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SOLID WASTE MANAGEMENT: NEW YORK COUNTIES' FLOW CONTROL ORDINANCES UPHELD

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Recently, in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,[1] the Second Circuit Court of Appeals gave a green light to flow control ordinances in two New York counties. This case is the latest in a series of cases decided by the United States Courts of Appeals dealing with the issue of flow control of solid waste. In a 1994 decision, *C & A Carbone v. Town of Clarkston*,[2] the United States Supreme Court ruled that a town ordinance that directed that all solid waste collected in the town be taken to a particular transfer station for processing violated the Commerce Clause of the United States Constitution. A number of lower court cases[3] decided after *Carbone* have allowed local governments to avoid the *Carbone* strictures by means of what has come to be called "economic flow control." These cases have typically involved a local government's entering into a franchise ar-

[1] 261 F.3d 245 (2nd Cir. 2001).

[2] 511 U.S. 383 (1994).

[3] *See* Houlton Citizens Coaltion v. Town of Houlton, 175 F.3d 178 (1.st Cir. 1999), United Waste Systems v. Wilson, 189 F.3d 762 (8th Cir. 1999), Village of Rockville Centre v. Town of Hempstead, 196 F. 3d 395 (2nd Cir. 1999) [discussed in **Local Government Law Bulletin No. 92** (Dec. 1999)]; Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F. 3d 46 (2nd Cir. 1998) [discussed in **Local Government Law Bulletin No. 87** (June 1998)]; USA Recycling, Inc. v. Town of Babylon, 66 F. 3d 1272 (2nd Cir. 1995), SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2nd Cir. 1995), and Harvey and Harvey, Inc. v. Chester County, 68 F.3d 788 (3d Cir. 1995) [discussed in **Local Government Law Bulletin No. 71** (Nov. 1995)].

rangement with a private hauler or haulers, paying the hauler from public funds, and inserting in the franchise a requirement that the waste collected be processed or disposed of in a particular facility. The courts have viewed the combination of the public financing of collection and the franchise agreement with a private hauler sufficient to remove the management arrangement from Commerce Clause scrutiny. *United Haulers* goes further and appears to allow local governments to circumvent *Carbone* so long as the flow control ordinance directs that the solid waste be processed or disposed of at a publicly-owned facility.

The counties' management arrangements

Oneida and Herkimer counties, located in central New York, agreed, in 1987, to coordinate their solid waste management activities. They agreed, over time, to construct six facilities: a waste-to-energy plant; an ash landfill; a recycling center; a compost facility; a transfer station; and a construction and demolition landfill. The counties then obtained legislative approval for the creation of a waste management authority, the Oneida-Herkimer Solid Waste Management Authority, to assume responsibility for waste management activities. In 1989, the counties entered into agreements with the authority whereby the authority undertook to manage and dispose of all solid waste generated in the two counties and collect tipping fees to pay its costs. The counties, for their part, agreed to adopt ordinances requiring that all solid waste generated in the counties be directed to facilities designated by the authority, and they adopted such ordinances.

To collect waste in one of the counties, a private hauler had to obtain a permit from the authority. One of the conditions of the permit was that the hauler deliver all solid waste and curbside recyclables to a facility designated by the authority. The authority has no sanitary landfill, so all solid waste that could not be recycled or otherwise reused or recovered was required to be processed at the Utica Transfer Station. The Utica Transfer Station was owned by the authority but operated by a private firm. After a bidding process, in 1998, the authority contracted with Waste Management of New York for operation of the transfer station. Waste Management disposed of the waste processed at the transfer station in two landfills, one in New York, and one in Erie, Pennsylvania.

Effect of these arrangements on private haulers

The private haulers who are plaintiffs in this case alleged that they had to pay a tipping fee to the authority of a minimum of $86 a ton, whereas they could have disposed of the waste at several out-of-state landfills for a tipping fee in the range of $26-30 a ton. They contended that because the flow control ordinances required them to pay the higher fee and prevented them from taking the waste to out-of-state landfills, interstate commerce was clearly affected. The haulers filed suit in federal district court alleging that the counties' and authority's solid waste management arrangements violated the Commerce Clause and deprived them of their constitutional rights.

District court decision

The district court (U.S. District Court for the Northern District of New York) found no significant differences between the flow control arrangements adopted by the authority and counties and those held unconstitutional in *Carbone*. It therefore granted summary judgment for the plaintiffs, declared the flow control ordinances unconstitutional, and enjoined the counties and authority from enforcing them.

Decision of the court of appeals

The court of appeals reversed. After stating the facts of the solid waste management scheme at issue, the court reviewed dormant Commerce Clause jurisprudence, concentrating on those cases dealing with solid waste management, the leading case, of course, being *Carbone*. Before taking up *Carbone*, the court discussed the two tests devised by the Supreme Court to determine whether a local ordinance that affects interstate commerce violates the Commerce Clause. The first is the "discrimination test": If the ordinance discriminates against interstate commerce, then the burden is on the local government to demonstrate that the local benefits outweigh the discriminatory effects and that no nondiscriminatory alternative exists to effectuate the local goals.[4] It is virtually impossible for a local government to meet this test, and if a court finds an ordinance to be discriminatory the ordinance almost never survives. The second test is the "balancing test": If an ordinance regulates even-handedly to effectuate a legitimate local interest, and its effects on interstate

[4] *See, e.g.*, Maine v. Taylor, 477 U.S. 131 (1986).

commerce are incidental, the ordinance will be upheld unless the burdens imposed on interstate commerce are clearly excessive when measured against the local benefits.[5] Thus, how a court characterizes the ordinance under scrutiny nearly always determines whether it will be upheld.

After an analysis of all three Supreme Court opinions in *Carbone*, the court reached the following conclusions regarding that case. First, it found that *Carbone* did not hold that all flow control arrangements are invalid, regardless of the circumstances. Second, it found that *Carbone* relied on the "local processing cases"[6] for its holding that the town's ordinance preferred a single private firm located in the town, to the exclusion of other firms in other states, and therefore was a form of the economic protectionism the Commerce Clause was intended to prevent. The court reasoned from this that the fact that the facility in *Carbone* was privately, rather than publicly, owned was central to the decision. Turning to the management arrangements employed by Oneida and Herkimer counties, the court found that the facility in question, the transfer station, was publicly owned—by the authority—rather than by a private firm. And although the transfer station was privately operated, the bidding process allowed any firm, wherever located, to participate. The court concluded from this line of reasoning that a flow control ordinance does not discriminate against interstate commerce unless it favors a local business firm over out-of-state firms. "Flow control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause. The district court erred by so holding."[7]

Having found that the ordinances did not discriminate against interstate commerce, the court stated that the *Pike* balancing test should be used to determine whether they violate the Commerce Clause, and it remanded the case to the district court to make that determination. It is clear from the court's comments about the use of the *Pike* test on remand that it does not think the district court will be able to find such a violation.

This case creates such a major exception to *Carbone* as to almost render that decision almost meaningless: So long as a city or county owns a waste-to-energy facility, transfer station, sanitary landfill, or other facility, it can adopt a flow control ordinance directing waste to that facility. This is true even though the facility may be operated by a private firm under contract. I think this is a misinterpretation of *Carbone*, in which the Supreme Court's concern was not about the nature of the ownership of the facility to which the solid waste was directed but rather about the effects of the flow control ordinance on other facilities, some of which were out-of-state. But then I think *Carbone* was wrongly decided, too, and that Justice Souter in dissent had the better of it.[8] *Carbone* was an application of the dormant Commerce Clause to a matter to which it should not have been applied—the traditionally local government responsibility for the management of solid waste in an environmentally responsible manner. If the court's reading of *Carbone* in this case prevails, then *Carbone* will be so limited as to do little mischief to solid waste management by local governments.

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[5] *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[6] *See* South-Central Timber Dev. v. Wunnicke, 467 U.S. 82 (1984), Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), and Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935).

[7] 261 F.3d at 263.

[8] *See* **Local Law Government Bulletin No. 59** (June 1994).

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