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No. 76954-1
(Court of Appeals No. 53920-5-1)

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

THE CITY OF SEATTLE, a municipal corporation, SEATTLE PUBLIC UTILITIES, and 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,

Respondents.

PETITIONERS' STATEMENT OF ADDITIONAL AUTHORITIES

William R. Maurer, WSBA No. 25451
Jeanette M. Petersen, WSBA No. 28299
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ORIGINAL

Pursuant to RAP 10.8, Petitioners respectfully submit the following additional authority without argument and in support of their Petition for Review:

Judge David R. Gamble's **Memorandum of Decision** in the Ninth Judicial District Court of the State of Nevada in and for the County of Douglas case of *Douglas Disposal, Inc. v. Wee Haul, LLC et al.* (case number 03-CV-0298), dated January 20, 2005.

The above-referenced Memorandum of Decision is attached to this Statement of Additional Authorities as Exhibit A. Exhibit A is a certified copy of such document received by Counsel for Petitioners from the Office of Clerk and Treasurer of the Douglas County Courthouse in Minden, Nevada.

Pursuant to RAP 10.8, Petitioners submit this authority regarding their contention that Respondent City of Seattle's ordinances restricting the collection of construction, demolition, and landclearing waste to only Respondents Rabanco, Ltd., and Waste Management of Washington, Inc., are not a legitimate exercise of the police power.

RESPECTFULLY submitted this 6th day of July, 2005.

INSTITUTE FOR JUSTICE
Washington Chapter

By 
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EXHIBIT A

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Case No. 03-CV-0298
(Consolidated)

Dept. No. I

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JAN 20 2005

DOUGLAS COUNTY
DISTRICT COURT CLERK

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

DOUGLAS DISPOSAL, INC.,

Plaintiff,

vs.

**MEMORANDUM OF
DECISION**

WEE HAUL, LLC; ROBERT HAIGHT;
SCOTT HOYLE; MITCHELL B.
CROCKETT; and DOES I-XX,
inclusive,

Defendants

DOUGLAS DISPOSAL INC.,

Plaintiff,

vs.

N J ENTERPRISES, INC., JOHN
INNES, NANCY INNES, and DOES
I-XX, inclusive,

Defendants.

This cause having come on to be heard before the Court sitting without a jury on

1
2 the 8th of September, 2004, and Plaintiff Douglas Disposal, Inc, having appeared in
3 person and through counsel, Jeffrey Rahbeck, Esq.; Defendants Wee Haul, LLC, Robert
4 Haight, Scott Hoyle, and Mitchell Crockett having appeared in person and through
5 counsel, Treva Hearne, Esq. and Robert Hager, Esq.; and Defendants N J Enterprises,
6 Inc., John Innes, and Nancy Innes, having appeared in person and through counsel,
7 Treva Hearne, Esq. and Robert Hager, Esq.
8

9 Plaintiff having introduced evidence, both oral and documentary, Defendants
10 having introduced evidence, both oral and documentary, said cause having been
11 submitted to the court for its decision and judgment on the 9th of September, 2004, now
12 makes the following Memorandum of Decision.
13

14 FACTUAL BACKGROUND

15 In 1969, Douglas County codified Ordinance 176 granting a franchise for the
16 collection of garbage and rubbish in East Fork Township, Douglas County, Nevada. *See*
17 Douglas County Code Ordin. (Nev.) 176 (1969), appended hereto as Exhibit "A".¹

18 Pursuant to Ordin. 176, Douglas County ("County") and Douglas Disposal, Inc.
19 ("DDI") entered into and Amended Franchise Agreement ("Agreement") on June 6,
20 1996. The Agreement granted DDI the exclusive privilege for the collection and
21 disposal of all solid waste within East Fork Township, except as precluded by N.R.S.
22 244.188, or within the boundaries of the unincorporated towns of Minden and
23 Gardnerville. Agreement § II(a).
24

25 The Agreement does not preclude an individual from picking up and hauling
26

27 ¹Although the instant case only attacks the Agreement as violating the Commerce Clause, because the Agreement was made pursuant
28 to the Statute and Ordinance, the Court must undertake to analyze all the authorities together.

1
2 his/her own solid waste to a transfer station or governmentally approved landfill.
3 Agreement § II(c).

4 Plaintiff filed suit naming Wee Haul, LLC, and NJ Enterprises, Inc. seeking
5 injunctive relief and damages, averring that both companies had picked up and disposed
6 of solid waste within Plaintiff's exclusive franchise area, by leaving debris collection
7 boxes at construction sites for the disposal of construction debris.²

8
9 Plaintiff relies on N.R.S. 244.187³ and 244.188⁴ to bolster its argument that
10 County has authority to displace or limit competition for waste removal by the grant of
11 an exclusive franchise. Additionally, Plaintiff cites N.R.S. 444.490⁵ for the proposition
12 that construction waste is included within the definition of solid waste, and therefore
13 properly falls within the exclusive franchise granted to DDI.

14 Defendants contend construction waste is non-putrescible, does not pose a health
15

16
17 ²The actions, filed separately, as 03-CV-0299 and 03-CV-0298 were consolidated under Case No. 03-CV-0298.

18 ³**NRS 244.187 Displacement or limitation of competition: Services.** A board of county commissioners may, to provide
19 adequate, economical and efficient services to the inhabitants of the county and to promote the general welfare of those
inhabitants, displace or limit competition in any of the following areas:

20 ...
3. Collection and disposal of garbage and other waste.

21 ⁴**NRS 244.188 Displacement or limitation of competition: Areas in which authorized; methods; limitation.**

22 1. Except as otherwise provided in subsection 3 and NRS 269.128 and 269.129, a board of county commissioners
may, outside the boundaries of incorporated cities and general improvement districts:

23 (a) Provide those services set forth in NRS 244.187 on an exclusive basis or, by ordinance, adopt a regulatory scheme
for controlling the provision of those services or controlling development in those areas on an exclusive basis; or
24 (b) Grant an exclusive franchise to any person to provide those services.

25 ⁵**NRS 444.490 "Solid waste" defined.** "Solid waste" means all putrescible and nonputrescible refuse in solid or semisolid
26 form, including, but not limited to, garbage, rubbish, junk vehicles, ashes or incinerator residue, street refuse, dead
animals, demolition waste, construction waste, solid or semisolid commercial and industrial waste. The term does not
27 include hazardous waste managed pursuant to NRS 459.400 to 459.600, inclusive.

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or safety issue, and is thus outside the purview of County's police powers to regulate. That being the case, County exceeded its authority by restricting the flow of construction waste in the Agreement, that the restriction violates the Interstate Commerce Clause, and should be found unconstitutional. Plaintiff's Pre-Trial Stmt. 4:26-28.

The issue before the Court, therefore, is limited to the inclusion of non-putrescible construction debris in the Statue, Ord. 176 and the accompanying Agreement, and whether the Statute, Ord. 176 and the Agreement are subject to dormant Commerce Clause analysis, and if so, whether such analysis renders them unconstitutional.

DISCUSSION

A. Standing

Standing is the constitutional requirement, imposed by the "cases or controversies" provision of Article III, that a plaintiff must allege a judicially cognizable and redressable injury in order to pursue a lawsuit. *Ben Oehrleins and Sons v. Hennepin County*, 115 F.3d 1372, 1378 (8th Cir. 1997) cert. denied December 15, 1997, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). "To establish standing, a plaintiff must demonstrate three requirements: (1) an injury in fact that is both (a) concrete and particularized, and (b) actual or imminent, rather than conjectural or hypothetical; (2) a causal connection between the alleged injury and the defendant's conduct; that is, that the injury is fairly traceable to the challenged action; and (3) that it is likely that a favorable decision will redress the

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2 injury.” *Lujan*, 504 U.S. at 560-61.

3 Although it is normally a plaintiff who must establish standing, in the instant
4 case, Defendants are the party charging a violation of the Commerce Clause, thus it is
5 Defendants who must demonstrate standing to challenge County’s actions. Here, the
6 Court finds Defendants have sufficiently demonstrated standing by alleging an actual
7 economic injury by their exclusion from the collection of solid waste in East Fork
8 Township. This injury is traceable to the granting of the exclusive franchise agreement
9 by County to DDI, and a decision holding the Ordinance and resulting Agreement
10 unconstitutional would redress the claimed injury.
11

12 In addition to constitutional standing, parties alleging a violation of a
13 constitutional or statutory right must show prudential standing. *Ben Oehrlins & Sons*,
14 115 F.3d at 1379. No single formula is capable of answering every prudential standing
15 question, however, several considerations fall within general considerations of
16 prudential standing, that are typically invoked. *Conte Bros. Auto., Inc. v. Quaker State-
17 Slick 50, Inc.*, 165 F.3d 221, 225-226 (3d Cir. 1998). It is generally required (1) that a
18 litigant assert his own legal interest rather than that of a third party, (2) that the court
19 refrain from adjudicating abstract questions of wide public significance which amount to
20 a generalized grievance, and (3) that a litigant demonstrate that the asserted interests are
21 arguably within the "zone of interests" intended to be protected by the statute, rule or
22 constitutional provision on which the claim is based. *Id.* citing *Wheeler v. Travelers Ins.
23 Co.*, 22 F.3d 534, 538 (3d Cir. 1994).
24
25

26 The Court finds that Defendants here are asserting their own legal interests, that
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28

1
2 the issue presented to the Court rises beyond that of a mere generalized grievance, and
3 that the interest falls within the zone of interest intended to be protected. *See C.A.*
4 *Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed. 399
5 (1994) (“The central rationale for the rule against discrimination is to prohibit state or
6 municipal laws whose object is local economic protectionism, laws that would excite
7 those jealousies and retaliatory measures the Constitution was designed to prevent.”).
8 The Court finds there are no prudential barriers to standing in the instant case.
9

10 **B. The Dormant Commerce Clause**

11 The Commerce Clause provides, "Congress shall have Power . . . To regulate
12 Commerce with foreign Nations, and among the several States, and with the Indian
13 Tribes" U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause is primarily an
14 affirmative grant of power to Congress. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502,
15 508 (2d Cir. 1995). If Congress has not exercised its commerce powers in a given area,
16 states can generally legislate in that area until Congress chooses to override it. *Id.*
17

18 The Supreme Court has long held that this affirmative grant of power to
19 Congress contains negative implications that restrict states' power to regulate interstate
20 commerce. *Ben Oehrleins & Sons*, 115 F.3d at 1383. This “negative” aspect of the
21 Commerce Clause is referred to as the dormant Commerce Clause. *Id.*
22

23 **C. Commerce Clause Application to Waste Disposal**

24 In *Huish Detergents, Inc. v. Warren County, Ky.*, 214 F.3d 707, 713 (6th Cir.
25 2000), the court declared, “[a]s a preliminary matter, there is no question that a State
26 law restricting the interstate travel of waste implicates the Commerce Clause, and, as we
27

1
2 have indicated, this is equally so of a local ordinance....". The article of commerce is
3 not so much the solid waste itself, but rather the service of collecting, processing and
4 disposing of it. *Id.* citing *Carbone*, 511 U.S. at 390-91. *See also Ecological Sys. v. City*
5 *of Dayton*, 2002 Ohio 388 (Ohio Ct. App. 2002) citing *National Solid Wastes Mgt. Ass'n*
6 *v. Meyer*, 63 F.3d 652, 657 (7th Cir. 1995) (determining "the dormant Commerce Clause
7 applies with full force to state regulation of the collection, transportation, processing,
8 and disposal of solid waste").

9
10 As instructed by the U.S. Supreme Court and above-cited cases, the Court
11 determines that the issue of waste collection properly falls within the scope of the
12 dormant Commerce Clause analysis, and proceeds to determine the result of such
13 analysis.

14 **D. Market Regulation vs. Market Participation**

15
16 As a threshold matter, a court must determine whether a state or local
17 government is "regulating" and, if so, whether that regulation affects interstate
18 commerce. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261
19 F.3d 245, 254 (2d Cir. 2001).

20 Commerce Clause principles are not implicated when the State's activity can be
21 characterized as market participation rather than market regulation. *Huish*, 214 F.3d at
22 714. When a state engages in market participation, it enters the open market as a buyer
23 or seller on the same footing as private parties, thus there is less danger that the state's
24 activity will interfere with Congress' plenary power to regulate the market. *SSC Corp. v.*
25 *Town of Smithtown*, 66 F.3d 502, 510 (2d Cir. 1995) citing *Wisconsin Dep't of Indus.*,

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2 *Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289, 106 S. Ct. 1057, 89 L. Ed.
3 2d 223 (1986).

4 Factors that generally govern a court's analysis of the market participation
5 exception in the waste context include whether the state [or county] was spending its
6 own funds, or acting in a proprietary capacity by selling a resource that it owned or
7 produced. *Huish*, 214 F.3d 707, 714. If the municipality was acting as a market
8 participant with regard to its challenged actions, the court need not proceed to determine
9 whether the actions burdened interstate commerce in violation of the dormant
10 Commerce Clause. *Id.*

11
12 Contrariwise, "...a state regulates when it exercises governmental powers that
13 are unavailable to private parties." *SSC Corp.*, 66 F.3d at 512. Characteristics of
14 government regulation include the threatened imposition of fines and/or jail terms to
15 compel behavior. *United Haulers*, 261 F.3d at 255; *see also USA Recycling v. Town of*
16 *Babylon*, 66 F.3d 1272, 1282 (2d Cir. 1995) (the Town's decision to eliminate the
17 commercial garbage collection market constitutes "market regulation" rather than
18 "market participation"...Ba bylon has exercised its governmental powers by denying
19 licenses to all garbage haulers but the one hired by the Town, and by establishing civil
20 and criminal penalties for haulers who collect garbage without a license.)

21
22
23 The Court finds the decisions of *SSC Corp.* and *USA Recycling* helpful, and
24 opines that County's actions of enacting Ordinance 176 and the granting of an exclusive
25 franchise constitute market regulation, not market participation. County does not own
26 nor produce solid waste collection as a market participant would. However, County did

1
2 exercise its power granted to it by the Legislature, to preclude all trash haulers in East
3 Fork Township except DDI; an act that no other private party could have done. The
4 Ordinance and resulting Agreement, therefore, are subject to dormant Commerce Clause
5 analysis.

6
7 **E. Commerce Clause Analysis**

8 When reviewing an ordinance under a constitutional challenge, it is well
9 established that such ordinances enjoy a presumption of constitutionality and a court
10 must, if at all possible, construe the ordinance in a light most favorable to the enacting
11 legislative body. *Ecological Sys. v. City of Dayton*, 2002 Ohio App. LEXIS 354, *11
12 (Ohio Ct. App. 2002) citing *State v. Dorso*, 446 N.E.2d 449 (1983).

13 In applying the dormant Commerce Clause, courts have identified guiding
14 principles: limiting “protectionist” state legislation and fostering the development of a
15 unified national market. *SSC Corp.*, 66 F.3d at 509.

16
17 The dormant Commerce Clause analysis subjects local legislation to a two-
18 pronged inquiry: First, if a state law or local regulation discriminates against interstate
19 commerce in favor of local business or investment, it is *per se* invalid, except for a
20 narrow class of cases in which the municipality can demonstrate, under rigorous
21 scrutiny, that it has no other means to advance a legitimate local interest. *USA*
22 *Recycling*, 66 F.3d at 1281 citing *Hughes v. Okla.*, 441 U.S. 322, 336, 99 S. Ct. 1727, 60
23 L. Ed. 2d 250 (1979).

24
25 a. Part I

26 Initially, the party challenging the validity of a municipal ordinance bears the
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2 burden of showing that it discriminates against, or places a burden on interstate
3 commerce. *Id.* If the party establishes discrimination, the burden shifts to the state or
4 local government to show that the local benefits of the statute outweigh its
5 discriminatory effects, and that the state or municipality lacked a nondiscriminatory
6 alternative that could have adequately protected the relevant local interests. *Id.* at 1281-
7 82.

9 In the context of a dormant Commerce Clause analysis, whether an ordinance
10 has a discriminatory impact upon interstate commerce means there is “differential
11 treatment of in-state and out-of-state economic interests that benefits the former and
12 burdens the latter.” *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 128 L. Ed.
13 2d 13, 114 S. Ct. 1345, 1350 (1994); *Ben Oehrleins & Sons*, 115 F.3d at 1383; *United*
14 *Haulers*, 261 F.3d at 255; *Sherwin-Williams v. City & County of San Francisco*, 857 F.
15 Supp. 1355, 1365 (N.D.Cal. 1994). “[M]ost often, the only way to justify state or
16 local statutes that patently discriminate against interstate commerce is to do so on health
17 or safety grounds.” *Ecological Sys. v. City of Dayton*, 2002 Ohio 388 (Ohio Ct. App.,
18 2002); *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 790 (4th
19 Cir. 1991) (stating that Supreme Court acceptance of facial discrimination focuses on
20 the presence of a threat of disease or death if the statute is struck down as
21 unconstitutional).
22

23
24 In *Waste Mgt. Of Alameda County, Inc. v. Biagini Waste Reduction Systems*, 63
25 Cal. App.4th 1488 (1998), the city enacted an ordinance to create an exclusive franchise
26 for collection and disposal of solid waste and entered into an exclusive franchise
27

1
2 agreement with the plaintiff. The plaintiff sued the city to enforce the contract, alleging
3 the city contracted with others to collect and dispose of construction debris generated
4 within the city. In upholding the contract, court stated the ordinance treated local and
5 out-of-state garbage haulers identically, in that they were both precluded from collecting
6 or transporting garbage, yet both were both free to compete for the exclusive franchise
7 awarded to the plaintiff in the future. *Id.* at 1497.

9 In coming to its conclusion, the court looked to the fact that the ordinance and
10 associated agreement only regulated waste generated and processed in the city, did not
11 prevent citizens from disposing of their own waste at any facility, and did not force out-
12 of-state garbage collectors to purchase processing services from the local exclusive
13 franchisee. Based on the above factors, the court distinguished the granting of an
14 exclusive franchise agreement pursuant to an ordinance, from the type of flow control
15 ordinance declared unconstitutional in *Carbone*.⁶ The court stated, “[t]he fact that the
16 ordinance may burden interstate *companies*, however, does not alone establish
17

18 ⁶
19 In *Carbone*, the Court describe a flow control ordinance as that which require all solid waste to be processed at a
20 designated transfer station before leaving the municipality. 511 U.S. 383, 386. Although the Court in this case finds no
21 such provision in Ord. 176, the exclusive franchise Agreement contains the following clauses:

22 § II(b):
23 COUNTY does hereby grant COMPANY during the term hereof the exclusive
24 right or privilege to operate a “transfer/compaction” station, wherein the solid
25 waste will be initially deposited before it is transported by COMPANY to the
26 Landfill.

27 § III(a):
28 COUNTY does hereby direct COMPANY to dispose of all solid waste picked
up by COMPANY and by the towns of Minden and Gardnersville together with
any other solid waste deposited at the transfer station, at the Landfill owned and
operated by REFUSE, INC.

On their face, the clauses appear to direct the flow of waste as was discussed in *Carbone*. The Court declines to render
any opinion regarding the constitutionality of the clauses, as the issue is not presently before the Court. However, the
Court encourages County to reexamine this language at the time the Agreement is renewed to ensure the language of the
Agreement passes constitutional muster.

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2 discrimination against interstate commerce...or protect particular interstate firms from
3 prohibitive or burdensome regulations.” *Id.* at 1496. (Emphasis original).

4 Similarly, in *USA Recycling*, the Town of Babylon granted an exclusive license
5 for waste collection services to a private local hauler. The plaintiffs, other waste hauling
6 companies, claimed their exclusion from the market facially discriminated against
7 interstate commerce because it favored a single hauler over all in-state and out-of state
8 competitors, violating the dormant Commerce Clause. The court found that the Town
9 did not in any way favor in-state competitors over out-of-state competitors, but
10 eliminated the commercial garbage market completely. The court stated, “Town’s
11 decision to hire an outside firm to provide services is quite unremarkable. State
12 governments have turned to the private sector to ‘contract out’ or ‘outsource’ numerous
13 governmental functions, including... the field of waste disposal.” *Id.* at 1284.

14
15
16 In the instant case, the Court finds that the Statutes, Ord. 176 and the Agreement
17 between DDI and County do not discriminate against interstate commerce in favor of
18 local business or investment. Any discrimination in favor of DDI for collection of solid
19 waste in East Fork Township is spread even-handedly among in-state and out-of-state
20 haulers. The Defendants have not demonstrated facial discrimination, therefore, the
21 burden does not shift to Plaintiff to prove the local benefits of the ordinance outweigh its
22 discriminatory effects. However, if Defendants were able to show facial discrimination,
23 the Court believes Plaintiff could not justify patent discrimination against interstate
24 commerce on health or safety grounds as shown by the Court’s analysis in Part II.

25
26 b. Part II

1
2 The second prong of inquiry was announced in *Pike v. Bruce Church, Inc.*, 397
3 U.S. 137, 90 S.Ct. 844, 25 L. Ed.2d 174 (1970), and provides that nondiscriminatory
4 regulations with incidental effects on interstate commerce are subject to a less rigorous
5 balancing test. The law will be held valid unless the burden imposed is clearly
6 excessive when balanced against the intended local benefits. *Waste Mgt.*, 63 Cal.
7 App.4th at 681.
8

9 The "incidental burdens" which *Pike* refers to "are the burdens on interstate
10 commerce that exceed the burdens on intrastate commerce." *USA Recycling*, 66 F.3d at
11 1287; see also *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th
12 Cir.) (explaining that "incidental burdens" on interstate commerce include disruption of
13 interstate travel and shipping due to lack of uniformity in state laws, impacts on
14 commerce beyond the borders of the state, or burdens that fall more heavily on out-of-
15 state interests).
16

17 In *Individuals for Responsible Gov't v. Washoe County by & Through the Board*
18 *of County Comm'rs*, 110 F.3d 699, 704 (9th Cir. 1997), the Washoe County Board of
19 County Commissioners ("Commissioners") enacted an Ordinance granting Washoe
20 County and its authorized agents or contractees the exclusive right to gather, collect and
21 haul garbage in certain unincorporated areas of Washoe County.⁷
22

23 One of several arguments advanced by plaintiffs, was that Washoe County
24 exceeded its police powers and the authority granted to it by N.R.S. 244.187, the same
25 statute DDI relies on in the instant case. 110 F.3d at 704. Although the District Court

26 ⁷ Thereafter, in 1992, Washoe County granted Independent Sanitation an exclusive franchise to operate all
27 garbage collection and disposal services in the unincorporated areas of Washoe County. 110 F.3d n.11.
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2 of Nevada ultimately found plaintiffs' police power argument without merit, the court
3 indicated, "[i]f the ordinance was (1) within the scope of the authority granted the
4 county by the state government, (2) aimed at serving some legitimate public purpose and
5 (3) rationally related to that purpose, this court will not second-guess the county
6 government." *Id.*
7

8 This Court is not persuaded by the holding in *Individuals for Responsible Gov't*,
9 but finds that County did exceed its authority by including non-putrescible construction
10 debris in the exclusive franchise agreement.

11 As NRS 244.187, sets forth *supra*, a county may limit competition in part to
12 promote the general welfare of the inhabitants. Although the police power cannot
13 justify the enactment of unreasonable, unjust or oppressive laws, it may legitimately be
14 exercised for the purpose of preserving, conserving and improving public health, safety,
15 morals and general welfare. *State v. Eighth Judicial Dist. Court*, 101 Nev. 658 citing
16 *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).
17

18 In *Parker v. Provo City Corp.*, 543 P.2d 769 (Utah 1975), Utah Supreme Court
19 reached the same conclusion. Plaintiff Parker was engaged in the business of hauling
20 waste material from its customers private premises in Provo City, Utah. Defendant City
21 claimed pursuant to its ordinance, it had the power to prevent plaintiff from engaging in
22 business within the city limits, and the trial court agreed.⁸ The Utah Supreme Court
23 reversed, finding that the waste material at issues consisted of corrugated cardboard,
24

25 _____
26 ⁸ The amended ordinance read: "It shall be unlawful for any person, firm, or corporation, other than the
27 waste removal department of Provo City, to collect, remove, or dispose of garbage, or waste matter, within
28 the limits of Provo City on a commercial basis or for hire."

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sawdust, lumber scraps, plastic wrappings, packing material of various natures, paper, tin cans, bottles, some paint and varnish containers and general rubbish. The court opined, that “[n]owhere in the record do we find that this waste is garbage, kitchen refuse, or a by-product which may be deemed deleterious to the public health.” *Id.* at 769-70. The court went on to note that although the claim was set forth as one involving a health measure, the record disclosed more concern for the convenience and economics of the waste disposal department than for the promotion of the public health. Finally, the court indicated that Plaintiff’s actions were a legitimate endeavor, the prohibition of which, did not bear a reasonable relation to the public health, therefore the defendant could not use its power to protect the public health to invade a private property right. *Id.* at 770.

In the case at bar, there is no indication that when the Nevada Legislature granted the authority to displace competition for the “[c]ollection and disposal of garbage and other waste” in **NRS 244.187**, that it intended to include all types of solid waste, namely **construction debris** under **NRS 444.490**. This Court finds that non-putrescible construction debris is not injurious to the public health, and therefore falls outside the County’s police power to include in a waste hauling exclusive franchise agreement. Therefore, the Court finds unconstitutional any construction or application of the phrase “other waste” in NRS 244.187(3) to include construction debris in NRS 444.490.

As in the foregoing cited authorities, and applying the *Pike* balancing test, the Court believes that the burden imposed by excluding Defendants from hauling

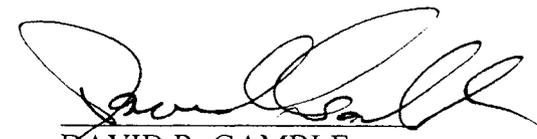
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construction debris is clearly excessive when balanced against the intended local benefit of promoting the general welfare.

Therefore, it is hereby ORDERED, ADJUDGED AND DECREED:

That Plaintiff's claim for injunctive relief is denied; and Defendants are hereby permitted to continue collecting construction debris within Plaintiff's exclusive franchise area as designated in the Agreement.

Dated this 20 day of January, 2005.

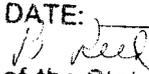

DAVID R. GAMBLE
District Judge

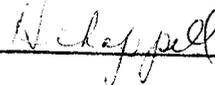
Copies served by mail this 20 day of January, 2005, to: Jeffrey Rahbeck, Esq., P. O. Box 435, Zephyr Cove, NV 89448; Treva Hearn, Esq., Robert Hager, Esq., 910 E. Parr Blvd., Suite 8, Reno, NV 89512.



CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: Jan 24, 2005
 Clerk of the Judicial District Court of the State of Nevada, in and for the County of Douglas,

By  Deputy

DECLARATION OF SERVICE

FILED
JUL - 6 2005
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON

I, Yvonne Maletic, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On July 6, 2005, a true copy of the foregoing Statement of Additional Authorities was placed in envelopes addressed to the following persons:

Polly McNeill
Summit Law Group, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104-2682

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

James K. Sells
Ryan Sells Uptegraft, Inc. PS
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Timothy Harris
P.O. Box 1909
Olympia, WA 98507

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600 – 4th Ave., 4th Floor
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David W. Wiley
Dana A. Ferestein
Williams, Kastner & Gibbs, PLLC
Two Union Square, Suite 4100
Seattle, WA 98111-3926

which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Seattle, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 6th day of July 2005 at Seattle, Washington.



Yvonne Maletic