

Construction Waste/Flow Control: Tennessee Appellate Court Addresses Challenge/Application of City of Jackson Ordinance



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The Court of Appeals of Tennessee (“Court”) addressed in a July 14th Opinion issues arising out of a municipality’s attempt to restrict persons from collecting and disposing of waste within its borders. See *City of Jackson v. Bosco*, No. W2019-00547-COA-R3-CV, 2020 WL 4012352, at *1 (Tenn. Ct. App. July 14, 2020).

The issues involved Lou Bosco’s (“Mr. Bosco”) and Bosco Contractor Services, LLC’s (“the LLC”) refuse and trash disposal that allegedly violated the City of Jackson’s (“the City”) municipal ordinance.

Mr. Bosco is the managing member of the LLC, a company that provides waste disposal services for construction and demolition sites on behalf of property owners and general contractors in the Jackson-Madison County, Tennessee area.

In 2014, Mr. Bosco was alleged to have violated Section 17-103 of the City’s Municipal Code that states, subject to certain specific exceptions:

“[n]o person shall convey over any of the streets or alleys of the city, or dispose of any refuse accumulated in the city.”

Municipal Code § 17-103.

As stated in the Municipal Code, the City is permitted to and has entered into an exclusive contract with a corporate entity for waste disposal, Waste Management, Inc. of Tennessee.

Local government’s directing the movement or disposition of refuse or waste is often denominated “flow control.” 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 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 trial court declined to issue fines. However, it enjoined the LLC from further removal of waste when it was not the actual producer.

Mr. Bosco and the LLC appealed, raising three issues:

1. Whether Mr. Bosco is subject to individual liability for a violation of the Municipal Code.

2. Whether the City's Municipal Code authorizes the LLC to operate as a subcontractor providing construction garbage and refusal disposal services in the City.
3. Whether the trial court erroneously granted summary judgment to the City on the LLC's state constitutional claims.

The Court first determined Mr. Bosco was not liable individually on the de novo appeal to the Circuit Court. The Court declined to address this issue because the Circuit Court only enjoined the LLC. It did not enjoin Mr. Bosco.

Second, the LLC argued that the Municipal Code has several provisions that allow for its activities. One exception the LLC argued states:

"Any producer of trash and bulky waste, as defined in this chapter, may personally transfer such trash and bulky waste and dispose of same in the city landfill[.]"

Municipal Code § 17-103(2).

The Court finds this provision inapplicable because it was stipulated that the LLC "was acting as an agent or subcontractor of the general contractor, conveying and disposing construction waste on behalf of the contractor for each of these violations at issue" and that the LLC "was not the producer of the wastes for any of the violations at issue." However, the Court agrees with another provision cited by the LLC that states:

Quantities of garbage and refuse materials resulting from the repair, excavation, construction or destruction of buildings, such as, but not limited to, broken concrete, dirt, sand, gravel, trees, tree limbs, woolen wastes or any other nonputrescible materials, shall be removed and disposed of by the contractor, owner or person having same in charge by a method satisfactory to the director of health and sanitation.

Municipal Code § 17-105(4).

The Court held that the facts clearly support that the LLC was placed in charge of disposing of the construction waste and was a "person having same in charge." The City argued that the "person having same in charge" language contemplates a lessee of property, but the Court disagreed that there is not such qualification or limitation in the language. Further, the City argued that waste disposal must be "by a method satisfactory to the director of health and sanitation." However, the Court stated that the focus of the City's argument is on the identity of the trash collector and not on the method of disposal. The City is allowed to regulate the method of disposal but the scrutiny applying to the disposal methods must apply equally to contractors, owners, and other parties having construction refuse in their charge.

Finally, the Court held that since the LLC is permitted to dispose of construction waste in the City, the LLC's asserted constitutional claims and the City's raised issues in defense are pretermitted. See *Henderson v. City of Chattanooga*, 133 S.W.3d 192, 215 (Tenn. Ct. App. 2003) ("[O]ur courts will not decide constitutional issues unless resolution is absolutely necessary for determination of the case and the rights of the parties.")

The Court reversed the lower court's judgment and vacated the injunction entered against the LLC.

A copy of the Opinion can be downloaded [here](#).