

PANNONE LOPES DEVEREAUX & WEST LLC

Tel 212 791 1860
Fax 646 845 7346

Pannone Lopes Devereaux &
West LLC
100 Church Street
8th Floor
New York, NY 10007

Memorandum

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Attorney Work Product**

To: Brad Smith
Stearns and Wheeler/GHD

From: Josh J. Meyer, Esq.
William A. Lawrence, Esq.

Re: Analysis of Flow Control
Implementation in Broome County

Background

Broome County is considering implementing flow control regulations to address its solid waste management needs. The County requested that Pannone, Lopes, Devereaux & West, LLC [New York, New York] complete an analysis of the various issues and benefits and drawbacks of flow control in the event it decides to implement such regulations. Accordingly, set forth below is a discussion of flow control, considerations associated with implementation of flow control regulations, issues to consider going forward, and a summary of the Madison County, New York flow control law (a community with similar solid waste programs).

Flow Control - Overview

Flow control refers to the ability of local governments and agencies to mandate — through laws or other regulations — that all locally-generated solid waste be delivered to designated solid waste management facilities. Until the United States Supreme Court's recent decision in *United Haulers Association, Inc. et al v. Oneida-Herkimer Solid Waste Management Authority, et al.*, 127 S.Ct. 1786 (2007), the prevailing view was that most flow control laws were unconstitutional because such laws imposed an impermissible burden on interstate commerce. That view had been endorsed by the Supreme Court's opinion in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). In *United Haulers*, the Supreme Court held that it is legally permissible for a local government to require that municipal solid waste be processed at a designated publicly-owned and operated solid waste management facility. Accordingly, municipalities throughout the country have started enacting their own flow control regulations.

Flow Control – Brief Legal History

Pursuant to the Commerce Clause of the United States Constitution, Congress has the power to regulate commerce among the several states. To ensure that the states do not impinge on the duties of Congress with respect to regulation of commerce, the judiciary created the

“dormant” Commerce Clause, which invalidates laws that result in “differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter.” (*Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 [1994]). Such discriminatory laws, typically “motivated by simple economic protectionism[,] are subject to a virtually per se rule of invalidity.” (*Oregon Waste Systems*). As explained by the United States Supreme Court in *HP Hood & Sons, Inc. v. Dumond* (336 U.S. 525 [1949]), the dormant Commerce Clause seeks to ensure that “every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them.” Given their perceived effect on the interstate marketplace, flow control measures — as had been in effect in the 1980s and early 1990s — were targeted for, among other things, dormant Commerce Clause challenges.

In the most notable dormant Commerce Clause challenge to flow control measures prior to the *United Haulers* decision, the United States Supreme Court held in *C&A Carbone, Inc. v. Town of Clarkstown* that flow control laws were unconstitutional because such laws imposed an impermissible burden on interstate commerce. In *Carbone*, the Town of Clarkstown, New York, engaged a private contractor to build and operate a solid waste transfer station. To alleviate the cost of building the facility, the Town of Clarkstown and the contractor agreed that the contractor would own and operate the facility for five years. During that period the contractor could charge the haulers who delivered the waste to the facility a fee, commonly known as a tipping fee, and would be entitled to the revenue generated by those fees. To ensure the contractor recouped the cost of building the facility, the Town passed a flow control law that required all non-hazardous solid waste generated within the Town to be delivered to the transfer station for five years.

The Clarkstown flow control law prohibited haulers of solid waste from obtaining processing services from any vendor other than the local contractor selected by the town. Haulers could not deliver waste to out-of-state facilities even if such facilities had lower tipping fees. The Clarkstown flow control law therefore conferred an exclusive economic benefit on a local contractor by “depriv[ing] out-of-state businesses of access to a local market.” (*Carbone*, 511 U.S. at 389). Based on these facts, the United States Supreme Court determined that the Clarkstown flow control law was invalid on the ground that “state and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities.” (*Carbone*, 511 U.S. at 394).

Because the 1994 *Carbone* decision was interpreted as supporting the proposition that all flow control measures were inherently unconstitutional, it effectively eliminated flow control measures for municipalities throughout the United States. Indeed, for the subsequent seven years following *Carbone*, municipalities steadfastly avoided enactment or enforcement of direct flow control measures. In 2001, however, the sweeping interpretation of *Carbone* was challenged. And, in 2007, it was ultimately refuted by the United States Supreme Court's decision in *United Haulers Association, Inc. et al v. Oneida-Herkimer Solid Waste Management Authority*.

In *United Haulers*, the counties of Oneida and Herkimer, New York each enacted flow control ordinances that authorized the counties to direct solid waste generated within the counties

to designated solid waste management facilities. Unlike the town of Clarkstown in *Carbone*, however, Oneida and Herkimer counties only designated facilities that were owned by the Oneida-Herkimer Solid Waste Authority, which is a state-created public benefit corporation. As acknowledged by the Court, this was the “only salient difference” between the laws enacted by Oneida and Herkimer Counties and the flow control laws that were invalidated in *Carbone*. In the Court’s estimation, however, this sole difference was “constitutionally significant.” The Court held that because the Oneida-Herkimer flow control laws excluded all private entities to the benefit of a system of publicly-owned facilities, the laws did not result in differential treatment of in-state and out-of-state businesses because all private companies were treated in the same manner. *United Haulers*, therefore, supports the proposition that flow control measures that direct solid waste to publicly-owned solid waste management facilities do not violate the dormant Commerce Clause, and are constitutional notwithstanding the United States Supreme Court's decision in *Carbone*.

In light of the *United Haulers* decision, municipalities are once again free to explore flow control options. At the very least, the decision makes clear that flow control measures that direct solid waste to publicly-owned and operated solid waste management facilities will pass constitutional muster. The decision also appears to support the constitutionality of flow control measures that direct solid waste to publicly-owned, but privately-operated solid waste management facilities. Indeed, the decision arguably broadly stands for the proposition that laws that enable public entities to fulfill their public duties are constitutional — at least with respect to the dormant Commerce Clause. Accordingly, municipalities across the country are developing and implementing flow control measures in accordance with *United Haulers* to benefit their solid waste management systems.

Flow Control – Benefits

Flow control is an essential tool, without which municipalities may find it more difficult to fulfill their responsibilities to plan for the management of municipal solid waste. Flow Control is necessary to ensure the financing of existing facilities within the municipalities and to meet the responsibilities of municipalities to sustain old disposal sites. Municipalities also are obligated to provide and/or fund all supplementary waste management services, such as household hazardous waste collection, curbside recycling programs, and community education programs. Flow Control is essential to keep municipalities from going bankrupt trying to fulfill these obligations, in addition to covering the costs of meeting regulatory requirements, planning, and public participation in decision-making activities. Flow control provides for various economic benefits, such as economies of scale in operation of solid waste management facilities. Greater throughput allows for a decrease in per ton costs for disposal at facilities and recyclables revenue can increase.

Aside from ensuring the financial viability of municipal solid waste management systems, flow control measures provide municipalities with greater control and oversight of the solid waste generated within their jurisdictions. Flow control measures therefore allow municipalities to better protect the health, safety, and welfare of their citizens. Indeed, by thoroughly regulating disposal of solid waste through flow control measures, municipalities can

ensure that solid waste is disposed of in a safe and environmentally-sound manner. Flow control measures also serve to protect natural resources by allowing municipalities to designate disposal sites in specific areas that must meet certain environmental standards. Such measures additionally provide municipalities with sufficient revenue to pursue alternative technological solid waste disposal methods that would be otherwise unattractive to private entities due to their prohibitive costs.

Of the many laudable goals that may be achieved through the adoption and enforcement of flow control measures, an increased rate of recycling is perhaps the most significant, given current environmental concerns. By allowing municipalities to control and inspect all the solid waste generated within their jurisdictions, flow control measures permit municipalities to implement recycling programs that would otherwise be unmanageable. For example, flow control measures increase the rate of recycling by (1) creating incentives for citizens to recycle (flow control measures are often drafted to exempt from tipping fee requirements disposal of recyclable materials, thus encouraging citizens to separate their recyclables from their solid waste) and (2) allowing municipalities to better enforce their recycling laws by requiring all solid waste to be delivered to designated publicly-owned solid waste management facilities. Flow control measures and their resulting increased rate of recycling allow municipalities to better conserve their resources and protect the local environment.

Flow Control – Issues

One important issue to consider is how to monitor waste collectors and haulers to ensure that they bring solid waste and recyclables to designated publicly-owned solid waste management facilities. Like other municipalities, Broome County must also consider whether and to what extent a flow control law could conflict with another existing law, such as a provision of health code.

Consideration must also be given relative to flow control law's impact on existing solid waste collection contracts. If a collection contract specifies that solid waste collected in a municipality must be taken to a transfer station or other solid waste facility that is privately owned, the likely impact by a flow control law is that the waste may be redirected to a publicly-owned solid waste facility. The impact to the hauler, if any, likely would result from a higher tip fee at the publicly-owned solid waste facility, and an increase in transportation costs if the publicly-owned facility is farther than the facility designated in the contract. While the hauler is unlikely to prevail on a constitutional challenge to the flow control law, presumably it would seek to pass these increased costs onto the municipality.

Flow Control – Implementation

As explained by the Supreme Court in the *United Haulers* decision, local governments' authority to enact flow control is derived from their police power. It is therefore essential for municipal governments interested in enacting legally sustainable flow control laws to demonstrate the relationship between the proposed flow control regime and the health, safety and welfare of their citizenry. Accordingly, it is recommended that a findings statement should be

prepared that establishes the public policy basis for restructuring the municipality's solid waste management system. The findings statement should discuss the legitimate governmental objectives that will be achieved through the implementation of flow control. Furthermore, the findings statement should, to the extent possible, provide persuasive evidence of community support for the creation and development of an integrated public solid waste management system. Additional items that may be appropriate for inclusion in the findings statement are:

- A technical description of the proposed integrated system and an examination of how such a system would operate to the benefit of the public;
- A technical assessment of existing publicly-owned solid waste management facilities and a discussion of their proposed role in an integrated waste management system;
- Evaluation of the perceived benefits of a public system as compared to waste management services provided by the private sector;
- Discussion of public health and environmental benefits of an integrated public system;
- Perceived economic benefits of an integrated system to the public;
- A clear presentation of the reasons why flow control would be good for the current and future needs of the County;
- A draft of amended flow control legislation

This local Solid Waste Management Plan Update identifies the County's current and future solid waste management needs. The County also must consider its policy with respect to recyclable materials and whether such materials would continue to be disposed of at private facilities. The County should also consider potential political issues involved with the implementation of flow control regulations and the impact of such regulations on the private solid waste industry.

Interestingly, it appears that the authority to implement flow control measures is already contained in the Broome County Solid Waste Code. Section 179-14 (B)(1) provides:

“The County Executive (Executive) or his designee, which designee must be an officer or agent of the county, is hereby authorized and directed to designate, by written statement, from time to time, one or more solid waste management - resource recovery facilities to be used for the disposal of solid waste generated, originated or brought within the County of Broome, which designation may include a determination that a particular solid waste management - resource recovery facility shall be the only facility used for the disposal of solid waste generated, originated or brought within all of, or a described area within, the County of Broome or by a particular person or persons. Such written designation of a facility shall be filed with the Clerk of the Broome County Legislature and

shall become effective within 60 days of filing, unless rescinded or modified by appropriate resolution of the Broome County Legislature.”

Flow Control Alternatives – Economic Flow Control

Economic flow control can be achieved when the costs of disposing of solid waste at government-owned facilities are lower than the costs of disposing of solid waste at alternative privately-owned facilities (similar to Broome County’s past experiences); the disparity creates an incentive for haulers to dispose at the government-owned facilities. See Geoffrey L. Oberhaus, *The Dormant Commerce Clause Dumps New Jersey's Solid Waste "Flow Control" Regulations: Now What? Possible Constitutional Alternatives to the Current "Flow Control" System*, 29 RUTGERS L.J. 439, 459 (1998). The problem with achieving economic flow control, of course, is that it can be difficult for governmental entities to charge lower tipping fees (which are charges for the disposal of a given amount of waste) than their privately-owned competitors. This is due to the fact that (1) governmental entities use the revenues from the tipping fees to fund other waste-related functions and (2) privately-owned landfills, without the expensive support programs and materials recovery facilities that most government-owned facilities contain, are cheaper. If, however, a government-owned facility charges lower tipping fees than its privately-owned competitors, haulers will be more likely to dispose of solid waste at the government-owned facility. In order to implement economic flow control, therefore, governments must devise means to charge tipping fees that are less than or equal to those charged at competing privately-owned facilities.

One way to lower tipping fees and achieve economic flow control is to charge a “generator fee” whereby a governmental entity charges a solid waste fee to its solid waste generator community, which is generally comprised of residences and businesses that generate solid waste. Governmental entities can charge the solid waste generator fee through their local tax bills. The money generated by these fees can then be applied to finance some of the costs of the governmental entity’s solid waste facility, and thereby enable the governmental entity to lower the tipping fee that it charges to haulers. Although solid waste customers will be required to pay an additional solid waste fee, the resulting decrease in the tipping fees charged to the haulers is usually passed onto the customers. Courts have concluded that such arrangements are valid means by which governmental entities can control the flow of waste within their jurisdictions.

Summary of Madison County, New York Flow Control Law

As may be instructive for Broome County as it considers implementation of its own flow control law, outlined below is a summary of a flow control law adopted by Madison County, New York in 2004:

Direction of Solid Waste

The Madison County Flow control law provides that “All Waste Collectors and other Persons shall deliver all Commercial Waste, Industrial Waste, Residential Waste, and

Construction and Demolition Debris generated within the County, other than Prohibited Materials, Designated Recyclables or Recyclables separated at the point of generation for separate collection, to the County Landfill for disposal or, if permitted to do so in accordance with this local law and applicable Department rules and regulations, to one of the County Transfer Stations.” Madison County Local Law No. 3 of 2004 Section IV. As indicated in the Legislative Findings for the Local Law, the County remains authorized by Chapter 369 of the Laws of 1991 of the State of New York to direct the flow of waste generated in the County to facilities constructed for that purpose.

Administration

The Madison County Department of Solid Waste and Sanitation (the “Department”) is primarily responsible for all ministerial and administrative duties described or reasonably required by the flow control law. The Department is also responsible for enforcement of the law and prosecution of violations.

Solid Waste Permits

Madison County provides that no waste collector shall collect, transport or dispose of Solid Waste and/or Recyclables generated within the County without first obtaining a Commercial Waste Permit, a Special Waste Permit, or a Resident Waste Permit. Madison County Local Law No. 3 of 2004 Section III. Failure to obtain a permit as required above is punishable pursuant to the penalty provisions of the statute. Madison County Local Law No. 3 of 2004 Section IV. The licensing requirements for solid waste management services allow the County to effectively direct the flow of its Solid Waste.

Recyclables

All persons and entities generating Solid Waste an/or Waste Collectors collecting Solid Waste and/or Recyclables generated in the County must separate Designated Recyclables from the Solid Waste stream. A list of Designated Recyclables is maintained by the Department and may be changed from time to time. All Waste Collectors and Resident Waste Permit holders must ensure that any such Designated Recyclables be delivered to a materials recovery facility or other recycling facility. The law does not appear to require Designated Recyclables to be delivered to a County-owned or operated facility.

All Waste Collectors operating in the County must provide collection services for both Solid Waste and Recyclables. All customers of Waste Collectors must be afforded the option of delivering their own Recyclables to a recycling facility. No tipping fee will be imposed at any facility located in the County for the disposal of Designated Recyclables.

Prohibition Against Littering

The Local Law regulates the throwing, dumping, depositing and placing of solid waste and recyclable material on lands within Madison County and upon all public or private lands.

Accordingly, it is a violation of the law for any person to place for collection solid waste or recyclables at a property other than the property generating said material. It is also a violation for any person to place solid waste and/or recyclable materials in dumpsters or containers designated for solid waste use by commercial and/or industrial establishments. Solid waste material may not be buried or burned on public or private property. Finally it is unlawful for any person to throw, dump, deposited, or placed solid waste and/or recyclable material along any public or private road or on lands bordering such roads.

Enforcement

The failure to deliver any Solid Waste to a County Facility within three days of collection of Solid Waste from any location within the County is presumptive evidence that the Solid Waste was disposed of at a location other than a County Facility.

The Department has the right to impose a surcharge and/or suspend or revoke any permit if the permit holder violates any provision of the flow control law. Upon any violation, the Department may serve notice regarding such violation, and the violator may demand a hearing be serving a request for a hearing. Any Person found, after hearing, to have violated any provision of the flow control law may be required to pay a surcharge not to exceed \$2,000 for each violation.

The County Sheriff's Department is also empowered to initiate proceedings against violators. Any Person violating the flow control law shall be guilty of a violation, which shall be punishable upon conviction by a fine of up to \$2,000. Failure to pay any fine may result in imprisonment as prescribed by the Criminal Procedure Law.