

# THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Garbage Wars Episode V: The Supreme Court reinvigorates flow control

BY RONALD G. HULL

Daily Record Columnist

As we commemorate the 30th anniversary of the cultural phenomenon of "Star Wars" (Confess — who doesn't have a plastic light saber squirreled away somewhere?), the U.S. Supreme Court has revisited another force from the 1970s — "Garbage Wars."

A recent decision may come to be valued more for the insight it provides on the workings of the Roberts court than for its practical impact on the management of solid waste. In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority* (April 30), the Supreme Court finally resolved a bitter battle over local governments' right to adopt flow control ordinances requiring all solid waste generated within municipal borders (in this case, the combined counties of Oneida and Herkimer) to be delivered to a particular site for processing and disposal.

Once upon a time and in a mindset that seems very far away from current thinking, nearly all garbage was disposed of within local dumps. More than a thousand of these small landfills, most public but some private, dotted the New York landscape.

In the 1970s, as our eyes opened to the impact these primitive facilities were having on surface water, air and groundwater, the newly-formed Department of Environmental Conservation began a campaign to transform the dumps into modern landfills, or close them down. They were closed by the hundreds, precipitating a garbage disposal crisis.

There was both a public and private response to the crisis.

On the public side, the Legislature mandated that every county come up with a plan for managing solid waste generated within its borders.

Out of this effort came multi-county compacts, such as Oneida-Herkimer, and single county-owned facilities such as Mill Seat Landfill in Monroe County, as well as non-landfill options such as mass combustion.

Local government naturally sought to pay for and ensure

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the long-term viability of these costly facilities by controlling the flow of solid waste.

At the same time, the private landfills that survived over time transformed into well-managed, state-of-the-art disposal facilities that grew into regional businesses in order to attract the volume of waste necessary to pay for the engineering and technology that are part and parcel of today's solid waste management facilities. Still, almost without exception, private enterprise was able to offer disposal at lower costs than publicly-owned and operated facilities, leading to the conflicts that spawned decades' long litigation over whether flow control is or is not permissible under the Dormant Commerce Clause of the U. S. Constitution.

The first phase of that litigation was decided in 1994 in *C&A Carbone, Inc. v. Clarkstown*, 511 US 383, where the Court held that an ordinance forcing haulers to deliver waste to a nominally private facility (owned and operated pursuant to a contract that required the owner to deed the facility to the Town of Clarkstown after five years) discriminated against interstate commerce.

Undaunted, Oneida-Herkimer enacted a very similar form of flow control to favor a facility that was publicly-owned and operated from day one. Based solely on that distinction, on April 30 the Supreme Court voted 6-3 that Oneida-Herkimer's scheme passes constitutional muster.

Will the decision usher in a new spate of flow control ordinances? Ironically, while the litigation has perked along for the past dozen years, the industry has transformed and private enterprise has predominated.

As private companies have become more expert and efficient at managing and disposing of solid waste, governments have found the burden of maintaining expertise and operating these facilities to be onerous, uneconomical and a greater than expected burden on taxpayers. Nationwide, perhaps only 20 percent of solid waste facilities are publicly owned, and even fewer are publicly-operated.

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A new paradigm of public/private partnership, where publicly-owned facilities are privately managed under a long-term lease or contract, has emerged. In our area, public landfills in Monroe, Ontario and Chemung counties all fall in this new category, and whether flow control could be invoked to prop up these arrangements raises a question that falls between *Carbone* and *United Haulers* and, so, remains unanswered.

The broader impact of *United Haulers* relates to the Dormant Commerce Clause in general. Justices Antonin Scalia and

Clarence Thomas are ready to abandon the dormant Commerce Clause altogether, while Justices Samuel Alito, John Paul Stevens and Anthony Kennedy would not only continue the limitations on state and local legislation, but expand the scope to include publicly-owned enterprises. Chief Justice John Roberts' plurality opinion attracted only three supporters.

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