UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SAL TINNERELLO & SONS, INC. Plaintiff	:	CIVIL ACTION NO.
vs.	:	
TOWN OF STONINGTON, STONINGTON RESOURCE RECOVERY AUTHORITY; and DONALD R. MARANELL, First Selectman	:	
Defendants	:	December 28, 2007

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

This action challenges the authority of the Town of Stonington ("Town") to create the Stonington Resource Recovery Authority ("SRRA") and adopt regulations and penalties that deprive plaintiff of its lawful waste hauling business for the sole purpose to direct waste to an incinerator managed by a private enterprise and in the absence of any evidence of a public health and safety purpose. The Town and SRRA's actions implicate serious constitutional issues and will cause plaintiff irreparable injury. Consequently, the Town and SRRA's actions, scheduled to take effect as against plaintiff on June 30, 1997, should be restrained pending a hearing on plaintiff's Application for Preliminary Injunction.

I. STATEMENT OF FACTS

Plaintiff operates a waste hauling business within the Town pursuant to contracts between the plaintiff and approximately seventy (70) commercial establishments and numerous residential customers. (Verified Complaint, ¶¶ 5, 7). Plaintiff has approximately 20 employees in southeastern Connecticut. (Id., ¶ 6). Plaintiff has made a significant capital investment in order to do business in Connecticut in reliance upon and with the expectation that it would be able to permanently engage in the lawful business of waste collection and hauling. (Id.)

The Town of Stonington ("Town") recently passed an ordinance to create a "Stonington Resource Recovery Authority" (SRRA) comprised of the Board of Selectmen of the town. (Exhibit A, attached to Verified Complaint). The ordinance provides that

> [e]ffective July 1, 1997 . . . all other persons [than the SRRA] are hereby prohibited from removing, transporting and/or disposing of solid waste generated within the Town.

(Id.) The ordinance further purported to authorize the SRRA to enter contracts or grant franchises to a private waste hauler to remove, transport and/or dispose of all solid waste generated within the Town. (Id.)

Thereafter, the SRRA adopted regulations that impose a penalty of $5,000.00 per violation for the "unauthorized collection, transport and/or disposal of Solid Waste generated within the Town" by any company that is not under contract with the SRRA

("Regulations"). (See, Exhibit B, attached to Verified Complaint). The SRRA has entered into a contract granting one private hauling company exclusive authority to haul waste generated within the Town. The contract requires the hauler to deposit all waste from the Town at the Preston Resource Recovery Facility ("the Preston Facility") operated by a private company, American Ref-Fuel Company.

The Town is contractually obligated, pursuant to a contract entered into on November 2, 1985, between the Town and the Southeastern Connecticut Regional Resources Recovery Authority ("SCRRRA"), an instrumentality and subdivision of the State of Connecticut, to share in the financing of the Preston Facility. Pursuant to the Contract, the Town is required to pay fees to the SCRRRA to subsidize its share of the operating and amortization costs of the Preston Facility. Each member town of SCRRRA is obligated to pay fees to SCRRRA based upon an anticipated volume of waste generated within the Town and expected to be delivered to Preston, regardless of whether that volume of waste is actually delivered to the Preston Facility.

Until approximately 1994, the Town attempted to subsidize its obligation under the SCRRRA Contract by directing that waste haulers deliver waste generated within the Town of the Preston Facility where waste haulers were charged a per-ton fee for the amount of waste delivered. Such flow control measures were found

to be unconstitutional in violation of the Interstate Commerce Clause of the United States Constitution. **C & A Carbone, Inc. v. Town of Clarkstown**, 511 U.S. _____, 114 S.Ct. 1677 (1994). As a result of the Carbone decision, the Town has attempted to subsidize its obligations under the SCRRRA Contract by charging a per-ton fee to waste haulers like the plaintiff Sal Tinnerello for each ton of waste generated within the Town and actually delivered to the Preston Facility.

The per-ton fee set by the Town for waste delivered to the Preston facility is higher than tipping fees charged by other waste disposal facilities. Since Carbone and as a result of the excessive fees charged by the Town for disposing of waste at the Preston Facility, waste haulers often dispose of waste at facilities other than the Preston Facility, thereby depriving the Town of fees that otherwise would be received and made available to subsidize the Town's obligation under the SCRRRA Contract.

However, the Town now seeks to ensure that all waste within the town is deposited at the Preston Facility, thereby subsidizing the Town's obligations with the fees charged to town residents. The Town thereafter informed plaintiff and all of plaintiff's customers that it must remove all containers placed at the sites of plaintiff's customers by June 30, 1997. (See, Letter dated June 20, 1997, attached hereto as Exhibit 1). The SRRA has required plaintiff to remove its containers so that the private hauler under

contract with the SRRA may utilize the facilities built by plaintiff on which to place its own containers.

On June 20, 1997, plaintiff filed a claim against the Town in State court, seeking a Preliminary Injunction and Declaratory Judgment that the regulations were invalid as an ultra vires act, and violated plaintiff's state and federal rights under the Contract Clause, the Commerce Clause, the Takings Clause, Substantive and Procedural Due Process, and Equal Protection Clauses. Plaintiff further alleged that the defendants' actions were in violation of the Connecticut anti-trust laws. (See, Plaintiff's Verified Complaint).

The hearing on plaintiff's application for preliminary injunction was scheduled to take place in Superior Court on Monday, June 30, 1997. However, today, June 27, 1997, defendants removed plaintiff's state court action to this federal district court, thereby effectively preventing any adjudication of plaintiff's constitutional claims prior to the July 1, 1997 effective date of the Town regulations and the Town's requirement that plaintiff remove its containers from the Town by June 30, 1997.

II. ARGUMENT

A. STANDARDS FOR GRANTING A TEMPORARY RESTRAINING ORDER

The standard enunciated by the United States Court of Appeals for the Second Circuit provides that a temporary or preliminary injunction will issue if the movant shows:

> (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Heublein v. Federal Trade Commission, 539 F.Supp. 123, 127 (D.Conn.1982). However, pursuant to Rule 65(b),

> [a] temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney . . . if (1) it clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

Thus, the Second Circuit has recognized that a temporary restraining order should issue in order to preserve the status quo and to prevent irreparable harm until the court has an opportunity to hold a hearing. See, Warner Bros., Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1124 (2d Cir. 1989).

B. PLAINTIFF WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A RESTRAINING ORDER.

Plaintiff has alleged that defendants actions have and will violate the Commerce, Contracts, Takings, Due Process and Equal protection clauses of the federal and state constitutions. By the very nature of its constitutional claims, plaintiff has met the first prong of the test for granting temporary relief. Bery v. City of New York, 97 F.3d 689, 693-94 (2d Cir. 1996), citing, Mary

Kane, Federal Practice and Procedure, @ 2948.1 at 161 (2d ed. 1995) ("when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary"). Moreover, plaintiff is not obliged to face the penalties imposed by the regulation prior to bringing this action. See, Town of New Milford v. SCA Services of Connecticut, Inc., 174 Conn. 146, 384 A.2d 337 (1977).

C. THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN PLAINTIFF'S FAVOR.

Since there is no evidence that plaintiff's continued collection of waste within the Town is deleterious to the public health, neither the defendants, nor the pubic interest will be harmed by issuance of the temporary restraining order. By contrast, unrestrained application of the Town an SRRA regulations will completely deprive plaintiff of its property and business located in the Town. Consequently, the balance of hardships tips decidedly in plaintiff's favor. See, Heublein, supra, at 128.

D. THERE IS A SUBSTANTIAL LIKELIHOOD THAT PLAINTIFF WILL SUCCEED ON THE MERITS OF ITS CONSTITUTIONAL CLAIMS.

1. Plaintiff Is Substantially Likely To Succeed On Its Commerce Clause Claim.

The evident purpose and effect of the Regulations is to allow the Town, through the SRRA, to direct Town generated waste to the Preston facility. The Town made no finding that the regulations were necessary to protect the public health or safety. (Exh. A, B, attached to Verified Complaint.) The courts have consistently held that a municipal regulation designed to, or having the effect to, direct waste either away from, or toward a favored local waste facility violates the Commerce Clause. See, C & A Carbon, Inc. v. Town of Clarkstown, 511 U.S. 383 114 S. Ct. 1677 (1994); Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of the State of Oregon, 511 U.S. 93, 114 S. Ct. 1345 (1994) Fort Gratiot

Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 112 S.Ct.2019 (1992); Chemical Waste Management Inc. v. Hunt, 504 U.S. 334, 112 S. Ct. 2009 (1992); Valley Disposal Inc. v. Central Vermont Solid Waste Management District, 1997 U.S. App. LEXIS 11104 (2d Cir. May 14, 1997); Atlantic Coast Demolition and Recycling Inc. v. Board of Chosen Freeholders of Atlantic County, 112 F.3d 652 (3rd Cir. 1997); Connecticut Carting Co. v. Town of East Lyme, 946 F.Supp. 152 (D.Conn. 1995).

The only exception to the unwavering rule that a town may not adopt regulations for the purpose of directing waste to a particular facility is where the town is deemed to a act as a market participant with respect to the challenged action. See, U.S.A. Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995). In U.S.A. Recycling, Inc., the court found that the town of Babylon did not violate the commerce clause in a contract with a waste hauler that required the hauler to deposit waste at the Babylon owned incinerator because the Town, which owned the incinerator, was a market participant with respect to the processing of waste. This exception does not apply in this case for three reasons: (1) Stonington is not a market participant with respect to the Preston facility; (2) in the absence of status as a market participant at the waste processing level, any attempt to direct waste at that level constitutes invalid "downstream" regulation; and (3) even assuming arguendo that the Town is a market participant with respect to the contract it entered, it is unquestionably a 'market regulator' with respect to the regulations enacted for the purpose of allowing the Town to direct the flow of waste.

First, Connecticut municipalities are not subject to the market participant exception to the Commerce Clause that was applied in Babylon, supra, with respect to regional recovery facilities such as Preston Facility. See, CRRA v. Commissioner of the Dept. of Environmental Protection, 1994 Conn.Super. LEXIS 1195, attached hereto as Exhibit 2. In CRRA, supra, the court held that a permit condition for a resource recovery facility was invalid as a violation of the Commerce Clause because it required the facility to discriminate against out of state waste. The court rejected the town's claim that it was a market participant with respect to the regional facility, holding that the town "is not a market participant in the waste disposal market, because it has no right to control marketing decisions" at the regional facility. Similarly, in this case, SRRA has no authority to control marketing decisions of the Preston Facility.

Second, because the Town is not a market participant with respect to the secondary market for the waste - waste processing - any attempt to direct waste to the Preston facility constitutes illegal "downstream" regulation. See, South Central Timber Dev. v. Wunnicke, 467 U.S. 82, 104 S. Ct. 2237 (1984). (Restriction imposed on timber cut on state-owned land requiring that it be processed in Alaska before export invalidated because state did not engage in lumber processing).

Finally, plaintiff's challenge to the adoption of regulations for the sole purpose of directing waste to the Preston Facility is distinct from its claim that the SRRA contract terms violate the Contract Clause. No authority supports the propriety of a town adopting regulations for the sole purpose of infringing upon interstate commerce. See, SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995)(invalidating regulation with effect of directing flow of waste while upholding contract directing waste flow based on market participation exception). Moreover, the condition that a Town contract hauler agree to deposit all waste at the Preston Facility is a violation of the Commerce Clause and thus, renders

any contract entered into with that condition, invalid. See, CRRA, supra. [1]

In light of the uncontroverted evidence that the Town regulations were enacted to direct the flow of waste to a favored local facility, and the overwhelming precedent that such conduct is in violation of the Commerce Clause, plaintiff has established a likelihood of success on the merits of this claim.

2. Plaintiff Is Substantially Likely To Succeed On Its Contract Clause Claim.

There is no question that the impact of the Regulations upon plaintiff's contracts with its customers is both substantial and severe - it acts to abrogate those contracts in their entirety. (See, Exh. 1). An impairment of contract such as is involved in this case can only be upheld if it is both reasonable and necessary to serve an important public purpose. United States Trust Co. v. New Jersey, 431 U.S. 1, 15-16, 22, 97 S.Ct. 1505 (1977) In addition, the legislation must be based "upon reasonable conditions

[1]The ordinance is also preempted by Federal Aviation Administrative Authorization Act of 1994. Woodfeathers, Inc. v. Washington City, Oregon, No. 96-257.HA (D.Ore. 3/31/97) (Attached).

and of a character appropriate to the public purpose justifying its adoption." Allied Structural Steele Co. v. Spannaus, 438 U.S. 234, 242-44, 98 S. Ct. 2716 (1978).

The unconstitutional purpose of inhibiting free trade is not a legitimate public purpose. Violation of the commerce clause is not justified by the Town's interest in financing the Preston facility. See, Carbone, 511 U.S. at 392. In addition, the regulation is not justified by any alleged interest in ensuring safe, clean processing of town waste. The town could achieve this result by enacting uniform health and safety regulations. Id.; SSC Corp., 66 F.3d at 514.

Even assuming arguendo that the Town had a legitimate purpose for adopting the regulations, "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purpose equally well." United States Trust Co., 431 U.S. at 31. "Police power" is not a magic word that permits the legislature to adjust any and every found economic ill without payment. Fonaris v. The Ridge Tool Co., 423 F.2d 563, 567 (1st Cir. 1970). In the absence of a substantial justification, not

found in the Town ordinances or regulations, the Towns actions are in clear violation of the Contract Clause.

3. Plaintiff Is Substantially Likely To Succeed On Its Due Process Claim.

Plaintiff has a constitutionally protected property interest in the operation of its lawful business and the continuing validity of its contracts in addition to its capital investments. See, Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 77 S. Ct. 752 (1957); Light Rigging Company et al. v. Department of Public Utility Control, 219 Conn. 168, 592 A.2d 386 (1991); United Interchange, Inc., et al. v. Spellacy, 144 Conn. 647; 136 A.2d 801 (1957). This interest may not be abrogated by an exercise of the police power unless there is (1) some need for serving the public health, safety or general welfare makes the regulatory legislation necessary or desirable, and (2) the legislation serves that need in a way which is not arbitrary, discriminatory and confiscatory to an unreasonable and unnecessary degree. Id. The legislative discretion in meeting the public need is drawn by the courts at that point where the regulatory measures either fail to serve the public good or serve it in a despotic way.

In this case, as set forth herein, there is no legitimate public health or safety need that makes the Town Regulations desirable, nor does the Regulation serve any conceivable need an a

means that is not arbitrary, discriminatory or confiscatory to an unreasonable degree. The Town's desire to subsidize its own debt and the private interests of the Preston Facility cannot justify the regulatory destruction of plaintiff's business in the town.

4. Plaintiff Is Substantially Likely To Succeed On Its Claim That The Town's Actions Are Ultra Vires.

a. The Legislature Did Not Give The Town Explicit Authority To Create And Implement Regulations That Would Retrospectively Abrogate Existing Contract Rights.

It is settled law that as a creation of the state, a municipality has no inherent powers of its own. In determining whether the municipality had the authority to adopt the regulations, the court, then, does "not search for a statutory prohibition against such an enactment; rather, [it] must search for statutory authority for the enactment."

The legislature has been very specific in enumerating those powers it grants to municipalities. Buonocore v. Town of Branford et al., 192 Conn. 399, 471 A.2d 961 (1984).

Although the relevant statutes authorize the municipalities to enter contracts for the provision of waste services, the provisions do not authorize municipalities to adopt regulations to abrogate existing contracts. "An enumeration of powers in a statute is uniformly held to forbid the things not enumerated." Buonocore v. Town of Branford et al., 192 Conn. 399; 471 A.2d 961 (1984).

b. The Town's Regulation Is Not Encompassed Within Its Authority to Protect The Public Health and Safety.

As set forth in section II(D)(2), supra, the Regulations adopted by the Town are not encompassed within the broad authority to protect the public health and safety.

c. To The Extent The Statutes Are Construed As A Broad Grant Of Authority To Adopt And Implement The Regulations, They Are Void.

Any claim that a broad grant of authority is sufficient to authorize the Town to destroy plaintiff's business must fail. In Town of New Milford v. SCA Services of Conn., Inc., 174 Conn. 146 (1977), the Connecticut Supreme Court interpreted a statute

authorizing towns to grant or deny permits to build resource recovery facilities. The Court held that

> Although the General Assembly has enacted a rather comprehensive state-wide solid waste management program, to be administered by the commissioner of environmental protection, it has nevertheless allowed localities to make additional provisions and otherwise further control the disposal of solid waste located within their boundaries. Any such delegation of legislative power by the General Assembly, however, is subject to constitutional restrictions. Where a statute, such as @ 7-161, vests public officials with the discretion to grant, refuse or revoke a license to carry on an ordinarily lawful business, and does not set an express standard to guide and govern the exercise of this discretion, the attempted delegation of power is a nullity.

Id., 174 Conn. at 150-151 (emphasis added). Here, there is not even an express delegation of authority to the Town to control plaintiff's business in any manner. Any implied delegation would necessarily be a nullity in the absence of primary standards to carry out that authority. Id.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that this Court grant its Application For Temporary Restraining Order.

PLAINTIFF,

By_____
Eliot B. Gersten, Esq.
Fed. Bar No.: ct05213
Gersten & Clifford
214 Main Street
Hartford, CT 06106
(860) 527-7044