

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**REPLY 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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ARGUMENT IN REPLY

Unconstrained expansion of private sanitary landfills throughout Ohio without local land use regulation or control is what Appellant, Rumpke Sanitary Landfill, Inc. (“Rumpke” or “RSL”) advocates here. According to Rumpke, once a landfill is established, “the need for local zoning control is eliminated.” (RSL Brief, p. 18). The landfill should be utilized to its maximum potential and expanded at will. Private landfills should become massive single operations. Small landfill operations should be eliminated. (RSL Brief, p. 16).

RSL’s 500± acre landfill is already the largest urban/suburban landfill in the state and one of the largest in the country. It is situated in the heart of Colerain Township and its 60,000 residents.¹ It has expanded over the years, doubling in size. RSL seeks to expand again, this time without the constraints of Colerain Township zoning.

Since Colerain Township denied RSL’s latest request for zoning approval for an enormous 70% landfill expansion (350± acres) RSL has attempted to orchestrate various factors in an attempt to become a “public utility” for the sole purpose of becoming exempt from zoning under R.C. 519.211. As a private landfill in Ohio, “public utility” status is a boon because unlike publicly owned or operated landfills, there is no public regulation or oversight of the rates and charges of private landfills in Ohio, no statutory or regulatory requirement that all solid waste delivered to a private landfill be accepted for disposal, and no right of the public to demand and receive services from a private landfill. The only claimed protection to the public is Rumpke’s self-serving representation that their rates are fair and reasonable based upon their large market share. This unfettered landfill expansion is contrary to Ohio statutes regulating solid waste management and disposal, the overall state/local regulation and management of solid waste in

¹ T.d. 51, p. 30-32, Deposition of Chris Jones attorney for former OEPA director

Ohio established by the legislature, and the criteria identified by this Court necessary to establish a common law public utility.

As a matter of public concern, landfills are a use that should never be relieved of strict regulation and local zoning control. They are an intense, hard use of land with adverse impacts so pervasive that they are recognized by statute as a matter of law.² Aspects of landfills are highly regulated because they are an intense land use with significant adverse affects on the environment and community in which they are located. The regulation of landfills for environmental impacts is controlled by the Ohio EPA. Zoning controls land use location to protect the public unless as claimed here, the landfill is defined to be a public utility exempted from zoning.

Determining “public utility status” to exempt a single landfill from zoning requires a different analogy. The question is whether there are sufficient safeguards to the public as to rate regulation, demand for service and public need to provide the exemption. Common characteristics of a “public utility” are the public’s right to demand and receive an essential service; indiscriminating and reasonable rates (generally regulated by a public authority); the equal treatment of customers; and a means to insure these elements. None are present with Rumpke. This Court should overrule the decision of the court of appeals and protect Ohio communities from the unlimited expansion of RSL’s private landfill with impunity.

² “[T]he added costs to a municipal corporation or township of maintaining roads and other public facilities and of providing emergency and other public services, and * * * [the] reductions in real property tax revenues due to reductions in real property valuations resulting from the location and operation of a solid waste disposal facility within the municipal corporation or township” are indisputable. R.C. 3734.57(C). These impacts recognized by the General Assembly are one more indication of the need for local zoning regulation and control.

RSL erroneously asserts that rendering a decision in Colerain Township's favor in this case requires the court overturn its decision in *A & B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 385, 596 N.E.2d 423 (“A&B” or “A&B Refuse”). In *A&B Refuse*, the court found insufficient facts to find *A&B Refuse* a public utility but set out a non-exhaustive list of things courts should consider. Rumpke claims this Court must to abandon its previous decisions and the factors it has identified to determine common law public utilities. Colerain is not asking the court overturn *A&B Refuse* or its public utility decisions. Colerain is asking the court to follow them and update them in light of the changes that have occurred. This Court should also apply and follow *St. Mary's v. Auglaize Cty. Bd. of Cmmrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026 in which the court again analyzed the “public utility” factors in the solid waste industry and found, contrary to the appellant that under Ohio's waste management scheme, a solid waste management district was a public utility, not a landfill. Though a leading case on the common law public utilities in the solid waste industry, Rumpke completely ignored *St. Mary's* in its brief. RSL does not even try to distinguish it because RSL simply cannot meet any of the standards it establishes for public utility status in the solid waste industry.

Appellant Colerain's argument is two fold, as set forth in its propositions of law. First, it was intent of the General Assembly to include local zoning in the state/local collaborative regulation and management of solid waste in Ohio thus a private landfill in Rumpke's position cannot be a pubic utility exempt from zoning. Second, only if this Court finds that township zoning is not to be part of the solid waste regulation of the state, then RSL does not meet sufficient criteria to be a common law public utility exempt from zoning.

**Sanitary Landfills are not Public Utilities Exempt from Zoning under the
Comprehensive Regulation of Solid Waste in Ohio**

Colerain has requested this Court to interpret R.C. 519.211 and determine that it was the intent of the General Assembly to exclude sanitary landfills in the position of Appellee Rumpke Sanitary Landfill (“RSL”) as “public utilities.” The General Assembly’s intent is evidenced by the comprehensive statutory framework of solid waste management and disposal in Ohio. If the status of landfills is determined by Ohio’s waste disposal service, “common law” interpretations of the township zoning statute are not necessary. *Amicus Curiae*, the State of Ohio, supports this position referring to the state scheme as the ‘state/local model for regulating solid waste facilities’ (*Amicus Curiae* State of Ohio Brief, p. 1).

Integral to the overall state/local regulation and management of solid waste is:

- (1) State environmental regulation by the OEPA as provided in R.C. Chapter 3734;
- (2) State and local management of solid waste and the assurance of adequate capacity for disposal: locally by solid waste management districts (“SWMD”), and statewide by the director of the OEPA and the advisory committee through the State Solid Waste Management Plan (R.C. Chapters 343 and 3734 and *see* Appendix 34-225); and
- (3) Local zoning regulation of the location, effects and health, safety and welfare of the host community (*see* R.C. Chapter 519 (townships) and R.C. Chapter 303 (counties)).

All these regulations are necessary to address different concerns and interests both private and public. Each are complementary and regulate concerns for: (1) protection of the environment from the adverse environmental effects relating to the disposal of solid waste; (2) assurance of capacity for the disposal of solid waste by the public now and for at least the next ten (10) years; and (3) protection of the health, safety and welfare of the host community and properties surrounding the landfill from the adverse consequences arising from their proximity to the

landfill and its unregulated expansion.³ These regulations are inclusive, not exclusionary. Determination of a public utility requires an examination of different factors: (a) the right of the public to demand landfill services; (b) the statutory duty of the landfill to provide the public with services; (c) indiscriminate and reasonable rates based upon the cost of providing the service; and (d) prohibition against withdrawal of the same.

Township Zoning in the Collaborative State/Local Regulation of Sanitary Landfills

Important in this case is the inclusion of township zoning as part of the regulatory scheme. Landfills in and of themselves are subject to township zoning. Their location is balanced by competing land uses and/or comprehensive plans. Its only when a “public utility” is involved that there is an exception to zoning. There are only really two zoning exemptions for landfills: (1) when the landfill is a hazardous waste facility (R.C. 3734.05(E)); and (2) when the solid waste management district has adopted a rule that exempts a landfill from compliance with changes in county or township zoning that was changed to prohibit the construction or expansion of a landfill within two years prior to the filing of an application for a landfill permit. (R.C. 343.01(G)). In other words, where a landfill is a permitted use and an application to OEPA to site or expand the landfill is filed, the owner is provided a two year window to get its application approved. (Neither circumstance exists here). RSL has not applied to locate its expansion and the zoning would not permit it.

³ As acknowledged by *Amicus Curiae*, the State of Ohio in its Brief at p. 3: “The Ohio General Assembly, Ohio courts, local governments, and the Ohio EPA have for decades embraced this cooperative approach to solid waste management. See, e.g., *Sites [v. Butler Cty. Bd. of Zoning Appeals]* (1989), 56 Ohio App.3d [90] 98 (Ohio EPA regulations and local zoning acts are deemed harmonious for the purpose of protecting the health, safety, welfare and property of the citizens of the state of Ohio); *Hulligan [v. Columbia Twp. Bd. of Zoning Appeals]* (1978)], 59 Ohio App.2d [105] 107-108 (citing *North Sanitary Landfill v. Bd. of Cty. Commrs.* (1976), 52 Ohio App.2d 167, 172); 1988 Ohio Atty. Gen. Ops. No. 231.”

With the adoption of R.C. 3734.05(E) and 343.01(G) in Amended Substitute House Bill 592 (“House Bill 592”), the General Assembly recognized that in general sanitary landfills were subject to township zoning. If they were not, those statutes would be meaningless. The express exemption of only certain landfills from township and county zoning ratifies that all local zoning applies to all other landfills. As the canon *expressio unius est exclusio alterius* provides, by excluding landfills from township zoning in some cases, the General Assembly included them in all others. *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169 ¶21.

The Management of Solid Waste

The solid waste management policy and plan of the state and the Hamilton County Solid Waste Management District is further evidence of the General Assembly’s intent that landfills be regulated through zoning. The comprehensive reform of solid waste regulation and management in Ohio adopted in House Bill 592 “was to create a solid waste management system and framework for the State of Ohio to ensure the proper management of the solid waste and to ensure capacity for disposal into the future.”⁴ (T.d. 51 p. 33). Under the state’s comprehensive

⁴ Former OEPA Director and attorney Chris Jones testified about the history and need for solid waste reform in Ohio:

“In 1988, if you recall, there were lots of news stories and video of trucks lining up from the East Coast to drive to Ohio and dispose of their waste in our landfills. There was a concern that we would run out of capacity, which at the time was getting scarce. * * * [T.d. 51 at p. 33]. But there have been a number of U.S. Supreme Court cases which say that solid waste is a commercial good and it’s regulated by the commerce clause and unless Congress acts, you cannot * * * prevent out-of-state waste from flowing into the state of Ohio.” [Id. at p. 35]. * * * “Ohio can’t prohibit other states from bringing in their trash.” [Id. at p. 35]. “The rates at Ohio landfills are at a level that makes it attractive to East Coast shippers because even with transportation costs, it’s still cheaper for them to put waste in an Ohio landfill.” [Id. at p. 36].

Mr. Jones opined that Ohio is attractive for out of state waste disposal because of its “geology and transportation fulcrum. We have ready access to the interstate system that goes to areas that from a geological standpoint are good for” solid waste disposal. (Id. at 36-37). Mr. Jones

scheme, no single landfill is more important than any other, as testified to by current and former OEPA officials.⁵ Of primary importance is the state and regional assurances of landfill capacity that are made and secured where necessary by the director of the OEPA and the 52 solid waste management districts (“SWMD’s”) in Ohio. (T.d. 78, p. 57 ¶5, Supp. 32, Greenberg Aff.). No single landfill has predominance. The state has absolutely no policy to maximize landfills or their potential as Appellee Rumpke claims in their brief. (RSL Brief, p. 16). To the contrary, the state policy is to “reduce reliance on the use of landfills for management of solid wastes” and to promote “solid waste reduction, recycling, reuse, and minimization.” R.C. 3734.50(A) and (B).

The HCSWMD has followed the state model and adopted an ‘open market’ solid waste management plan in which no single landfill is more important than any other. (T.d. 78, p. 57 ¶5, Supp. 32, Greenberg Aff.). When Rumpke asked the HCSWMD to ‘designate’ its landfill and endorse its expansion, the HCSWMD refused. (Supp. 36).

The Exception: Rumpke Sanitary Landfill is Not a Common Law Public Utility

Zoning applies absent a showing of exception. RSL claims it is as a “common law” public utility and as such, exempt from township zoning all local regulation of the Rumpke landfill under R.C. 519.211. Resort to a ‘common law’ public utility determination under R.C. 519.211 is only necessary if this Court cannot determine the intentions of the General Assembly.

acknowledged that the OEPA could neither prohibit the disposal of out-of-state waste in Ohio, nor require RSL or any other landfill to stay open or accept solid waste from Ohio. (Id. at 37). Under both the State Plan and the plan of the HCSWMD, no single landfill in Ohio is or can be essential.

⁵ Thomas Winston, District Chief of the Southwest District office of Ohio EPA, T.d. 77; p. 58-59; Chris Jones, former Director of Ohio EPA, T.d. 50, T.d. 51; T.d. 78, p. 57 ¶6; Supp. 32, Michael Greenberg Aff.

When the court looks at the elements of a public utility, Rumpke Sanitary Landfill, Inc. simply has failed to prove it meets sufficient criteria to be declared a “public utility” exempt from township zoning under R.C. 519.211.⁶ The number of times Rumpke has prevailed in the local Hamilton County courts is not surprising, but irrelevant. The endorsement of the Hamilton County Regional Planning Commission for a change of zoning is also irrelevant and meaningless because the RPC did not consider Rumpke to be a public utility nor did it show the landfill as a public utility in its comprehensive plan. (T.d. 57, p. 63, Sprague Depo). Rumpke’s contention in this case is to ignore the township zoning.

This Court has decided two cases relating to common law public utilities in the solid waste industry. This is particularly important because the “resolution of the question of whether an enterprise is operating as public utility is decided by an examination of the nature of the business in which it is engaged.” *Industrial Gas Co. v. Pub. Util. Comm. of Ohio* (1939), 135 Ohio St. 408, paragraph one of the syllabus, cited and followed in *A & B Refuse, supra* at 387 and *St. Mary’s, supra* at ¶54. In both cases, this Court ***did not find a sanitary landfill was a common law public utility.***

The first case, *A&B Refuse, supra* was decided in 1992. In its ‘mixed law and fact’ determination, this Court found that the private landfill did not meet sufficient common law public utility factors and was not exempt from zoning. In *A&B Refuse*, the court set out a list of elements to evaluate in determining in the future whether a private landfill was a common law public utility and found the landfill did not meet them. The list was not exhaustive and was not always in conjunction with the waste management laws. The court considered the solid waste

⁶ Rumpke only wants to be a “public utility” to exempt it from zoning. It does not want the public review of its rates, regulation of its ability to customer or to pay the “public utility” taxes.

industry and the state regulation of solid waste disposal facilities to determine if the environmental law of R.C. Chapter 3734 excluded landfills from regulations. In *A&B Refuse* the landfill claimed its environmental regulation under R.C. Chapter 3734 entitled it to be a “public utility” exempt from township zoning. This Court expressly found “[t]he General Assembly enacted R.C. Chapter 3734 because of a public concern with adverse environmental effects related to the collection and disposal of solid waste * * *.” *Id.* at 389. “The public concern with environmental regulation is separate and distinct from the public concern involved in the regulation of public utilities” which must be “*provided to protect members of the public from disparate treatment in the acquisition of an essential good or service.*” *Id.* at 389. This Court has acknowledged then that the “elements of a public utility” is a separate analysis. A true public utility, whether privately or publicly owned, looks to public protection for rates and demand for service.

It is RSL who challenges *A&B Refuse*. Despite this Court’s holding that environmental regulations cannot be considered in the determination of the public utility “concerns” in their Brief Appellees extensively review various OEPA landfill regulations and siting criteria in an effort to convince the court they are highly regulated. Without question the environmental impacts of landfills are and should be highly regulated. Landfills are intense land uses for the permanent storage of trash and pollutants that will produce odors, methane gas, and leachate for decades even after they close. The use is intense, perpetual and potentially dangerous. Beneficial end uses are extremely limited. Environmental regulations are irrelevant to the determination of whether RSL is a “public utility” as this Court has expressly held. This Court should follow its prior decision and disregard any environmental regulations of the landfill as a public utility criterion or “concern.”

The regulations that are important to the “concerns” and determination of “public utility” status are: (1) governmental regulations of the good or service provided; (2) regulations assuring that the service provided is (a) indiscriminate, (b) has reasonable rates and (c) is available to the public who has a (d) right to demand it. Rumpke cannot meet any of these elements: it discriminates as to landfill rates, maintains a “monopoly” so rates are what Rumpke sets, and the public has no absolute right to the service of waste disposal except as the whim of Rumpke. While it is certainly in Rumpke’s interest to provide the service, it has no legal duty to do so.

Appellee Rumpke also erroneously claims the purpose of R.C. Chapter 3734 was “to prohibit NIMBY local zoning decisions interfering with the provision of public services to Ohioans” without citation or law. This is clearly wrong. (Appellee’s Brief, p. 14). The purpose of R.C. Chapter 3734 is set out in R.C. 3734.02(A) and is “to ensure that 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, cause or contribute to water pollution, create a health hazard, or violate” certain federal laws (on endangered species, explosive gases (methane), mandatory periodic cover, and putrescible wastes (decomposing organic matter)). They have nothing to do with the community impacts of siting and operating a landfill. They have nothing to do with protecting members of the public from disparate treatment in the acquisition of an essential good or service. They are, again, irrelevant to a public utility determination.

As former OEPA Director and attorney Chris Jones testified, OEPA regulations have no control over public utility concerns such as a landfill’s rates, obligation to provide services to its customers, or the community impacts of a landfill (including siting). The OEPA cannot require a landfill to serve any customer or market or even to remain open to the public. It cannot regulate rates or customer relations. Its only concern is protection of the environment, particularly the

water table. (T.d. 50, p. 68-72, 88-89). The OEPA does not consider community impacts or compatible land uses when siting and regulating landfills “but [EPA] permits are always issued subject to compliance with the laws. So it would not be conditioned upon zoning, but if you didn’t have it, just because you had a landfill permit wouldn’t necessarily mean you could put it in place. That goes with any permitation. They’re always subject to compliance with applicable law,” thus affirming the state/local model for regulating solid waste facilities. (T.d. 50, p. 71).

Solid Waste Management Districts as Public Utilities

This Court did not consider R.C. Chapter 343, the management of solid waste in Ohio, solid waste management districts or their role in the regulation of solid waste in Ohio in *A&B Refuse*.⁷ Fifteen years after *A&B Refuse*, this Court again considered “public utilities” in the solid waste industry and the effect of solid waste regulations on a ‘common law’ public utility determination. In *St. Mary’s*, the court yet again identified and evaluated an extensive list of elements of common-law public utilities in the solid waste industry and found that the solid waste management district was the “public utility” in waste disposal issues, not an individual landfill.

The *St. Mary’s* court distinguished *A&B Refuse* and found ***the solid waste management district was a public utility*** because it had: (1) a statutory duty (2) applicable to its entire district (3) to provide for the disposal of all solid waste generated in the district, (4) charged uniform rates throughout the district that are “set considering the cost of service rather than based solely

⁷ The General Assembly made comprehensive changes in the statutes, regulation and management of solid waste in Ohio with the enactment of House Bill 592 in 1988. It does not appear solid waste reform was raised or considered by the court in *A&B Refuse*. House Bill 592 had a four-year staggered phase in through December 1991. At the time of this Court’s 1992 *A&B Refuse* decision, the solid waste districts mandated by House Bill 592 were just forming and beginning to consider and adopt their solid waste management plans. (T.d. 78, p. 60 ¶15, Supp. 32, Greenberg Aff.).

on market conditions” and that are (5) paid “by *every* person” in the district (emphasis of “every” original). *St. Mary’s* at ¶66, R.C. 3734.573, 3734.57(B)(1) through (3), 3734.53(C)(2), and 343.08(A). Rumpke has none of these elements.

A Solid Waste Management District is “a unique government-run entity charged with the creation and implementation of a solid waste-management plan applicable to the entire county that will provide for the disposal of all solid waste produced by the county for at least ten years” (Hamilton County chose 15 years). *St. Mary’s* at ¶66. The role of SWMDs is particularly significant in this case because Rumpke attempted to get the HCSWMD to support its rezoning and “designate” it as the facility to receive the solid waste generated in the county hoping to get under the solid waste management district’s umbrella of “public utilities.” After studying the issue, the HCSWMD refused to support the expansion of the landfill or designate the facility. (Supp. 36). Not because ‘there was no point’ as Rumpke claims, but because it did not want to be held hostage to a single landfill provider in the region. (Supp. 76-439, 254-344).

The HCSWMD Policy Committee members felt “that there were also other facilities that were important to the District in terms of disposal capacity and gave examples.” (Supp. 36). The HCSWMD refused to designate RSL and adopted an open market Solid Waste Management Plan to assure reasonable rates, since they have no government oversight. (Supp. 76-439, T.d. 78, p. 57 ¶13, Supp. 31, Greenberg Aff.). Rumpke does not get “public utility” status for the HCSWMD. In fact, the opposite is true. Since HCSWMD did not ‘designate’ RSL to receive district waste, Rumpke claims that HCSWMD’s “designation” was not important. The importance of the designation is the comprehensive evaluation by the HCSWMD and its determination that Rumpke, and its services, are not essential to the management of solid waste

in the district.⁸ This Court should follow the determination of the HCSWMD and find RSL does not meet this public utility factor.

Rumpke cited only one case in the state of Ohio from 1989 where a Logan County trial court found a privately owned sanitary landfill was a public utility under R.C. 519.211.⁹ *See In Re: The Appeal of Laidlaw Waste Systems (Bellefontaine), Inc.* (Nov. 30, 1989), Logan Cty. C.P. No. CV89-06-0086. Unlike RSL here, in that case, the landfill “was *designated* by Logan County as a facility for solid waste disposal” that had “standing agreements pursuant to H.B. 592.” By “designation,” the SWMD requires that solid waste generated within the designating district be delivered to a designated landfill and prohibits it from going to any other facility. Designation typically includes a contract that establishes the uniform rates for the district and its waste generators, as in the *St. Mary’s* case. Despite its best efforts, RSL has not been designated by the HCSWMD.

Private Landfills are Not R.C. 519.211 Public Utilities

Rumpke claims it is a public utility because R.C. 519.211 applies to public utilities “whether publically or privately owned” and Colerain cannot ‘rewrite’ the statute to exclude

⁸ The District noted “both CSI and Waste Management are in the process of either developing or expanding solid waste transfer station, which should enable the haulers who serve Hamilton County to transport waste further distances and increase the radius of the waste shed to include more solid waste disposal facilities with permitted capacity. (Supp. 264).

⁹ Rumpke also cites a Wood County common pleas court case for the proposition that privately owned (construction and demolition) landfills are public utilities exempt from township zoning. (RSL Brief p. 11). *See Center Twp. Bd. of Twp. Trustees v. Valentine* (Oct. 13, 1999), Wood Cty. C.P. No. 97-CV-534. However, RSL fails to advise this Court that in the appeal of the *Valentine* case, the court of appeals did not consider nor review the public utility issue, but dismissed it as moot. *Center Twp. Bd. of Twp. Trustees v. Valentine* (Nov. 9, 2000), Wood App. No. WD-99-065, 2000 WL 1675511. The court of appeals in *Valentine* affirmed the power of townships to regulate landfills (a privately owned construction and demolition (C&D) landfill) but held townships could not, through its zoning resolution, exclude all privately owned C&D landfills within the township and permit only the existing township landfill or public landfill site).

RSL simply because it is privately owned. Rumpke misses the point. It is not the fact that Rumpke is privately owned that disqualifies its landfill from becoming a public utility. It is the fact that there are no ‘public utility’ elements that apply to or regulate private landfills in Ohio. (Supp. 37). However, in Ohio’s solid waste industry, publicly owned landfills do have ‘public utility’ type regulations that satisfy the ‘public service’ and ‘public concern’ factors this Court has identified. Private landfills do not. Public landfills are regulated by statutes, elected officials and public authorities that simply do not apply to private landfills. See R.C. 3734.35, 343.014, 343.08, (T.d. 78, Supp. 37-39, Long Aff.). This can be demonstrated by a series of questions:

1. Do the landfill customers have the right to demand service?
Public landfill: yes RSL and private landfills: no
2. Is the landfill required to provide its services indiscriminately?
Public landfill: yes RSL and private landfills: no
3. Are landfill customers charged uniform rates?
Public landfill: yes RSL and private landfills: no
4. Are landfill rates set through a public hearing process?
Public landfill: yes RSL and private landfills: no
5. Are the landfill rates based upon the cost of providing the service (rather than market conditions)?
Public landfill: yes RSL and private landfills: no
6. Does the landfill have a statutory duty to provide disposal service?
Public landfill: yes RSL and private landfills: no
7. Can any regulatory authority require the landfill to provide services to the public?
Public landfill: yes RSL and private landfills: no
8. Is the landfill required to comply with all OEPA regulations and safely dispose of all of the solid waste it receives?
Public landfill: yes RSL and private landfills: yes

Rumpke identified many types of private industries to show that some private companies can be public utilities. Colerain does not dispute that. Ironically, every single industry identified by Rumpke as an example of a ‘privately owned’ ‘public utility’ is regulated by the Public Utilities Commission of Ohio (“PUCO”) and has rate and service oversight. (Rumpke Brief, p. 1). “Electric companies, natural gas companies, telephone companies and trucking

companies” are all subject to PUCO regulations on the ‘public service’ and ‘public concern’ factors this Court has identified as well as public utility taxes.¹⁰

R.C. 519.211 Should Not be Strictly Construed to Include Private Landfills

Rumpke claims this Court should follow its recent decision in *Terry v. Sperry*, 130 Ohio St.3d 125, 2011-Ohio-3364, 956 N.E.2d 276, and construe the “privately owned” public utility exemption broadly in Rumpke’s favor to permit its continued use of land and massive landfill expansion. *Terry v. Sperry* is not similar to this case. In *Terry*, this Court interpreted R.C. 519.21(A) to determine when a winery may be exempt from township zoning regulations not whether the winery was exempt. Without question, agricultural uses were exempt from zoning and “viticulture” was expressly included as an agricultural use. R.C. 519.01. The only question before the court was what constituted viticulture and whether there were limitations on its express exemption from zoning based upon the percentage or portion of the property dedicated to that use. This Court found that a winery for “vinting and selling wine” was viticulture and did fall within the agricultural exemption from zoning. The court held it was not required to be the predominant use of the property to receive the exemption. R.C. 519.21(A). In this case, the General Assembly did not expressly include landfills exemptions in R.C. 519. Landfills are covered by township zoning and are only excluded if they are “public utilities.”

Rumpke also claims Colerain fails to understand that R.C. 519.211 “is part of the regulatory framework” of solid waste management in Ohio by preventing “NIMBY zoning resolution from interfering with the statewide scheme.” (Appellee’s Brief, p. 12). Rumpke presumes that the statute’s undefined term “public utility” applies to private landfills. It does

¹⁰ While Colerain acknowledges this Court has held regulation by the PUCO is not determinative of public utility status, it is a factor that must be weighed in determining whether the business enterprise, whether public or private, satisfies the necessary public service and public concern elements of a public utility

not, unless they are within the two narrow exceptions created by the General Assembly. *See* R.C. 3734.05(E)(hazardous waste facility) and R.C. 343.01(G) (change of zoning within two years prior to the filing of an application for a landfill permit). Whether statutorily excluded or not, privately owned landfills must still meet the common law factors for a public utility. It cannot.

There is no regulatory framework in Ohio that prevents regulation of landfills through zoning as Rumpke claims. This is demonstrated by the complementary statutes regulating and managing solid waste in Ohio and its environmental and local impacts. It is the OEPA, SWMDs and local zoning that work “hand in glove” to provide for the capacity and disposal of solid waste in Ohio with limited exception to zoning. It is also solid waste management districts and local governments who have the duty to assure adequate landfill capacity and to exercise their governmental authority to contract for services for their constituents or own and operate public landfills, using their power of eminent domain, if necessary, to guarantee landfill service.

Rumpke Sanitary Landfill, Inc. has Failed to Prove it Meets the ‘Public Service’ and ‘Public Concern’ Elements of *A&B Refuse and St. Mary’s* Necessary to be a Public Utility.

Rumpke focuses on three things to prove its claim: (1) solid waste *collection* and disposal service are essential; (2) it provides an overwhelming market share of those services in the region that it has been able to orchestrate with the tremendous advantage it has from the location of its massive urban landfill in Colerain Township and the systematic elimination of the competition by providing favorable landfill rates to their own hauling companies and no others (i.e. it has created a monopoly); and (3) its self proclamations, even ‘sworn’ statements, that it will remain open to the public and accept solid waste. All of these factors lead to a landfill profit alone of more than one million dollars a month, and absolutely no protection for the public or customers of the landfill – essential criteria for any public utility. (T.d. 41, p. 64-65, Rumpke

Depo.). This Court has consistently held that assurances to be “open to the public,” even ‘sworn,’ are not sufficient to establish a public utility. If that were so, essential business enterprises such as gas stations, grocery stores, even restaurants that are also subject to government regulation would also be public utilities, and they are not. *A&B Refuse* at 389.

Rumpke claims in its brief that it is a monopoly, yet asserts its rates are reasonable due to the competition in the marketplace (“and significantly lower than the competition”). (Rumpke Brief p. 4, 25). If RSL is indeed a monopoly, there is no competition. It cannot be both. Rumpke’s own witnesses testified it was not a monopoly, and identified its competition. The HCSWMD determined that more than 20% of the solid waste generated in Hamilton County is not taken to RSL and refused to endorse Rumpke’s attempts to gain an even larger market share. In fact, Rumpke’s large market share, monopolistic tendencies and manipulation of the regional hauling market invite the greater governmental regulation and control over Rumpke’s landfill, not less as this Court forewarned in *A&B Refuse*. Rumpke fails to explain why an unregulated business monopoly is a good thing.

Rumpke cannot relieve itself of Colerain Township zoning and local regulation simply with a large market share of solid waste disposal and self proclamations of being open to the public. There must be some protection for landfill customers; some legal obligation to provide service beyond simply entering contracts for services at its discretion, whether or not competitively bid; some regulation or oversight of its rates and charges. These are the concerns of a public utility and the criteria that Rumpke cannot meet.

This Court should not endorse RSL’s attempts to monopolize the marketplace at the expense of Colerain Township and its residents without any protection for the public or the regulation of landfill rates and services. The very nature of the regulation of the solid waste

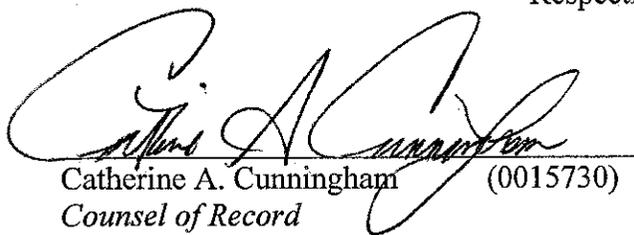
industry in Ohio precludes Rumpke from becoming a public utility. Colerain Township is already the host of the permanent storage of trash generated outside the township, county, region and state. If RSL is relieved of local zoning and land use control, Colerain Township may become host of one of the largest landfills in the country, and the only urban/suburban area with a landfill in its heart. RSL is not a public utility, and should not be relieved of this local zoning regulation and the protection of the health, safety and welfare of the Colerain Township community it brings. The township's future development cannot be held hostage to the ever expanding, free from zoning, Rumpke landfill. To do so dooms the township to the whims of expansion and kills potential growth, jobs and development.

Conclusion

The General Assembly has chosen to manage solid waste in Ohio, not to regulate it as a public utility. Rather than create landfill utilities, Ohio has chosen to create solid waste management districts to manage waste and assure capacity and has granted them the power to designate landfills, build publicly owned and operated landfills, exercise eminent domain authority if necessary to secure land and build necessary landfills, and enter contracts for the operation and maintenance of public solid waste facilities among other powers. Local governments (townships, counties and municipalities) can also provide for solid waste disposal. The Rumpke Sanitary Landfill is not a public utility within this statutory scheme and is not exempt from Colerain Township zoning.

For the reasons stated herein, Colerain Township respectfully requests that this Court find that a private sanitary landfill is not exempt from township zoning regulations under the comprehensive statutory framework of solid waste disposal and township zoning.

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 electronic mail, on this 20th day of December, 2011:

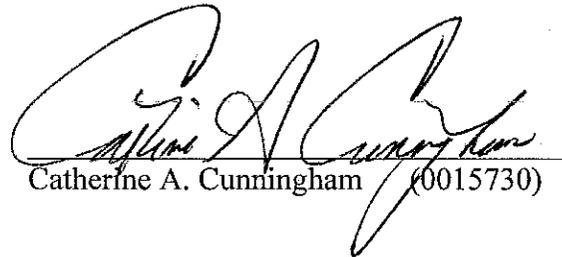
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