operations a matter of great public concern, the test

does not require that it be essential waste is disposed of at Rumpke. Rumpke's service – waste disposal – is what is essential.

Further, Colerain's description of the HCSWMD Plan (the "Plan") is woefully inaccurate. Colerain asserts that The Plan identified 33 other solid waste disposal facilities with available landfill capacity. Colerain cites this "fact" to assert Rumpke is not essential (even though this is not a factor). What Colerain fails to cite is that these landfills are up to 200 miles away from the HCSWMD and that numbers rely on the false assumption that only those businesses and residents located within the HCSWMD would utilize these distant landfills. T.d. 65, (Plaintiff's Motion for Summary Judgment, Ex. E (HCSWMD Plan VI-5.)). Unless the rest of the current users of these other landfills stop disposing of their solid waste, these numbers are absolutely meaningless as to their capacity.

Rumpke has never claimed that Rumpke is essential. Rather, Rumpke is asserting it is a common law public utility because its service of waste disposal is essential. *See Broughton v. Cleveland* (1957), 167 Ohio St. 29, 33 (holding the safe, sanitary, and efficient disposal of solid waste is a serious health concern vitally important to any community). Colerain acknowledges this fact. Former Colerain Township Trustee Corman considers waste disposal "an essential public necessity." T.d. 56, (Corman Dep. 14:25-15:1). The trial court was correct in granting summary judgment on this point, and the First District correctly affirmed, as reasonable minds can only conclude this fact is correct.

2. **Colerain has not disputed one material fact, and reasonable minds can only come to one conclusion when applying the legal standard to the facts.**

Colerain again misstates the applicable legal principles when it asserts the public does not have a legal right to demand waste disposal service from Rumpke. One of the characteristics of a public utility this Court has identified is whether the public has a legal right to demand *the*

service, not whether the public has a legal right to demand the service from a particular provider. *A&B Refuse*, 64 Ohio St. 3d at 385. All that is needed to understand this point is a brief example of other public utilities. Greater Cincinnati Water Works (“GCWW”) supplies water to most residents of Cincinnati. Duke Energy provides electricity and natural gas to most of Cincinnati. But if a customer does not pay his or her water or electricity bill, GCWW and Duke Energy are under no obligation to continue their services. The public has a legal right to demand water and energy be provided, just like they have a right to demand waste disposal service.

Rumpke provides its waste disposal service to the public indiscriminately and reasonably. Rumpke presented undisputed evidence to the trial court that it has *never* denied any person access to its landfill who sought to dispose of qualifying solid waste, and Colerain has no evidence to refute this. Former Colerain Township Trustee Fiedeldey, who has made his antagonistic position toward Rumpke no secret, even stated that Rumpke provides its waste disposal service indiscriminately. T.d. 53, (Fiedeldey Dep. 28:25). Rumpke offered evidence that it is contractually obligated to accept for disposal all waste generated within the City of Cincinnati. T.d. 46, (Jeff Rumpke Aff. ¶5), T.d. 65, (Plaintiff’s Motion for Summary Judgment, Ex. F). Rumpke has made sworn statements to the HCSWMD and the OEPA that it will remain open and accept any qualifying solid waste so long as it has capacity. T.d. 20, (Riddle Aff. ¶4). Finally, Rumpke is in the business of disposing waste. If it is not disposing of waste, its business will fail. The notion that Rumpke would arbitrarily refuse qualifying solid waste into its landfill is not only refuted by undisputed facts, but refuted by basic logic. Colerain has not - and cannot - dispute these facts.

Instead, Colerain invents a legal requirement that in order for Rumpke to be a common law public utility, it must charge uniform rates pursuant to some regulatory scheme. Colerain’s

argument is that because Rumpke's rates are not regulated like a PUCO public utility or governmental entity, Rumpke cannot be a common law public utility. Colerain has no legal authority to support this claim. Further, Colerain's argument again renders R.C. 519.211 meaningless. Private entities do not set their rates like public entities. Rumpke has never asserted its rates are subject to PUCO-type regulations. Whether or not Rumpke makes a profit has no relevancy to whether it is a common law public utility. There is simply no requirement a common law public utility limit its rates to the cost of its service, as Colerain posits. The Revised Code expressly states a private, i.e., for profit, entity may qualify as a public utility for zoning purposes. Rumpke is not a publicly owned landfill and is not a state mandated solid waste management district. HCSWMD has found disposal costs will increase if Rumpke closes, thus establishing the fairness of its rates. As stated earlier, if Rumpke's rates are not fair, HCSWMD can shut it down.

A&B Refuse is the leading case on a private landfill's common law public utility status. In *A&B Refuse*, this Court analyzed whether a solid waste landfill operating under entirely different factual circumstances was a common law public utility. *A&B Refuse*, the landfill provider in the case seeking common law public utility status, did not prove it possessed any of the factors the Court identified. *A&B Refuse* did not present one single fact supporting its claim. The Court was "astonished at the paucity of the evidence offered by [*A&B Refuse*] to establish that its landfill should be characterized as a public utility" *A&B Refuse*, 64 Ohio St.3d at 385. The Court cautioned that its holding did not "foreclose the characterization of a privately operated solid waste disposal facility as a public utility Under certain demonstrated circumstances, a landfill operations might be deemed as such." *Id.* Rumpke has demonstrated those circumstances on all of the factors.

Colerain desires to gut R.C. 519.211 and the holding of *A&B Refuse*. Under Colerain's arguments, no private landfill could ever be deemed a common law public utility. This claim is in direct opposition to the Revised Code and this Court's holding in *A&B Refuse*. No private landfill is subject to rate regulation. Neither R.C. 519.211 nor *A&B Refuse* makes mention of rate regulations. Colerain has merely created this requirement for its convenience. Further, none of the cases cited above where courts found private entities R.C. 519.211 public utilities discuss the rate regulation. Colerain's argument is nothing more than a red herring.

Rumpke's operations are a matter of great public concern. In 2007, Rumpke accepted 87%, 89%, and 78% of all municipal solid waste generated within Hamilton, Butler, and Warren Counties, respectively. T.d. 68, (Jeff Rumpke Dep. 204:22-25), T.d. 65, (Plaintiff's Motion for Summary Judgment, Exhibit G). Colerain refutes this claim not by citing a disputed fact, but by pointing to the fact that the HCSWMD has not designated Rumpke as Hamilton County's only landfill able to accept solid waste. This logic ignores a fundamental question. If Rumpke is the only operating landfill in Hamilton County and provides nearly 100% of the HCSWMD's funding (T.d. 65, (Plaintiff's Motion for Summary Judgment, Ex. E (HCSWMD Plan))), why would the HCSWMD bother to go through the lengthy statutory process of designating Rumpke as the only landfill in Hamilton County able to dispose of solid waste? There is simply no point. Where else in the county will the waste go? Designating a landfill is not an easy or quick process. Why would the HCSWMD spend time and resources to make this a legal requirement when there is absolutely no reason to do so? The HCSWMD does not need to formally designate Rumpke to prove Rumpke's operations are a matter of public concern.

Colerain's argument is focused on the lack of regulation of Rumpke's rates. This call for regulated rates misses the point. Rumpke's rates are significantly lower than the competition.

The regulation of Rumpke's rates would only increase them. Colerain also attempts to make several "fairness" arguments. Colerain highlights that different municipalities have negotiated different rates with Rumpke based upon the amount of waste, length of contract and other factors. Colerain claims market flexibility evidences a lack of indiscriminate and reasonable rates. This isn't so. Even Colerain admits rates would increase significantly if Rumpke were to close. There is nothing evil about negotiated rates for negotiated services.

The Court of Appeals correctly concluded: "(1) Rumpke provides virtually all residents and businesses of Southwest Ohio a vital and essential service-the sanitary disposal of solid wastes in a facility licensed under RC. Chapter 3734; (2) Rumpke operates in a monopolistic position with no other cost-effective alternative to its services; (3) Rumpke is legally required to dispose of all of the city of Cincinnati's solid waste; (4) Rumpke has pledged, in sworn statements to the Hamilton County Solid Waste Management District and the Ohio Environmental Protection Agency, that it will remain open and will accept any qualifying solid waste so long as it has the capacity to do so; and (5) the disposal of solid waste is an essential public necessity. Therefore, Rumpke provides an essential public service, and its operations are a matter of public concern. As a matter of law, Rumpke was entitled to the trial court's declaration that it is a public utility for purposes of R.C. 519.211." (Opinion at 4). *A&B Refuse* should be reaffirmed, and the judgments of the trial court and the court of appeals should be affirmed.

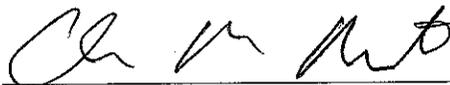
III. CONCLUSION

Whether an entity is a common law public utility involves answering two simple questions: (1) Does the entity provide an essential public service and (2) are the entity's operations a matter of public concern. Rumpke possesses all characteristics of a common law public utility. Reasonable minds can only answer these two questions in the affirmative when analyzing Rumpke. Rumpke's service is the safe and sanitary disposal of an entire region's solid

waste. Ohio law holds this waste disposal service is essential. Basic logic supports this claim as well. And when this fact is coupled with the fact that Rumpke disposes of the overwhelming majority of all solid waste generated in southwest Ohio and operates in a monopolistic position in the waste disposal marketplace, it is easy to see why its operations are a matter of public concern. Solid waste must be properly disposed, and Rumpke is southwest Ohio's only viable option. Rumpke provides an essential public service and its operations are a matter of great public concern.

For the reasons stated herein, Rumpke respectfully requests this Court affirm the lower courts' well reasoned decisions.

Respectfully submitted,



Joseph L. Trauth, Jr. (0021803)

Thomas M. Tepe, Jr. (0071313)

Charles M. Miller (0073844)

Barrett P. Tullis (0082531)

KEATING MUETHING & KLEKAMP PLL

One East Fourth St., Suite 1400

Cincinnati, Ohio 45202

Phone: (513) 579-6400

Fax: (513) 579-6457

jtrauth@kmklaw.com

ttepe@kmklaw.com

cmiller@kmklaw.com

Attorneys for Appellee,

Rumpke Sanitary Landfill, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail this 29th day of November 2011 on:

Catherine A. Cunningham
Richard C. Brahm
Aaron M. Glasgow
Brahm & Cunningham
A Legal Professional Association
145 E. Rich Street
Columbus, Ohio 43215

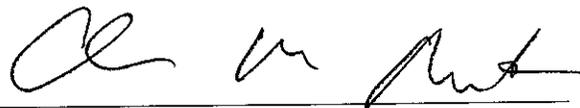
James E. Reuter
3025 W. Galbraith Road
Cincinnati, Ohio 45239

Barry H. Zimmer
4540 Cooper Road, Suite 300
Cincinnati, Ohio 45242

Michael DeWine
Attorney General of Ohio
Alexandra T. Schimmer
Solicitor General
Robert C. Moorman
Nicholas J. Bryan
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, OH 43215

Matthew J. DeTemple
Ohio Township Association
6500 Taylor Road, Suite A
Blacklick, Ohio 43004

Dirk P. Plessner
Albin Bauer, II
Rene L. Rimelspach
One Seagate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699



Charles M. Miller (0073844)