

53920-5

53920-5

76954-1

No. 53920-5

(King County Superior Court No. 03-2-25260-3 SEA)

---

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

JOSEF VENTENBERGS, KENDALL TRUCKING, a  
Washington corporation, RONALD HAIDER and HAIDER  
CONSTRUCTION, INC., a Washington corporation,

Plaintiffs/Appellants,

vs.

THE CITY OF SEATTLE, a municipal corporation, SEATTLE  
PUBLIC UTILITIES, CHUCK CLARKE in his Official Capacity  
as Director of Seattle Public Utilities;

WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a  
Waste Management of Seattle, a Delaware corporation;

RABANCO, LTD., a Washington corporation,

Defendants/Respondents.

---

BRIEF OF AMICUS CURIAE  
WASHINGTON REFUSE AND RECYCLE ASSOCIATION

---

James K. Sells  
Ryan Sells Uptegraft, Inc. P.S.  
9657 Levin Rd. NW, Suite 240  
Silverdale, WA 98383  
(360) 307-8860  
Attorney for WRAA

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES .....ii

I. IDENTITY AND INTEREST OF AMICUS CURIAE ..... 1

II. INTRODUCTION AND BACKGROUND .....3

III. ARGUMENT .....7

    1) SEATTLE HAS AUTHORITY TO CONTRACT  
        FOR COMMERCIAL COLLECTION.....7

    2) PLAINTIFF VENTENBERGS IS AN ILLEGAL  
        HAULER, AND PLAINTIFF HAIDER IS FREE  
        TO HAUL HIS OWN SOLID WASTE.....10

IV. CONCLUSION ..... 12

**TABLE OF AUTHORITIES**

Cases

***AGG Enterprises v. Washington County***, 281 F.3d 1324  
(9th Cir. 2002)..... 10

***Golberg v. Sanglier***, 96 Wn.2d 874, 879, 639 P.2d 1347  
(1982) ..... 12

***Kleenwell Biohazard and General Ecology Consultants,  
Inc. v. Nelson***, 48 F.3d 391, 400 (9th Cir. 1995) .....6

***Shaw Disposal, Inc. v. Auburn***, 15 Wn. App. 65, 68, 546  
P.2d 1236 (1976).....9

***Spokane v. Carlson***, 73 Wn.2d 76, 82, 436 P.2d 454 (1968)  
.....9

Statutes

RCW 70.95.030(22) .....8

RCW 81.77.020 ..... 4, 5

WAC 480.07.340(1) ..... 1

WAC 480-70-041 ..... 1

Other Authorities

Seattle Municipal Code, Sec. 21.36.012(5) .....8

**I. IDENTITY AND INTEREST OF AMICUS CURIAE  
WASHINGTON REFUSE AND RECYCLING ASSOCIATION**

The Washington Refuse and Recycling Association ("WRRRA") is a trade association representing the solid waste collection and recycling industry. WRRRA is organized as a Washington non-profit corporation, and has been in continuous existence since its formation in 1947. It has over 60 "regular" members, who are directly engaged in the business of solid waste and recycling collection and range in size from small, truly "mom and pop" or family-owned, local businesses, to large publicly-traded corporations.<sup>1</sup>

In Washington, trade associations such as WRRRA are permitted by administrative rule to participate as parties before the Washington Utilities and Transportation Commission ("WUTC"). WAC 480-70-041 and WAC 480.07.340(1). WRRRA has participated in numerous administrative hearings and legal actions involving the rights of solid waste collection companies since enactment of the

---

<sup>1</sup> WRRRA also has over 70 "associate" members, such as attorneys, CPAs and equipment suppliers. It employs an Executive Director and office staff, and retains lobbyists and an attorney.

regulatory structure in 1961. It has appeared in administrative and legal actions on its own behalf, and has also on occasion provided assistance to those members directly embroiled in litigation, particularly with respect to issues of major significance to the solid waste collection industry as a whole.

WRRA is very familiar with the issues in this matter. It deals with city contracts on behalf of its members virtually on a daily basis. Its attorney and Executive Director have closely followed this action in Superior Court and have consulted with the two haulers' attorneys regarding strategy and the applicable law.

WRRA's primary concerns focus upon plaintiffs' apparent contention that cities do not have authority to grant exclusive solid waste collection contracts; or if they do it is somehow restricted by the need to consider contract awards to anyone and everyone who may want the job. This is directly contrary to the applicable statutes and some thirty years of case law, both state and federal.

A second concern is that plaintiffs have admitted that they were hauling solid waste without either authority from the WUTC or a contract with the city. Illegal hauling such as this is a major issue with WRRRA and its members, and WRRRA devotes a significant amount of energy and resources in the seemingly never ending battle against illegal haulers.

The litigants in this action are focused on an actual situation, which happens to involve the state's largest city and two large publicly-traded solid waste haulers. The overall impact, however, will affect small cities and small haulers as well. As a trade association representing both large and small haulers, WRRRA wants the Court to be aware of the importance of this action to the entire solid waste industry and the many cities, other than Seattle, which contract for solid waste collection.

## **II. INTRODUCTION AND BACKGROUND**

The City of Seattle has, over the years, tried several different scenarios for the collection, hauling and disposal of

the considerable amounts of solid waste generated within the City. For some forty years, from 1962 to 2001, the City treated residential (sometimes called "curbside") collection, and commercial collection differently. During that time commercial waste was collected pursuant to "certificates of convenience and necessity" (G certificates) issued by the Washington Utilities and Transportation Commission (WUTC) pursuant to RCW Chap. 81.77. This approach provided businesses within the City with regular, regulated service, without the necessity of the City being the regulator.

The City used a different system for residential collection. It exercised its statutory option to contract for solid waste service with private firms, two of them being defendants Waste Management of Washington (WMI) and Rabanco Ltd. (Rabanco). RCW 81.77.020. Residential solid waste continues to be collected pursuant to contracts.

The City was, and is, able to utilize innovative methods of solid waste handling because of a statutory scheme which grants to cities three choices in how to deal with solid waste.

A city can contract with a private entity (or entities), perform the service itself by means of a municipal department, or do neither, in which case the WUTC certificated hauler for that particular geographical area will provide service pursuant to its "G certificate". RCW 81.77.020.<sup>2</sup> There is even a fourth option; citizens can always deliver their own garbage to a disposal site, a process usually referred to as a "self haul."

Thus, one way or the other, the collection and transportation of solid waste is regulated by a governmental entity. There are very good reasons for the treatment of solid waste collection as a utility rather than a "free market" trucking situation.<sup>3</sup> One of the major goals is universal service, i.e., anyone who wants solid waste service will receive it, at a reasonable price, by a fully licensed and certificated carrier. A single home miles from an urban area will be given the same service, at the same rate, as someone

---

<sup>2</sup> Cities in Washington exercise all of these options. For example, Tacoma and Olympia have municipal departments. Gig Harbor allows the G certificate holder to provide service, and Puyallup contracts.

<sup>3</sup> In fact, when Congress deregulated the trucking industry in 1994, solid waste collection (including "curbside recycling") was exempted. *see* 49 USC Sec. 14501(c).

on a city block. This prevents what is known in regulatory parlance as "cream skimming," the practice of serving only those customers whose homes are close together, near a disposal/transfer site, while ignoring the nonprofitable rural customer. ***see Kleenwell Biohazard and General Ecology Consultants, Inc. v. Nelson***, 48 F.3d 391, 400 (9th Cir. 1995).

Another, perhaps more obvious, reason for regulation concerns public health and safety. Garbage must be collected efficiently and competently, and disposed of safely. Regulation, by the WUTC or by a city contract, ensures that this is the case. It also ensures that a community's streets are not assaulted daily by a fleet of garbage trucks from companies that may or may not reappear for next week's pick-up.

Washington's solid waste regulatory structure has been in place since 1961, and it works. It has withstood constitutional, administrative and legal arguments in federal and state courts. The simple fact is that garbage collection

and transportation is not a free market, it is regulated, not unlike other utilities such as sewers and electrical power. Plaintiffs' arguments here, taken to the extreme, would allow for every business to select their own sewage disposal provider, probably on the basis of which one offers the best deal that particular day.

### **III. ARGUMENT**

**1) SEATTLE HAS AUTHORITY TO CONTRACT FOR COMMERCIAL COLLECTION.** It seems clear to all the parties, plaintiffs included, that Seattle does, indeed, have statutory authority to contract for solid waste service, whether it be commercial or residential. Plaintiffs, however, somehow want the court to believe that it does not have the authority to contract for "CDL"<sup>4</sup> collection and transportation.

There is a very basic and fatal flaw in this line of reasoning. "CDL" is not something other than waste. Simply

---

<sup>4</sup> Construction, demolition and land clearing.

put, CDL is garbage. RCW 70.95.030(22); Seattle Municipal Code, Sec. 21.36.012(5).

Since Seattle, and other cities, can contract for solid waste collection, it obviously can contract for CDL. RCW 35.21.152 gives cities "full jurisdiction and authority" to collect and transport solid waste. RCW 81.77.020 exempts cities from WUTC regulation of solid waste if the city chooses to either contract or operate its own municipal system. Not only is the practice in accordance with statutory authority, it has been approved time and again by the courts, which clearly recognize and approve of a local jurisdiction's exercise of its police powers in granting exclusive solid waste contracts. *see Kleenwell*, at 398 and *Spokane v. Carlson*, 73 Wn.2d 76, 82, 436 P.2d 454 (1968).

Nor is a city under an obligation to go through a bidding process. Once the city has decided it wishes to contract for the service, it may negotiate with anyone it

chooses.<sup>5</sup> ***Shaw Disposal, Inc. v. Auburn***, 15 Wn. App. 65, 68, 546 P.2d 1236 (1976). In this case, Seattle chose to negotiate with the two largest haulers in the state, both of whom have divisions which operate "state of the art" landfills. The reasons for dealing with these two companies are perhaps too obvious to state, but certainly the knowledge that Seattle's solid waste will forever rest in a modern, safe facility, thereby virtually eliminating the City's exposure to "SuperFund" liability undoubtedly was a factor, as well as it should be.

This is similar to the situation facing the Ninth Circuit in ***AGG Enterprises v. Washington County***, 281 F.3d 1324 (9th Cir. 2002).<sup>6</sup> There the Court approved the County's restriction of solid waste collection and transportation to a single contractor, noting that solid waste regulation is an inherently local function, and declining to "second guess" the local jurisdiction's choice of the best manner in which to

---

<sup>5</sup> A collection/hauling company which only operates pursuant to a city contract need not have a WUTC certificate, although most, if not all, do.

<sup>6</sup> Amicus WRRRA also appeared as amicus curiae in that action.

meet its obligations relative to solid waste. **AGG**, at 1328.

Amicus WRRRA will leave the constitution arguments concerning privileges and immunities to the defendants, who have already competently and thoroughly briefed those issues. Amicus would suggest that, in view of the clearly applicable statutory and precedential authority regarding a city's right to contract, that argument seems, at best, a transparent attempt to direct the Court's attention from the real issues.

**2) PLAINTIFF VENTENBERGS IS AN ILLEGAL HAULER, AND PLAINTIFF HAIDER IS FREE TO HAUL HIS OWN SOLID WASTE.** One of Amicus WRRRA's major concerns, and major efforts, involves illegal hauling of solid waste. As noted, collection and transportation of solid waste in this state is regulated either by the WUTC or by those cities which choose to do so. There are no other options<sup>7</sup> other than self haul. Plaintiff Ventenbergs has frankly stated

---

<sup>7</sup> Counties, for example, do not have authority to regulate collection of solid waste. RCW 36.58.040(2).

(admitted?) that he and Haider had a contract for the collection and transportation of solid waste. They appear to rely upon this contract for their "impairment of contract" argument. The problem is that an illegal contract is no contract at all. ***Golberg v. Sanglier***, 96 Wn.2d 874, 879, 639 P.2d 1347 (1982).

Once again, there are only three legal ways to collect and haul solid waste, and this "contract" involved none of them. Plaintiff Haider has two choices regarding solid waste generated at a construction site. He can utilize the city contractor (or the WUTC certificated hauler if the site is in the county) or he can haul it himself. He cannot find the lowest unregulated bidder and enter an illegal contract that ignores legitimate state and local regulatory authority.

Plaintiff Haider is free to utilize his own workers and his own equipment to transport his garbage to a disposal/transfer site. Many contractors do so. For some reason Haider chose not to do so, and thereby became an integral part of an illegal enterprise. One has to almost

admire plaintiffs for suing Seattle based upon that illegal enterprise, but hopefully the Court will see it for what it really is, as did Judge McBroom.

There are good reasons why WRRRA and its members are concerned about illegal haulers. Illegal haulers are not subject to regulation, which includes equipment safety checks, regulated pricing, audits, and driver testing. These are the things that distinguish the solid waste industry in Washington from that in other, non-regulated states. It is much better here.<sup>8</sup>

#### **IV. CONCLUSION**

This is an action which was properly decided on summary judgment. The facts are clear and apparently without a great deal of dispute. The trial court only had to interpret the law, which is also clear. Plaintiffs may not like the fact that solid waste is regulated as a utility in Washington, but that is the law. It is law that has been

---

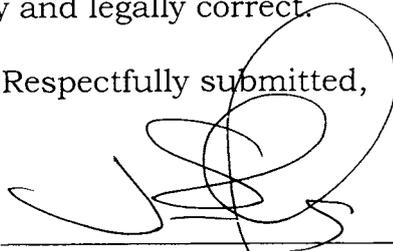
<sup>8</sup> Of significant importance are the payment of various solid waste taxes and fees, which support the regulatory efforts at both the state and local levels. Regulated haulers pay them, illegal haulers do not.

upheld by virtually every court, state or federal, which has examined it. It is law which is beneficial to the public and, simply put, makes sense. If plaintiffs truly believe that commercial waste collection should be "wide open" within the City of Seattle, or any other jurisdiction, they simply are either ignoring reality or choose to bend reality to suit their own particular purpose. Luckily, the Legislature and the Seattle City Council have chosen to consider the greater good ahead of the self-serving interests of one or two particular businesses.

Judge McBroom clearly considered all the arguments presented, which were complete and scholarly in content, and made the obvious and correct legal decision. That

decision should be upheld by this Court, for the simple reason that it is factually and legally correct.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Sells', written over a horizontal line.

JAMES K. SELLS  
WSBA No. 6040  
Attorney for Amicus Curiae  
Washington Refuse and  
Recycling Association

**CERTIFICATE OF SERVICE**

I hereby certify that on this day a true copy of the foregoing BRIEF OF AMICUS CURIAE WASHINGTON REFUSE AND RECYCLING ASSOCIATION was served by first class mail, postage prepaid, on:

William R. Maurer  
Jeanette M. Petersen  
Institute for Justice  
Washington Chapter  
811 First Ave., Suite 625  
Seattle, WA 98104

William H. Patton  
Rebecca Earnest  
Seattle City Attorney  
600 Fourth Ave., 4th Floor  
PO Box 94769  
Seattle, WA 98124-4769

Polly L. McNeill  
Jessica L. Goldman  
Summit Law Group PLLC  
315 Fifth Ave. South, Suite 1000  
Seattle, WA 98104-2682

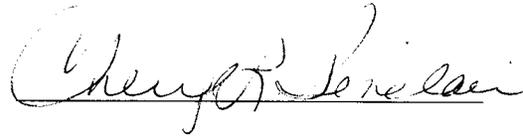
Andrew M. Kenefick  
Waste Management of Washington, Inc.  
801 Second Ave., Suite 614  
Seattle, WA 98104-1599

David W. Wiley  
Dana A. Ferestein  
Williams, Kastner & Gibbs PLLC  
Two Union Square, Suite 4100  
Seattle, WA 98101-2380

2001 SEP 27 07:11:00

I swear under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 26<sup>th</sup> day of July 2004 at Silverdale, Kitsap County, Washington.

A handwritten signature in cursive script, reading "Cheryl K. Kneiser". The signature is written in black ink and is positioned centrally on the page.