

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

11-8-2007

Summary of Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. Adv. Op. No. 51

Nevada Law Journal

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Nevada Law Journal, "Summary of Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. Adv. Op. No. 51" (2007). *Nevada Supreme Court Summaries*. 767.

<https://scholars.law.unlv.edu/nvscs/767>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. Adv. Op. No. 51 (2007)¹

**CONSTITUTIONAL LAW – POLICE POWERS OF THE STATE AND THE
DORMANT COMMERCE CLAUSE - CONSTRUCTION WASTE COLLECTION AND
DISPOSAL**

Summary

Appeal of a district court decision denying a request for injunction and damages against a company acting in violation of a Douglas County ordinance in the collection and disposal of construction waste.

Disposition/Outcome

Reversed. The Nevada Supreme Court first held that construction waste regulation is a proper exercise of the county’s police powers because construction waste poses public health and safety concerns. Second, in granting an exclusive franchise agreement to collect and dispose of construction waste the Court concluded that the County had appropriately exercised its police power. And, third, the Court determined that the exclusive franchise agreement granted by the County to Disposal for the collection and disposal of construction waste did not violate the dormant Commerce Clause.

Factual and Procedural History

Under an ordinance enacted in 1996, Douglas County (the County) entered into a franchise agreement that granted Douglas Disposal, Inc. (Disposal) the exclusive privilege to collect and dispose of all solid waste within the East Fork Township of the county. Subsequently, Wee Haul, LLC, and NJ Enterprises, competitors to Disposal, commenced operating within the exclusive franchise area. Their operations, unauthorized by the County, included the removal and disposal of construction waste that they hauled to local landfills, as well as to landfills in California.

Based on its exclusive franchise agreement, Disposal commenced an action requesting injunctive relief and damages to prohibit Wee Haul and NJ Enterprises from continuing the collection and disposal of construction waste. Disposal subsequently filed a “Motion for Judgment on the Pleadings and/or for Partial Summary Judgment.” Wee Haul and NJ Enterprises argued in opposition that Disposal did not have an exclusive franchise to collect and dispose construction waste within the township because the ambiguous nature of the franchise agreement’s language failed to include construction waste. In the alternative, Wee Haul and NJ Enterprises argued in their pretrial statement that the agreement was unenforceable, even if it included construction waste, because it violated the dormant Commerce Clause and because the County exceeded its police powers in granting the exclusive franchise. Disposal countered, arguing the merits of the dormant Commerce Clause violation.

The district court found that regulation of non-putrescible construction waste falls outside the scope of the County’s police powers because it is not injurious to public health. It further

¹ By Candace Oranges.

concluded that an exclusive franchise agreement to collect and dispose of construction waste violates the dormant Commerce Clause because it places an excessive burden on interstate commerce. Therefore, the district court denied Disposal's request for an injunction and damages.

Discussion

In this appeal, the Nevada Supreme Court considered (1) whether construction waste poses risks to the health and safety of the public; (2) whether the County may regulate, under its police powers, the collection and disposal of such waste through an exclusive franchise agreement; and (3) whether such an agreement violates the dormant Commerce Clause.

Disposal raised the following four arguments: (1) that Wee Haul and NJ Enterprises failed to properly assert their constitutionally based defenses in their answers as affirmative defenses and thereby waived them; (2) that the County possesses the authority to enter an exclusive franchise agreement for collection and disposal of waste, including construction waste; (3) that the agreement secured between the parties grants Disposal an exclusive franchise to collect and dispose of construction waste;² and (4) that the agreement does not violate the dormant Commerce Clause. The Nevada Supreme Court agreed with Disposal arguments with the exception of the issue of waiver.

In review of the constitutionality of statutes, the Court defers to the state with a presumption that the statutes are valid.³ The challenger assumes the burden to make a clear showing of their unconstitutionality.⁴

Alleged Waiver Pursuant to NRCP 8(c)

Disposal first argued that Wee Haul and NJ Enterprises waived their constitutional defenses, that the County exceeded its police power in granting an exclusive franchise agreement and the franchise agreement violated the dormant Commerce Clause, in failing to assert them as affirmative defenses in their answers.⁵

The Court disagreed with this argument. The Court reasoned that although Wee Haul and NJ did not assert any affirmative defenses in their answers, their opposition to Disposal's "Motion for Judgment on the Pleadings and/or for Partial Summary Judgment" raised the constitutional issues. Therefore, Disposal effectively had notice of the constitutional arguments, thereby duly enabling it to argue the merits of them.

Construction Waste Poses Public Health and Safety Concerns

As a threshold issue to the determination of proper exercise of police powers, the district court determined that non-putrescible construction waste did not pose public health and safety risks and therefore remained outside the scope of the County's police powers.

² The Court determined it unnecessary to reach this issue because the district court did not address this issue. *See e.g.*, *American Home Insurance Co. v. Dist. Ct.*, 122 Nev. ___, ___ n. 51, 147 P.3d 1120, 1130 n.51 (2006).

³ *Sheriff v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002) (quoting *Childs v. State*, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991)(alteration in original)).

⁴ *Id.*

⁵ *See* NEVADA RULES OF CIVIL PROCEDURE 8(c).

The Court disagreed with this determination because contrary to the district court's finding construction waste contains not only materials hazardous to human health but also those that potentially create dangerous conditions such as fire hazards or animal habitats. Furthermore, the Court found the accumulation of construction waste to create a public nuisance, which would certainly be subject to county regulation.⁶ Therefore, the regulation of the collection and disposal of construction waste falls within the scope of the County's police power.

The County Has the Authority to Grant an Exclusive Franchise Over Waste Collection and Disposal

Disposal's second argument was that the County exceeded its police power authority in granting an exclusive franchise for the collection and disposal of construction waste. The Nevada Supreme Court agreed with this argument. The police power of the states encompasses the authority to enact laws to protect the safety, health, morals, and general welfare of society.⁷ Furthermore, because of the police power conferred on the states, municipalities possess the authority to enact ordinances that seek to protect public health and welfare, even if the ordinances infringe on private property rights.⁸ Nevada Revised Statutes Chapter 444, which seeks to protect the public health and welfare, to prevent water and air pollution, the spread of disease, and the creation of nuisances, to conserve natural resources, and to enhance the beauty and quality of the environment,⁹ obligates local governments¹⁰ to develop waste management plans for the adequate management and disposal of solid waste, including construction waste,¹¹ within counties, cities, and towns. Additionally, NRS 244.187(3) and NRS 244.188(1)(b) authorize counties to grant exclusive franchises for the collection and disposal of garbage and "other waste"¹² construction waste which the court interpreted to include construction waste. Therefore, the Court concluded that counties may grant exclusive franchise agreements that include construction waste.

Here, the Court determined that the County developed a waste management plan by granting Disposal an exclusive franchise agreement for the collection and disposal of all solid waste, including construction waste, within the franchise area. The County acted within its authorization under NRS 244.187(3) and 244.188(1)(b) to include an exclusive franchise agreement. Accordingly, the Court concluded that the County was authorized to enact an ordinance granting an exclusive franchise agreement with Disposal for the collection and disposal of waste, including construction waste.

⁶ See *City of Spokane v. Carlson*, 436 P.2d 454, 456-58 (Wash. 1968) (holding that an ordinance enacted by Spokane, which provided that Spokane was the exclusive trash services provider to its residents, including disposal of inorganic refuse, was a valid exercise of Spokane's police power for health, sanitation, or safety); *City of Chicago v. Krisjon Const. Co.*, 617 N.E.2d 21, 26 (Ill. Ct. App. 1993) (determining that excessive quantities of construction debris and inefficient and improper methods of its disposal result in scenic blight, cause serious health hazards to public health and safety, and create public nuisances).

⁷ *Kirkpatrick v. Dist. Ct.*, 119 Nev. 66, 70, 63 P.3d 1056, 1059 (2003).

⁸ *Reduction Company v. Sanitary Works*, 199 U.S. 306, 323-24 (1905); see *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073, 1082 (1st Cir. 1993) (concluding that a municipality could lawfully regulate waste control for public health reasons, even if the ensuing regulations "severely limit[ed] the value of an ongoing business"); *State v. Park*, 42 Nev. 386, 392, 178 P. 389, 391 (1919).

⁹ NEVADA REVISED STATUTES § 444.440 (1971).

¹⁰ § 444.510 (1993).

¹¹ § 444.490 (1981).

¹² § § 244.187(3) (2005), 244.188(1)(b) (2001).

The County's Exclusive Franchise Agreement Does Not Violate the Dormant Commerce Clause

Disposal also argued that the district court erred in finding the exclusive franchise agreement violated the dormant Commerce Clause. The Nevada Supreme Court agreed with this argument. The Commerce Clause of the United States Constitution which gives Congress the power to regulate interstate commerce,¹³ has also been interpreted to grant Congress the implicit power, known as the dormant aspect of the Commerce Clause, to prohibit the states from impeding the flow of interstate commerce thereby advantaging themselves and their own commercial interests.¹⁴

The dormant aspect of the Commerce Clause may be used to invalidate state statutes that discriminate on their face or through their purpose.¹⁵ To determine whether a violation has occurred, Courts engage in a two-level analysis: (1) whether the statute facially discriminates against interstate commerce; and if the statute facially does not discriminate, then (2) whether the statute as applied unduly burdens interstate commerce.¹⁶

With respect to the first level of the analysis, the Court concluded that the exclusive franchise agreement facially does not discriminate against interstate commerce. The agreement does not contain any overt language that seeks to impede the flow of interstate commerce or advantage the commercial interests of the state. Therefore, the Court proceeded to the second level of the analysis.

With respect to the second level of the analysis, the Court concluded that the exclusive franchise agreement does not unduly burden interstate commerce. The Court employed the three additional criteria set forth in *Pike* to determine the extent of burden on interstate commerce: (1) the nature of the municipality's interest in enacting the legislation; (2) the extent of the burden on interstate commerce created by the legislation; and (3) whether the interest in enacting the legislation could have been served by a less impactful alternative.¹⁷

First, the Court determined that waste management and collection is a proper exercise of police powers in the interest of public safety and welfare even if somewhat burdensome to interstate commerce. Therefore, the Court concluded that the exclusive franchise agreement advances a legitimate state interest and meets the first factor of the *Pike* standard.

Second, the Court determined that the County was authorized to grant an exclusive franchise to Disposal, which prohibited other in-state or out-of-state garbage collectors from engaging in the same commercial activity. Therefore, the Court concluded that the exclusive franchise agreement applied equally to intrastate and interstate firms and thereby does not place unfairly burden interstate commerce.

Third, the Court determined that Wee Haul and NJ Enterprises failed to raise this argument. Therefore, the Court declined consideration of this third element.

¹³ U.S. CONST. art. I, § 8, cl. 3.

¹⁴ *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 98 (1994); *National Solid Wastes Management Ass'n v. Meyer*, 63 F.3d 652, 657 (7th Cir. 1995) (quoting *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359 (1992)).

¹⁵ *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); see *Ben Oehrleins & Sons & Daughter v. Hennepin County*, 115 F.3d 1372, 1383 (8th Cir. 1997).

¹⁶ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁷ *Id.*; see also *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1013-17 (9th Cir. 1994); *Waste Mgmt. v. Biagini Waste Reduction*, 74 Cal. Rptr. 2d 676, 683-84 (Ct. App. 1998).

Conclusion

In reversing the decision of the district court, the Nevada Supreme Court held that the County's has properly exercised its police power in regulating construction waste, because of its injurious nature. The Court also held that the exclusive franchise agreement Douglas County granted to Disposal was an appropriate exercise of its police power. Further, the Court concluded that the exclusive franchise agreement granted to Disposal does not violate the dormant Commerce Clause. Thus, the Court remanded this matter to the district court proceedings consistent with its opinion.