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SOLID WASTE MANAGEMENT: FRANCHISE AGREEMENT FOR COLLECTING AND PROCESSING MUNICIPAL SOLID WASTE DECLARED INVALID ON COMMERCE CLAUSE GROUNDS

■ William A. Campbell

A series of federal cases[1] decided during the past five years has upheld against Commerce Clause challenges various local government arrangements that required municipal solid waste to be collected by a single hauler or disposed of in a designated facility. Recently, in *Huish Detergents, Inc. v. Warren County*,[2] the Court of Appeals for the Sixth Circuit struck down such an arrangement on the ground that it imposed a flow control regime contrary to *C & A Carbone, Inc. v. Town of Clarkstown*.[3] This case, when read together with the cases that pre-

[1] Houlton Citizens Coalition v. Town of Houlton, 175 F.3d 178 (1st 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 (2d Cir. 1999) [discussed in **Local Government Law Bulletin No. 92**, (Dec. 1999)], Sal Tinnerello & Sons, Inc. v. Town of Stonington, 141 F. 3d 46 (2d Cir. 1998) [discussed in **Local Government Law Bulletin No. 87** (June 1998)], USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995), and Harvey & Harvey, Inc. v. Chester County 68 F.3d 788 (3d Cir. 1995) [discussed in **Local Government Law Bulletin** No. 71, (Nov. 1995)].

[2] 214 F.3d 707 (6th Cir. 2000).

[3] 511 U.S. 383 (1994).

ceded it, offers some useful lessons to local governments in how *not* to structure exclusive hauling and disposal arrangements.

Warren County's franchise agreement

Warren County, Kentucky, issued a Request for Proposals and received competitive bids from trash haulers interested in collecting and processing municipal solid waste generated in the city of Bowling Green. The county awarded the contract, in the form of an exclusive franchise, to Monarch Environmental for five years. Under the terms of the franchise, Monarch was given the exclusive right to collect and process all solid waste generated in the city. It was obligated to operate the city's transfer station, deliver all waste to the transfer station, and dispose of the waste at a landfill permitted by the State of Kentucky. Monarch billed its Bowling Green customers directly, according to a fee schedule fixed by the franchise agreement; the city did no billing and provided no financial subsidy to Monarch. All waste generators in the city were required to use Monarch's services. At the time the franchise agreement became effective, Warren County passed an ordinance that incorporated the agreement's provisions by reference, thereby making the terms of the agreement part of the county's solid waste management ordinance.

Challenge to the franchise and the court's decision

Huish Detergents operated a laundry detergent manufacturing facility in Bowling Green and concluded that it could dispose of its solid waste more cheaply if it could do the job itself or contract with a firm other than Monarch. It filed suit in federal district court alleging that Warren County's franchise arrangement amounted to flow control in violation of the Commerce Clause. The district court held that the county was acting as a market participant by purchasing waste collection and disposal services from Monarch, and therefore the franchise arrangement was exempt from Commerce Clause scrutiny. So finding, the court dismissed the suit.

The court of appeals reversed. It held that the county could not avail itself of the market participant exception because it was not acting in a proprietary capacity in the solid waste market. It was not using county funds to purchase solid waste collection or processing services or selling the county's own solid waste services. In so holding, the court distinguished *USA Recycling, Inc. v. Town of Babylon*[4] and *SSC Corp. v. Town of Smithtown*,[5] in both of which the municipalities entered into exclusive franchises or contracts with private firms but levied fees on property owners to finance the collection and disposal arrangements. Stripped of the market participant defense, the county's requirement in the franchise agreement that Monarch process all of the waste it collected at the city's transfer station looked suspiciously similar to the scheme declared invalid in *Carbone*. And the court of appeals so held; it found no distinction between imposing flow control by means of an ordinance, as in *Carbone*, and imposing it through an exclusive franchise. To make matters worse, the county had in fact incorporated this provision in its ordinance, making the case almost identical to *Carbone*. Moreover, by requiring disposal of the waste in a landfill permitted by the State of Kentucky the franchise agreement prohibited disposal in an out-of-state landfill, thus discriminating against out-of-state disposal services, again contrary to *Carbone* and other dormant Commerce Clause cases.

Comments

This case illustrates the perils of a local government's relying solely on an exclusive franchise with a private firm to control the collection and disposal of solid waste. Assuming that Kentucky law allows for such arrangements, the county could have adopted one of the organizational and financial arrangements used in the cases cited in note 1, and the court of appeals would very likely have upheld such an arrangement since it distinguished *SSC Corp.* and *USA Recycling, Inc.* from the instant case. That is, the county could have either levied a tax or charged a fee to city property owners for solid waste management, used the funds generated by the tax or fee to pay a private firm with which it had an exclusive franchise agreement to collect the waste, and required in the franchise agreement that the firm deliver all of the waste to the city's transfer station. This use of county funds to pay the franchisee would, based on the earlier cases, have brought the county within the market participant exemption, and no Commerce Clause violation would have been found. In addition, the county should have made no provision in the franchise agreement regarding disposal of the waste; it should simply have

[4] 66 F.3d 1272 (2d Cir. 1995).

[5] 66 F.3d 502 (2d Cir. 1995).

allowed the franchisee to make whatever disposal arrangements it found to be environmentally sound and financially feasible. By requiring disposal in a Kentucky landfill, the county in effect extended an invitation to the court to invalidate the franchise and ordinance.

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