

Flow Control/Solid Waste: U.S. District Court (Kentucky) Addresses Challenge to Hopkinsville, Kentucky Ordinance

Arkansas Environmental, Energy, and Water Law Blog



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The United States District Court (Western District – Kentucky) (“Court”) issued a January 27th opinion addressing a challenge to a Hopkinsville, Kentucky solid waste ordinance (“Ordinance”) involving flow control. See *Burkhead & Scott, Inc. v. Hopkinsville Solid Waste Authority*, 2016 WL 337768.

Burkhead & Scott, Inc. (“BSI”) challenged the Ordinance alleging it is:

- Unconstitutional
- A tortious interference with a business relationship

The City of Hopkinsville, Kentucky (“City”) enacted a “Flow Control” Ordinance in 1998. The Ordinance granted the Hopkinsville Solid Waste Authority (“HSWA”) exclusive rights over the disposal of trash and building materials within the City limits.

BSI alleged it was injured by the Ordinance because it was required to transport waste to HSWA’s transfer facility as opposed to more inexpensive facilities.

“Flow Control” describes a scenario in which local government utilizes a law or regulation to direct one or more types of solid waste to a particular disposal, processing transfer or other facility. The issue has been a subject of strident debate for years among local government, waste management and recycling industries, and environmental groups. Many flow control disputes have been addressed by the courts.

The Court in this dispute states BSI began operation in 1998 and “continued to grow” until 2011 when it received a letter from HSWA demanding it cease operations.

The Court notes in regards to BSI claims:

BSI makes two claims in this case. First, BSI contends that the City’s Ordinance is unconstitutional because it discriminates against interstate commerce by benefiting a privately operated business. (Am. Compl. ¶ 22). Second, BSI argues HSWA tortuously interfered with the business relationship between BSI and its customers, ultimately leading to two of its clients ending their relationship with BSI. (Am. Compl. ¶¶ 26-28). Since BSI fails to address its constitutional claim in its response and this claim is invalid regardless¹, the Court considers only the latter argument.

The Court summarily dismissed the constitutional claim in a footnote stating:

Specifically, BSI’s claim is invalid under the Supreme Court’s decision of *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 338 (2007). The Court is persuaded the *United Haulers* decision invalidates BSI’s claim and Plaintiff has not raised a single argument which

would contest this finding. Therefore, the Court declines to address BSI's Commerce Clause argument further.

The Court states that BSI based its tortious interference claim upon its allegation that HSWA representatives "wrongly informed BSI's customers that BSI was operating illegally under the ordinance." The tortious interference claim is dismissed by the Court because of its conclusion that BSI had not shown that "Defendants acted with malice, or without justification, or some other wrongful conduct." The Court states:

The City's actions were not wrongful; instead, it is clear that the City's notice to BSI's customers was justified by BSI's failure to obtain a permit in contravention of the Ordinance... HSWA's notification to BSI's customers that BSI was violating the Ordinance advanced the City's interest in ensuring compliance with its laws and its legitimate economic interests, rather than any malice toward BSI. Such a motivation does not constitute malice.

The Court also rejects what it characterizes as BSI's "inaccurate interpretation" of the Ordinance. Section 93.02(C)(5) of the Ordinance states:

[i]t shall be unlawful for any person or firm, except pursuant to temporary collection service permits to engage in or conduct any collection of trash or building material within the City's corporate limits. Any individual or firm providing this service without proper consent shall be in violation of this chapter and subject to a civil penalty as established herein. Collection at each premises shall constitute a separate offense.

The Ordinance also provides that the City shall maintain or have access to a facility for disposal of garbage, commercial refuse, building material and trash generated within the City's corporate limits. It further provides that all garbage, commercial refuse, building material and trash generated within the City shall be disposed of at the designated facility. The City is deemed to have control of the operation of the facility under the direction of the Department.

BSI argued that it never obtained a permit because its collection of "industrial waste" and "commercial refuse" were not encompassed by the Ordinance. The Court notes:

BSI claims a genuine issue of material fact exists regarding whether or not the Ordinance *actually* applied rather than establishing a genuine issue whether Defendants *knew* the Ordinance did not apply and partook on a wrongful or malicious venture to frustrate Plaintiff's business relations.

The Court states BSI has always been limited to the disposal of industrial waste and construction demolition debris. The opinion notes that the Ordinance defines the term "building material" as "solid waste which results from the collection, remodeling, repair and demolition of structures." Therefore, the Court states that there would be no question that demolition debris would include solid waste from demolition of structures, "which squarely falls within the definition of 'building material' of the Ordinance."

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