



LOCAL GOVERNMENT LAW

Number 87 June 1998

David M. Lawrence, Editor

SOLID WASTE MANAGEMENT: THE SECOND CIRCUIT AGAIN APPROVES A CONTRACT FOR WASTE COLLECTION THAT DESIGNATES A DISPOSAL FACILITY

■ William A. Campbell

In *Sal Tinnerello & Sons, Inc. v. Town of Stonington*,¹ the United States Court of Appeals for the Second Circuit rejected constitutional challenges to an arrangement for the collection and disposal of solid waste in which a town entered into an exclusive contract for the collection of commercial waste with a single hauler and as part of the contract required that the waste be disposed of in an incinerator in which the town had an interest. This case follows two earlier ones in which the court made similar rulings,² and it provides additional guidance on the issue of the legality of terminating the contracts of haulers who are no longer allowed to collect waste in the unit.

The Town of Stonington's financial difficulties

Pursuant to Connecticut legislation providing for the environmentally sound disposal of solid waste, the Town of Stonington, along with other towns in the region, formed the Southeastern Connecticut Regional Resource Recovery Authority (SCRRA). In 1992 SCRRA constructed an incinerator to serve the waste disposal needs of its member towns. The incinerator was financed through the issuance of state bonds. Stonington and the other member towns entered into contracts with SCRRA by which they agreed to supply a minimum amount of waste to the incinerator to finance its operations and bond servicing or pay an amount equivalent to the costs of disposing of that portion of the minimum

¹ 141 F.3d 46 (2d Cir. 1998).

² The two earlier cases are discussed in William A. Campbell, "Solid Waste Management: Recent Developments in Flow Control," *Local Government Law Bulletin* No. 71 (Nov. 1995).

commitment that was not delivered (a "put or pay" contract). Stonington's minimum commitment was 10,149 tons a year, of which approximately 6,000 tons was from commercial establishments. To ensure delivery of the minimum amount of waste to the incinerator, Stonington enacted a flow control ordinance that required all haulers operating in the town to dispose of the waste they collected in the SCRRA incinerator.

After the Supreme Court invalidated flow control ordinances on Commerce Clause grounds in *C&A Carbone, Inc. v. Town of Clarkstown*,³ in 1994, haulers began taking the waste to other facilities with lower tipping fees. The tipping fee at the incinerator was \$79 a ton; the tipping fee charged by transfer stations in Rhode Island was \$52 a ton. Because the town was unable to meet its contractual obligation to deliver a minimum tonnage of waste to the incinerator, it faced the prospect of having to pay approximately \$500,000 a year to SCRRA, funds that would have to be raised through local taxes.

The town's solid waste management plan

In 1997, to provide for the collection and disposal of solid waste and to avert a financial crisis, Stonington adopted a solid waste management plan with the following features. First, the town established a solid waste authority and directed the authority to either assume responsibility for collecting solid waste from all commercial firms or contract for collection with a private hauler. Second, the authority elected to contract with a private hauler for collection and to assess a volume-based charge on all commercial generators to finance the contract. Third, the contract with the private hauler would require that all waste collected from commercial accounts be disposed of in the SCRRA incinerator. Fourth, effective July 1, 1997, by town ordinance, only the hauler that won the contract would be permitted to collect solid waste from commercial firms in the town.

The authority advertised for bids for the contract in local newspapers and national publications. It selected USA Waste and entered into a one-year contract with that firm. Tinnerello had seventy commercial accounts in Stonington, which generated about \$18,000 a year, approximately seven percent of its business. Tinnerello had written contracts with half the accounts and oral agreements with the rest. Shortly before the July 1, 1997, effective date of the exclusionary ordinance, Tinnerello brought suit in federal district court seeking both a preliminary and permanent injunction against

enforcement of the ordinance. The suit alleged that the ordinance and management plan violated the Contract and Commerce clauses of the United State Constitution.

The court's decision

The district court rejected the request for a temporary injunction on the grounds that Tinnerello would not be irreparably harmed by enforcement of the ordinance and was unlikely to prevail on the merits of the case. The court of appeals affirmed solely on the ground that Tinnerello had failed to show a likelihood of success on the merits. The court gave most of its attention to Tinnerello's claim that the ordinance impaired its contracts with commercial accounts in the town in violation of the Contract Clause.⁴ The court said that the Contract Clause was not an absolute prohibition against impairing contracts, but rather that three factors must be considered in determining whether a law impermissibly impairs contracts. The three factors are: (1) whether the impairment is in fact substantial; (2) if so, whether the law serves a significant social purpose; and (3) if it does, whether the means chosen to accomplish the purpose are reasonable and appropriate. The court stated that there was insufficient evidence in the record on which to determine whether Tinnerello's contracts had been substantially impaired, but it stated that the test of substantial impairment is the extent to which reasonable expectations under the contracts have been disrupted. Thus, the court said, if the contracts were entered into after the enactment of Connecticut legislation that reserved to municipalities the authority to collect, or to regulate the collection and disposal of, solid waste, the claim of substantial impairment would be weak. Even assuming that the ordinance substantially impaired Tinnerello's contracts, it served a significant social purpose, that of ensuring that the town's solid waste would be efficiently collected and disposed of in an incinerator that possessed the necessary permits. Finally, the court found that the town acted reasonably in achieving this purpose by weighing the alternatives available to it and deciding to assume responsibility for waste collection from commercial firms.

The court had little difficulty in holding that Stonington's solid waste management plan did not violate the Commerce Clause.⁵ Relying on its two previous decisions,⁶ the court said that when Stonington's

⁴ U.S. Constitution, art. I, § 10.

⁵ *Id.* art. I, § 8, cl.3.

⁶ *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), cert. denied, 116 S.Ct. 911 (1996), and *USA Re-*

³ 511 U.S. 383.

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solid waste authority assumed responsibility for collecting and disposing of solid waste generated by commercial firms, it was participating in the interstate market for solid waste rather than regulating that market. As a market participant, the town is not subject to Commerce Clause restrictions. When the town prohibited all haulers from collecting commercial waste in the town except the one with which the authority had a contract, it was acting as a market regulator. But the regulation fell equally on local and nonlocal firms and placed no special burden on interstate commerce.

Conclusion

Two observations about this case are in order. First, and obviously, what is allowed in the second circuit may not be allowed in the fourth; however, this

cycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), cert. denied, 116 S.Ct. 1419 (1996).

is the third in a line of cases that has upheld various contract and franchise arrangements in which local governments have been able to direct solid waste to designated facilities for disposal. The fourth circuit would very likely find the court's reasoning persuasive. Second, it is important to note that Stonington did not simply select one hauler, give that hauler an exclusive franchise with a condition that waste be taken to the incinerator, and then allow the hauler to charge collection fees to commercial generators. An important element in the case is that the town assumed responsibility for collecting the waste and then contracted directly with the hauler. The commercial generators paid no fees to the hauler; rather, the generators paid fees to the town, which in turn paid the hauler under the contract.

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