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SOLID WASTE MANAGEMENT: RECENT DEVELOPMENTS IN FLOW CONTROL

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In *C & A Carbone v. Town of Clarkstown*,[1] the Supreme Court declared unconstitutional a municipal ordinance that required all solid waste generated in the town to be brought to a town-owned transfer station before it was processed further. The Court held that the ordinance discriminated against interstate commerce and therefore violated the Commerce Clause of the United States Constitution.[2] After the *Carbone* decision, a number of local governments attempted to control the disposal of solid waste by using measures crafted to avoid the discriminatory aspects of flow control found invalid in that case. Three recent decisions of the courts of appeals indicate that some of these measures stand a good chance of success.

Exclusive license to collect combined with free disposal: *USA Recycling, Inc. v. Town of Babylon*

In *USA Recycling, Inc. v. Town of Babylon*,[3] the court upheld an arrangement in which the Town of Babylon, a New York municipality, gave an exclusive franchise to a private company to collect commercial solid waste in the town and then allowed that company to dispose of the waste in a town-owned incinerator at no charge. In the early 1980's, the town contracted with Ogden Martin Systems, Inc. to build and operate a solid waste incinerator. To finance the facility, the town created an industrial development agency, which issued tax exempt bonds. The incinerator is on land owned by the town; the incinerator itself is owned by the agency and leased to Ogden. Under its contract with Ogden, the town agreed to pay a

1. 128 L.Ed.2d 399 (1994). This decision is discussed in William A. Campbell, *Flow-Control Ordinances Held Unconstitutional:* C & A Carbone, Inc. v. Town of Clarkstown, Local Government Law Bulletin No. 59 (June 1994).

2. Article I, § 8, cl. 3.

3. 66 F.3d 1272 (2d Cir. 1995).

service fee, which includes Ogden's operation and maintenance fee and debt service on the bonds. The agreement also required the town to deliver a minimum of 225,000 tons a year of waste to the incinerator. In 1987, the town enacted a flow control ordinance requiring that all solid waste generated in the town be disposed of in the incinerator, and it charged the haulers using the incinerator a tipping fee.

In response to *Carbone*, the town took four steps. First, it created a commercial garbage collection service district covering most of the commercial real estate in the town. Second, it solicited bids from haulers to collect waste in the service district. Based on the bids, it granted an exclusive license to Babylon Source Separation Commercial, Inc. (BSSCI), and refused to renew the licenses of the other haulers who had been collecting commercial waste in the town (some of whom are plaintiffs in this suit). Under its service agreement with BSSCI, the town pays the company a base fee of $22.75 per parcel per week for the collection of commercial waste, with additional fees for amounts collected above the base amount. Third, the town agreed to allow BSSCI to dispose of up to 96,000 tons of waste per year in the incinerator at no charge. Above 96,000 tons, the company must pay the prevailing tipping fee or take the waste elsewhere for disposal and pay that facility's tipping fee. Fourth, to finance these collection and disposal services, the town imposed an annual benefit assessment of $1,500 on each parcel of improved commercial property in the district. This covers a basic service of weekly collection of one cubic yard of refuse to be disposed of and one-half cubic yard of recyclable material. Businesses must pay an additional fee for service beyond the basic level. The plaintiffs sued to prevent implementation of these measures, alleging, essentially, that they could not survive scrutiny under *Carbone*.

The court began its analysis by stating that in granting an exclusive license to one hauler in the district and denying licenses to all others, the town was regulating interstate commerce. The question then was, what standard of review should the court use to determine the validity of this regulation. If the town was found to have discriminated against interstate commerce, then the court would be bound to use a strict test of review that would require the town to justify the discrimination by showing a compelling local interest and no less drastic means of serving that interest, a standard of review that a local government can virtually never meet. On the other hand, if the town has not discriminated against interstate commerce, the court would use the more lenient standard of review adopted in *Pike v. Bruce Church, Inc.*[4] This test requires only that the local program regulate even-handedly to effectuate a legitimate local public interest, that its effects on interstate commerce be only incidental, and that the burden on interstate commerce not be clearly excessive in relation to the local benefits.

The court found that in its licensing measures, the town had not discriminated against interstate commerce: it had not favored in-state haulers over out-of-state haulers; nor had it handicapped out-of-town businesses that might be in competition with local businesses. Rather, what the town did was to replace private collection with public collection in the district. Except that instead of using town-owned trucks and crews it used a private company to which it had granted a license. The town, said the court, had replaced the private market in waste collection with a public service, which as a provider of utility services such as water, sewer, electricity, and solid waste management, it was entitled to do.

Then, employing the *Pike* test, the court found no Commerce Clause violation. The court found only minor impacts on interstate commerce from the licensing measures, and these must be measured against the compelling interests the town has in efficient and environmentally sound programs for the collection and disposal of solid waste.

Turning to the part of the arrangement that allowed BSSCI to dispose of waste in the town's incinerator at no charge, the court said that here the town was acting as a market participant (in the market for disposal of solid waste) and not as a market regulator. As a market participant, the town could charge anything it wished for use of the incinerator, or nothing at all. Since the Supreme Court has long held that state and local governments acting as market participants are not subject to Commerce Clause restraints,[5] the court found the challenge to the free disposal arrangement to be without merit.

Finally, the court stated that local governments generally, and the Town of Babylon in particular, are entitled to rely on two ninety-year old Supreme Court cases, *California Reduction Co. v. Sanitary Reduction Works*,[6] and *Gardner v. Michigan*,[7] which upheld the authority of San Francisco and Detroit to grant exclusive franchises to a single company to collect and dis-

4. 397 U.S. 137 (1970).

5. See, e.g., Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) and White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983).

6. 199 U.S. 306 (1905).

7. 199 U.S. 325 (1905).

pose of solid waste. Indeed, the court issued what might be considered a challenge to the Supreme Court in these words:

> We refuse to undercut the long-standing precedents of *California Reduction* and *Gardner* absent clear indication from the Supreme Court that the Commerce Clause is now to be interpreted to effectively preclude local governments from providing basic sanitation services such as garbage collection on an exclusive basis, and financing those services by taxing local residents.[8]

Some of the solid waste control measures upheld in this case are available to North Carolina local governments. Cities and counties may grant exclusive franchises to collect waste under G.S. 160A-319 and G.S. 153A-136. Both collection and use fees may be charged to businesses or residences receiving solid waste services under G.S. 160A-314 and G.S. 153A-292, and these fees, along with other revenues, may be used to finance collection and disposal facilities. Although counties may establish service districts to provide for solid waste management pursuant to G.S. 153A-301, it appears they do not have authority to do what the Town of Babylon did in this case and levy the solid waste charge only on commercial property in the district. Under the North Carolina service district statutes it appears that the intent of the legislature was that when district boundaries are drawn all property within the boundaries must be subject to the additional service district tax.

Contracts for collection and disposal: *SSC Corp. v. Town of Smithtown*

In *SSC Corp. v. Town of Smithtown*,[9] the court invalidated the town's flow control ordinance but upheld its contracts with private waste collection firms that required the firms to dispose of the waste collected at an incinerator financed by the town. In the mid-1980's, the Town of Smithtown, a New York municipality, entered into a joint arrangement with the Town of Huntington for construction of a solid waste incinerator. The incinerator was built by Ogden Martin Systems on land owned by the Town of Huntington. Ogden Martin is sole owner of the incinerator. The towns financed the incinerator through tax-exempt bonds issued by a New York public authority, and the bonding authority then lent the proceeds of the bonds to Ogden Martin to build the incinerator. The bonds are secured by a twenty-five year obligation by the towns to pay Ogden Martin a service fee, which covers Ogden's operating costs and payments to the bonding authority. The towns set a tipping fee of $65 a ton for waste disposed of at the incinerator.

In 1991, Smithtown adopted a flow control ordinance requiring that all persons collecting solid waste in the town dispose of it at the town's designated facility, and that facility was the Huntington incinerator. Also in 1991, the town divided its residential areas into ten districts and solicited bids from private firms for contracts to collect waste in each district; the bidders were instructed to include in their bids the $65 a ton tipping fee that they would be required to pay at the incinerator. The contract that the successful bidders had to sign required them to dispose of the waste they collected at the incinerator in Huntington. Smithtown levied on each residence an annual user fee of $218 with which it paid the contract firms for collecting and disposing of solid waste. The $65 a ton tipping fee paid by the firms was thus a pass-through: the firms paid the fee at the incinerator and were then reimbursed for this payment through the contract payments from the town.

SSC won contracts to collect waste in seven of the ten districts. In 1994, the town had reason to believe that SSC was diverting the waste it collected to disposal facilities that charged a lower tipping fee than the incinerator and was pocketing the difference between this lower charge and the $65 a ton reimbursement under the contract. The town withheld more than $750,000 in contract payments from SSC. In response, SSC brought this suit alleging that both the flow control ordinance and the disposal provision in the contract violated the Commerce Clause.

The court reviewed Commerce Clause jurisprudence at some length but ultimately had no difficulty in finding the flow control ordinance unconstitutional in light of *Carbone*. The contract provision requiring disposal at the incinerator was another matter. The court said that in contracting for the collection services and paying for those services with use fees levied on property owners, the town was acting as a market participant rather than a market regulator. As such, it was not subject to Commerce Clause restraints. The court reasoned that what Smithtown had done through its contract was a close analogy to what Boston had done in *White v. Massachusetts Council of Constr. Employers*.[10] If, said the court, the City of Boston can require construction firms with city contracts to hire a certain percentage of city residents, then the Town of

8. 66 F.3d 1272, 1294.

9. 66 F.3d 502 (2d Cir. 1995).

10. 460 U.S. 204 (1983).

percentage of city residents, then the Town of Smithtown can require waste haulers with town contracts to dispose of the waste at a town-financed facility.

Although the opinion in this case does not so state, the apparent reason that the contract arrangement was held to be market participation but the exclusive licensing arrangement in *Town of Babylon* was held to be market regulation was that the Town of Smithtown did not need to rely on its police power to enforce the contract arrangements. That is, Smithtown did not need to prohibit non-contract haulers from collecting waste in the districts because no district resident would do business with a non-contract hauler any way. No regulation was needed because economics dictated the result. Residents were required to pay a use fee of $218 for the collection service, so it is highly unlikely that a resident would pay an additional charge to a different hauler for the same service.

North Carolina cities and counties have statutory authority to adopt the arrangements approved in *Town of Smithtown*. Cities and counties are authorized by G.S. 163A-20.1 and G.S. 153A-449 to enter into contracts with private frims for the collection of solid waste, and they are authorized by G.S. 160A-314 and G.S. 153A-292 to levy fees for the collection services.

Carbone explained and avoided: *Harvey & Harvey, Inc. v. Chester County*

In *Harvey & Harvey, Inc. v. Chester County*,[11] the court, in two cases, faced *Carbone*-style flow control ordinances head-on and refused to invalidate them. In *Harvey & Harvey*, Chester County, Pennsylvania, adopted a waste management plan that divided the county into two service areas and designated a landfill in each service area to which waste generated in that area must be taken for disposal. One of the landfills was financed by the county. The county ordinance did not prohibit out-of-state disposal facilities from applying for designation. When Harvey & Harvey, a licensed hauler in Chester County, challenged the county's plan on Commerce Clause grounds, the trial court found no discrimination against interstate commerce and announced it would apply the *Pike v. Bruce Church, Inc.* test to determine the plan's validity. At that point, Harvey & Harvey took a final judgment against itself and appealed.

In the companion case, *Tri-County Industries, Inc. v. Mercer County*, Mercer, a small Pennsylvania county, published a national request for bids for a contract to dispose of all of the county's waste. Twenty-three firms, some from out-of-state, requested the bid specifications, but only four firms, all in Pennsylvania, submitted bids. The county awarded the contract to Waste Management of Pennsylvania, operator of a landfill in Butler County, and adopted an ordinance requiring all licensed waste haulers in the county to haul waste generated in the county to Waste Management's landfill. Tri-County, a licensed hauler, took some of its waste to other landfills for disposal and when notified of a possible license revocation because of the waste diversion, sued the county to have the flow control ordinance declared unconstitutional. The district court entered judgment in favor of Tri-County.

The judge writing for the majority in these two cases did not interpret *Carbone* as holding flow control ordinances unconstitutional per se. Rather, the court said that to be held unconstitutional under the Commerce Clause a flow control ordinance must be shown to discriminate against out-of-state facilities. The fact that the designated disposal sites are in-state does not, by itself, establish that the flow control measures discriminate against interstate commerce. In remanding the cases to the district courts for further proceedings, the court identified three factors to be weighed in making the determination whether the ordinances are discriminatory: (1) was the designation process open and objective—were out-of-state facilities given a fair opportunity to compete for the designation; (2) what is the duration of the designation—a short period of designation is to be weighed more favorably than a long one; and (3) how likely is it that the solid waste plans can be amended to add other sites, possibly out-of-state ones. The court speculated that from the facts it appeared that Chester County would have a very difficult time showing that its ordinance did not discriminate. Mercer County, on the other hand, has a better chance of prevailing.

The dissenting judge took issue with the majority's interpretation of *Carbone*. The dissent said the focus of *Carbone* was on the effect of flow control, not on the process by which the designation was made. If the effect was to deprive out-of-state firms access to the local market in waste disposal, then there was discrimination against interstate commerce.

Even if the majority's reading of *Carbone* is correct, it is irrelevant in most cases. Most local governments that adopt flow control ordinances do so to guarantee the financial prospects of a facility owned or financed by the local government. If they have to give other facilities a right to compete for the designation,

11. 1995 U.S. App. LEXIS 29705 (3d Cir. Oct. 20, 1995).

flow control is of no value. The duration of the designation typically depends on the term of bond payments or the length of the contract with the private operator of the facility. These time periods cannot realistically be shortened. The Mercer County situation represents a relatively small number of flow control situations.

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