Docket No.: 97-7919

To be argued by: ELIOT B. GERSTEN

IN THE
United States Court of Appeal
FOR THE SECOND CIRCUIT

SAL TINNERELLO & SONS,
Plaintiff-Appellant

v.

TOWN OF STONINGTON,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

HONORABLE ROBERT N. CHATIGNY

BRIEF OF APPELLANT SAL TINNERELLO & SONS

ELIOT B. GERSTEN & JOHN P. CLIFFORD
GERSTEN & CLIFFORD
214 Main Street
Hartford, CT 06106
Tel. (860) 527-7044
and
AVIVA CUYLER
ATTORNEY-AT-LAW
5686 Lakeville Highway
Petaluma, CA 94954
[Counsel for Appellant]

STATEMENT OF ISSUES ON APPEAL

1. Whether the District Court erred as a matter of law in holding that the Town's violation of the Contract Clause was remedial by money damages.

2. Whether the District Court erred as a matter of law in holding that plaintiff business, which had never previously been regulated, was on notice that the Town could supplant its garbage collection business at any time for fiscal reasons.

3. Whether the District Court applied an erroneous standard to determine whether the Town's impairment of plaintiff's contracts was justified by a significant public purpose.

4. Whether the District Court erred as a matter of fact and law in holding that the Town met its burden to demonstrate that the ordinance was supported by a significant public purpose.

5. Whether the District Court erred as a matter of law in holding that the ordinance accomplished its purpose in a reasonable and appropriate manner.

6. Whether the District Court erred as a matter of law in holding that Babylon precluded plaintiff's Commerce Clause claim for preliminary injunction.

PRELIMINARY STATEMENT

On April 21, 1997, The Town of Stonington ("Town") enacted an ordinance, effective July 1, 1997, to illegalize the private collection, transportation and disposal of waste (the "Ordinance"). Plaintiff Sal Tinnerello & Sons ("Tinnerello") has been in the business of waste collection, transportation and disposal within the Town for the past twenty-eight years. On July 18, 1997, by oral order, the district court denied plaintiff's application to enjoin the Town of Stonington ("Town") from implementing and enforcing the Ordinance. Joint Appendix 375-395 (hereinafter J.A. __ _). The district court focused on Tinnerello's claims under the United States Constitution, Article I, § 10 (the Contract Clause) but ultimately denied the injunctive relief sought on all issues. On August 26, 1997, the district court filed a written Memorandum of Opinion setting forth its findings of fact and conclusions of law. J.A. 480-491. This appeal is taken from the district court's decision and seeks a preliminary injunction.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. The district court had removal jurisdiction over this action pursuant to 28 U.S.C. § 1441(b). The district court denied plaintiff's application for a preliminary injunction. This court has interlocutory appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF PROCEDURAL AND FACTUAL BACKGROUND

FACTUAL BACKGROUND

In about 1970, Sal Tinnerello and his wife founded a garbage collection, transportation and disposal business in the southeastern part of Connecticut. J.A. 478, ¶ 2; J.A. 152. The company grew to a substantial size after almost three decades of dedication and commitment to competitive, safe, sanitary service. Id. The company remains a family owned and operated business, run by Joseph Tinnerello since the recent death of his father. Id.

The Town never regulated or licensed any waste management company. J.A. 473, ¶ 6; J.A. 180; J.A. 237. Tinnerello was never cited for violation of any state or other local waste disposal law. J.A. 180; J.A. 238. As part of its competitive practices, the company disposed of the waste it collected at facilities that offered the most reasonable rates. J.A. 180. These facilities were sometimes located outside of Connecticut in neighboring states such as Rhode Island. Id.

In 1985, the Town entered a compact with eleven other Connecticut towns whereby they agreed to ensure that all non-hazardous waste generated within their borders would be disposed of at a local incinerator ("the Incinerator") financed by the Connecticut Resource Recovery Authority ("CRRA").[1] J.A. 194-95; J.A. 409-450. As part of the compact, on November 13, 1985, the Town promised to "enact an ordinance directing that Acceptable Waste generated within the municipality by persons other than the Municipality be delivered to the system." J.A. 412, § A(5); J.A. 200. However, C&A Carbone, Inc. v. Town of

[1] The towns have no ownership or vested interest in the incinerator. J.A. 430, § 204; J.A. 445, § 515.

Clarkstown, 511 U.S. 383, 114 S.Ct. 1677 (1993) precluded the Town from forcing private haulers to dispose of their waste at the incinerator.

The Carbone decision created a dilemma: the Town had guaranteed payment for the incineration of 845 tons of waste per month ("minimum commitment"). J.A. 198-99. The amount of this debt was based on a per ton fee ("tipping fee") set annually. J.A. 431, § 301(b)(iii)[2]. The Town had agreed to "make all budgetary and other provisions or appropriations necessary to provide for . . . payment by the Municipality." J.A. 431-32, § 301(c). The contract explicitly provided that "[t]o the extent that the Municipality shall not make provisions or appropriations necessary . . . the Municipality shall levy and collect such general or special taxes or cost sharing or other assessments as may be necessary to make such payment in full." J.A. 441, § 505.

As of 1997, the privately owned incinerator charged a tipping fee that is one of the highest in the northeast, between $20.00 and $30.00 more per ton than other facilities, thereby exacerbating the Town's dilemma. J.A. 181; 210. While the market "tipping fee" was $57.50 per ton, the incinerator charged $84.00 per ton. J.A. 181; 486.[3] In the absence of flow control, and in order to remain competitive with other waste haulers, the private haulers ceased delivering

---

[2] The "minimum commitment" requirement, of either delivery or payment, was "financial in nature," J.A. 198, to ensure that the privately owned incinerator receive "tipping fees" sufficient to operate the facility and enable CRRA to pay the financing bonds. J.A. 199.

[3] The defendants presented no evidence as to why the tipping fees are so high. J.A. 485.

substantial amounts of waste to the incinerator. J.A. 181. The Town, pursuant to the 'put or pay' provision of the contract, soon became obligated to pay the incinerator's tipping fees for waste which it was not incinerating. J.A. 207; 273-74.

At the time of contracting, the Town expected that, through the flow control laws, it would compel private haulers to pay the Town's minimum commitment. J.A. 484. Carbone frustrated the Town's expectation. The Town was now liable to pay for any shortfall in its 845 ton commitment to the incinerator. J.A. 273-74; 198; 200; 425-26, § 201(c)); J.A. 432-434, §302.

In early December 1996, the Town commissioned a study which concluded that private haulers would voluntarily deliver their waste to the incinerator if the tipping fee was competitive. J.A. 485. Consequently, between April and June, 1997, the Town subsidized the incinerator's tipping fees by $26.50 per ton. J.A. 487. With competitive fees, the waste haulers delivered even more than the Town's minimum tonnage commitment of waste to the incinerator. J.A. 487; J.A. 119. However, the Town anticipated that the subsidy would cost $200,000 per year. J.A. 487. The Town believed that to pay this amount, it would need to increase taxes for fiscal year 1998. J.A. 487. In addition, a primary drawback of subsidization was that:

> it doesn't solve the problem because it leaves the Town vulnerable to the spot market. It was specifically the reason why [the Town] didn't opt for subsidies. Anytime in the future if the spot market drops to twenty dollars a ton or thirty dollars a ton, the haulers can then say, well . . . you increase your subsidy . . . or we take it away. So it didn't solve [the Town's] problem

with the fact that the Incinerator is not competitive. J.A. 262-63. Thus, the cost of the incinerator's extreme tipping fees would likely be passed on to consumers in the form of a tax increase rather than a monthly waste hauling bill.

In order to avoid raising taxes, or being subject to a competitive market, the Town sought to take over the collection of waste, and thereby finance its obligation to the incinerator, again, in the form of a waste hauling bill rather than increased taxes. J.A. 400-403; 234; 244; 270. In April, 1997, at a public meeting, the Town tied its take over of garbage collection to a budget referendum. J.A. 234. The Town represented to the public that the only alternative to Town control over garbage collection would be a tax increase. J.A. 231-232; 234 ("The Town was in a position to require either to pass this ordinance and go with town-wide collection, or increase the mil rate by half a mil to cover the lost revenue.").

In placing the Ordinance to a vote by taxpayers, the Town represented that a continued subsidy would cost the taxpayers $260,000. J.A. 247. However, in the district court, the Town admitted to overestimating the cost of the subsidy by $100,000. Id. The Town also estimated the "necessary" tax increase by projecting the loss of tonnage experienced in the heart of the winter season, February, 1997, as remaining the same throughout the rest of the year. J.A. 248. However, the Town is aware that as

> a seasonal community, and a large seasonal community, our tonnages fluctuate greatly. If you'll notice, for instance, July, we exceeded our minimum. But then if you go down to January, we

> were half of our minimum. So to look at it, you need to look at the entire year. Certainly, in certain months, in the summer months, we would exceed our minimum. Then we would hit January and February and we never would. So the aggregate effect is, of course, that we don't hit our minimum.

J.A. 251 (emphasis added).

The evidence submitted to the court revealed that a tax increase was not necessary. The Town could have sought to avoid its contractual obligation by contesting the tipping fee, a legal challenge to the contract, or through an administrative request to avoid its minimum commitment obligation. J.A. 415 (Representation of Authority ¶ (3)(iv)("reasonable fees"); J.A. 415-24, § 101[4]; J.A. 445, § 516(severability); J.A. 445-48, § 517(arbitration); J.A. 443-44, § 512(parties agree to abide by all laws); J.A. 243. The Town also could have, as many other member towns, subsidized the incinerator's charges to make it more competitive. J.A. 231; 264; J.A. 400-403. The subsidy could have been generated from a variety of sources other than a tax increase such as a licensing fees, user fees, or reallocation of the budget. See, J.A. 234; J.A. 244; J.A. 432, §301(d)("All Service Payments and other payments of the Municipality under this Contract shall be deemed to be current operating expenses of the Municipality");

[4] The contract provides that a Municipality that is unable to meet its minimum commitment for "good cause" may request that its minimum commitment be reduced and "the Municipalities Minimum Commitment for such Contract Year shall be such lesser amount in tons of such acceptable Solid Waste, if any, to be delivered to the System as established by the Authority at its sole discretion." J.A. 418 ("Minimum Commitment," § b).

J.A. 441, § 505.

Before the district court, the Town began to claim that the purpose of the ordinance was to ensure safe and efficient collection and disposal of waste and to avoid Superfund liability. J.A. 211-214; J.A. 228-230; J.A. 231. No evidence exists from the public meetings to support this claim. See, J.A. 400-403; 245 (First Selectman stated the "whole purpose" of the ordinance is to "get our commercial garbage up to Preston.") At the hearing in this case, the Town's witness also testified that health and safety concerns were not an issue. J.A. 238; 129; 207(discussion of Ordinance was "really part of the budget process."); 243-44.

Moreover, the Ordinance as adopted does not evidence any public health, safety, efficiency, or equity concern. The Ordinance simply and solely provides that:

> Effective July 1, 1997, the removal, transport and/or disposal of solid waste, as that term is defined in Chapter 446d of the Connecticut General Statutes, shall be managed, supervised and/or performed by the Town of Stonington Resource Recovery Authority or its agent(s) in conformance with such rules and regulations as the Authority has or shall from time to time adopt. Such solid waste generated within the Town shall be removed, transported and/or disposed of only by the Authority, or refuse collectors with whom the Authority has contracted or has awarded franchises. All other persons are hereby prohibited from removing, transporting and/or disposing of solid waste generated within the Town. The Authority may, however, provide by regulation an exception for generators of solid waste to self-transport and self-dispose of such waste.

J.A. 451-52. Although the preamble to the Ordinance contains the boilerplate statement regarding "health, safety and welfare," the Ordinance has no provision for the protection of these interests. Id. The Ordinance, on its face, simply

prohibits the private collection, transportation and disposal of waste. Id.

At the district court, the Town also claimed that a purpose of the Ordinance was to prevent inequity to Town residents who assisted the Town to meet its obligation by purchasing special yellow garbage bags. J.A. 232-33; 205-206. The Town claimed that, by increasing residential taxes, as required by the contract, the Town residents would be unfairly subsidizing the disposal of commercial waste. J.A. 232-33. However, the evidence at the hearing, and indeed the basis for the Ordinance, was that commercial waste was not being disposed of at the incinerator. J.A. 23-44; J.A. 400-403.

The Ordinance permits the Board of Selectmen to designate "one or several residential and/or commercial improvement districts, and to enter contracts, or grant franchises, for the provision of solid waste collection, transport and/or disposal services within those districts." J.A. 451-52.[5] The Town refused to negotiate contracts with any organization that contested the constitutionality of the Ordinance. J.A. 224; 266. Tinnerello chose to challenge the Ordinance.

---

[5] In exercising the authority allegedly conferred by the Town, the SRRA later divided the Town into three primary classifications: two commercial districts and residential districts. J.A. 277. The SRRA negotiated residential contracts individually and did not open them to a bidding procedure. J.A. 269. The SRRA did not provide plaintiff an opportunity to negotiate a contract to retain its residential customers. The SRRA regulations are not the subject of plaintiff's Contract Clause claim.

PROCEDURAL HISTORY

On June 30, 1997, following oral argument, the district court granted plaintiff's Application For Temporary Restraining Order on the basis that "a plausible claim of irreparable harm ha[d] been made" and that the Court was "satisfied that the balance of hardships does tip in favor of the plaintiff." J.A. 83-84. The Court also indicated that "a debate about irreparable harm could embroil us in lengthy proceedings; and that being the case, I think it's fair for me to allow for the possibility of irreparable harm here." J.A. 53.

Thereafter, the plaintiff requested an extension of the Temporary Restraining Order pending a hearing on plaintiff's Request for Preliminary Injunction in order to conduct discovery. Defendants also moved to vacate the existing Temporary Restraining Order. On July 9, 1997, following oral argument, the Court stated that "I am prepared to assume for purposes of the analysis here that there has been a substantial impairment of one or more contractual relationships." J.A. 129. The Court also indicated that it would continue under its previous assumption that the plaintiff "could show irreparable harm based on the threatened substantial disruption of [] business for which money damages might prove to be an inadequate remedy." J.A. 100; J.A. 139-40.

However, the Court stated that "it would be appropriate to have an evidentiary proceeding focusing on the plaintiff's contracts and the reasonableness of the Town's action" the following day. J.A. 133. In response to plaintiff's counsel's concerns regarding the scope of the hearing, the Court reiterated that it only expected testimony regarding the Town's explanation for its

conduct and evidence of the existence of plaintiff's contracts. J.A. 138-39[6]. Defense counsel also responded that, "[i]t seems to me, your Honor, we're at the preliminary stage. We have a t.r.o. The plaintiff has burdens he must sustain in order to have a t.r.o. Your honor has indicted that there's one issue he wants to focus on. And I think we could certainly do that tomorrow." J.A. 134(emphasis added). Consequently, the court decided to conduct a hearing the following day without providing plaintiff the opportunity to conduct any discovery. J.A. 139-40.

At the hearing the following day, the Court changed course, over plaintiff's counsel's objection, and stated that plaintiff would be now required to establish "substantial disruption of [] business." J.A. 148-149, 150. However, the Court reiterated that the primary issue at the hearing would be the "question of valid legislative purpose reasonably implemented." J.A. 151.

At the conclusion of the hearing, the Court extended the T.R.O. by stipulation of the parties, and requested the parties to submit post hearing briefs

---

[6] Plaintiff's counsel stated that he would "like to have the opportunity to conduct both discovery and . . . testimony . . . dealing with . . . the reasonableness of the Town's action." J.A. 134. Counsel suggested that the court extend the t.r.o. just one week "so everybody has a chance to present what their best case is to the Court." J.A. 134-35. Counsel further articulated that it would be inequitable to conduct a hearing focused on the justification for the Town's conduct in the absence of any discovery by which plaintiff could impeach anything the Town represented. J.A. 134-35.

limited to specific issues relating to the question of validity of legislative purpose and its reasonable implementation. J.A. 338-39. Notwithstanding this, the defendants filed a brief containing a statement of facts. Both parties continued under the impression that the hearing was to determine the continuance of plaintiff's temporary restraining order pending a hearing on its application for preliminary injunction. See, Record 18 ("Defendants' Post Hearing Memorandum In Opposition To Plaintiff's Motion For Extension of Temporary Restraining Order").

Not surprisingly, in the absence of any discovery to rebut the defendants' testimony regarding the purpose and implementation of the Ordinance, on July 18, 1997, the Court indicated that "there didn't appear to be any dispute about the underlying facts of the case" and that it would therefore adopt the "historical facts" contained in defendants' brief. J.A. 301-303. Thereafter, the court issued an order denying plaintiff's motion for preliminary injunction. J.A. 378. The Court held that the plaintiff had failed to demonstrate irreparable harm. J.A. 386, 388. The Court also held that the plaintiff failed to demonstrate a likelihood of success on the merits because the plaintiff entered its contracts with notice of the Town's interest in regulating the collection of commercial waste. J.A. 386.

Plaintiff's counsel commented as to the Court's inconsistency in finding that plaintiff had not established irreparable harm in light of the Court's previous indication to the parties that it would be unnecessary for plaintiff to address the 'irreparable harm' element at the hearing. J.A. 389-90. The Court confirmed plaintiff's counsel's understanding of the Court's instructions (J.A. 390) but

indicated that, following the hearing, it had occurred to the Court that plaintiff could not establish irreparable harm. J.A. 390-91. The district court invited plaintiff to file a motion for reconsideration. Plaintiff decided to appeal the court's decision as supplemented by the written memorandum.

ARGUMENT

Standard of Review

The appellate court will reverse the grant or denial of a preliminary injunction where the district court abused its discretion either by misinterpreting the law, committing a clear error of fact, or by erroneously fashioning the substance of form of the injunction. Church of Scientology Internt'l v. The Elmira Mission of the Church of Scientology, 794 F.2d 38, 41 (2d Cir. 1986). In this case, the district court should be reversed because it misinterpreted the law and committed clear errors of fact.

I. THE DISTRICT COURT ERRONEOUSLY DENIED PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION AS TO ITS CONTRACT CLAUSE CLAIM.

INTRODUCTION

One issue before the district court was whether the Contract Clause prohibits the government from retrospectively impairing contracts in order to avoid raising revenue. This issue was squarely decided by this court in Condell v. Bress, 983 F.2d 415 (2d Cir. 1993) and Association of Surrogates & Supreme Court Reporters v. New York, 940 F.2d 766 (2d Cir. 1991), cert. denied, 112 S.Ct. 936. "The choice of which revenue-raising or revenue-saving devices should be used is for others, not the courts, but the menu of

alternatives does not include impairing contract rights." Condell, 983 F.2d at 419-20. While these cases involved public contracts, rather than private contracts, there is no authority, under either the language of the Contract Clause, or case law, to support that government employees have a greater constitutionally protected interest in their paychecks than Tinnerello has in the continuance of its business in Stonington which it invested twenty-eight years to develop.

Nor does the claim that garbage collection constitutes a "core government function" suffice to validate the constitutional infirmity of such a law. The maintenance and expansion of the judicial system, and fighting the "exploding drug crisis," are no less a "core government function." See, Association of Surrogates & Supreme Court Reporters v. New York, 940 F.2d 766, 773 (2d Cir. 1991), cert. den'd, 1992 U.S.Lexis 504, 112 S.Ct. 936 (1992). In addition, this court made clear that the potential for government action, where it has not been taken in the past, does not rebut a finding of substantial impairment. Id. at 772.

As set forth herein, the Ordinance at issue is in clear violation of the Contract Clause and should be enjoined. The district court in this case erred both as a matter of law and fact in upholding the Ordinance.

A. THE ORDINANCE CAUSES IRREPARABLE HARM TO PLAINTIFF'S CONSTITUTIONAL AND BUSINESS INTERESTS.

The Contract Clause, as interpreted by the courts, prohibits the state from imposing a substantial impairment on private contracts unless such action is necessary to serve a legitimate public interest, and is upon reasonable conditions. Sanitation and Recycling Indust. v. City of New York, 107 F.3d 985, 993 (2d Cir. 1997). In this case,

the court assumed substantial impairment and held that the Town violated the Contract Clause by failing to give plaintiff one or two years advance notice. J.A. 491. Nevertheless, the Court concluded that plaintiff's losses were remedial by money damages. Id.[7]

In so holding, the district court departed, without any supporting authority, from well established precedent. First, as a constitutional check on the authority of the state, a law that violates the Contract Clause is void - it cannot legally be implemented and enforced. See, Allied Structural Steel Co. V. Spannaus, 438 U.S. 234, 241-43, 98 S.Ct. 2716, 2721 (1978)(holding law invalid because violative of the Contract Clause); W.B.

[7] Although the district court stated that the ordinance is "reasonable and appropriate," J.A. 490, in the very next paragraph, the Court stated that the Town could "have taken over municipal waste collection without running afoul of the Contract Clause if it provided adequate notice." J.A. 491(emphasis added). The district court then made a finding that "considering the terms of plaintiff's contracts and the foreseeability of the Town's action, advance notice of a year or two would presumably be adequate." Id. The court's footnote indicates that the notice provided by the Town was insufficient. J.A. 490-91, n.9. Thus, the court's statement that plaintiff suffered from the "termination of its Stonington contracts one or two years earlier than they otherwise could have been" can only be read to indicate that, by failing to provide one or two years notice, the Town did, in fact, 'run afoul' of the Contract Clause.

Worthen Co. v. Thomas, 292 U.S. 426, 54 S.Ct. 816 (1934)(same); Condell, 983 F.2d at 419 (same); Association of Surrogates, 940 F.2d at 771 (same).

Second, the Contract Clause is a "rights protecting provision" of the Constitution. Association of Surrogates, at 771. The violation of such a constitutional right constitutes per se irreparable harm. Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996); Cuomo v. Patrissi, 967 F.2d 73 (2d Cir. 1992); Mitchell v. Cuomo, 748 F.2d 804 (2d Cir. 1984). As in the context of other "rights protecting" amendments, the Contract Clause is designed to protect fundamental expectations rather than economic interests. See, United States Trust Co. v. New Jersey, 431 U.S. 1, 15, 97 S.Ct. 1505, pet. reh'g. den'd, 431 U.S. 975, 97 S.Ct. 2942 (1977) (purpose of Contract Clause is to "encourage trade and credit by promoting confidence in the stability of contractual obligations); Spannaus, 438 U.S. at 245 ("Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.")[8]. There is no authority to support the proposition that money is a replacement for the loss of the protections of the Contract Clause. See, Spannaus, supra, (granting injunction to prevent imposition of monetary penalty because statute violated Contract Clause); United States

[8] See also, Condell, 983 F.2d at 417-418 (contract clause protects reliance interests); Surrogates, 940 F.2d at 772 (same); Opinion of Justices, 135 N.H. 625, 633, 609 A.2d 1204 (1992)(same), citing, State v. Vashaw, 113 N.H. 636, 637-38, 312 A.2d 692 (1973)("The underlying policy of this prohibition is to prevent the legislature from interfering with the expectations of persons as to the legal significance of their actions taken prior to the enactment of the law.")

Trust Co., supra, (granting injunction to prevent government action causing monetary loss); Condell, supra (granting injunction to prevent wage withholding because conduct violated Contract Clause); Surrogates, supra (same);

The district court's holding is thus a clear misapplication of the law that an ordinance which violates the Contract Clause is (1) void and unenforceable and (2) its application imposes irreparable harm.

In addition the Ordinance injures plaintiff's business interests in a manner that is not entirely measurable in monetary terms. See, Jolly, 76 F.3d at 482. In Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1204-1205 (2d Cir. 1970), this court held that preclusion of an individual from engaging in a business in which he had invested many years constituted irreparable harm. See, Id.; Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co., 749 F.2d 124, 125-26 (2d Cir. 1984)(per curiam)(finding irreparable harm from loss of ongoing business representing many years of effort and the livelihood of its husband and wife owners.); Jacobson & Co. v. Armstrong Cork Co., 548 F.2d 438, 445 (2d Cir. 1977)(affirming finding of irreparable harm based on loss of good will and customers both present and potential). Similar to the plaintiffs in the above cited cases, plaintiff wishes to engage in the business which it developed in Stonington over a period of twenty-eight years, not live on the income from a damage award. Semmes, 429 F.2d at 1205-1206.

The Ordinance has a more complex impact upon the continuing viability of plaintiff's business than the loss of 7% of its gross income through the loss of commercial accounts. While the district court noted that commercial accounts in

Stonington account for 7% of plaintiff's business, the court specifically recognized that there is no evidence regarding the value of plaintiff's "roll off" work and residential accounts. J.A. 481, n.2. Plaintiff submitted an affidavit and testified that the aggregate lost income from the destruction of its business in Stonington constituted a loss of one quarter of its gross income. J.A. 153; J.A. 475, ¶ 15.

Moreover, plaintiff entered contracts, both for waste disposal and equipment, in reliance upon its income from Stonington. J.A. 156-57; 159-60. Plaintiff's inability to meet its financial obligations in the absence of this income may destroy plaintiff's business and preclude it from competing effectively in other markets. Id.; Carlos v. Philips Business Systems, Inc., 556 F.Supp. 769, 774 (E.D.N.Y. 1983). Plaintiff's claim of business destruction is not speculative - given the opportunity, plaintiff can establish the economic impact of the Ordinance on its ability to repay its debts and conduct its operations.

However, as eloquently stated by the son of Sal Tinnerello "[y]ou know, how can you measure the level of stability of being in a town so long? Like I said, my dad started thirty years ago. It takes time to do that. You can't measure it. This is my life we're talking here. I've been doing this since I was, you know, a young teen-ager in this business here and, you know, it's my life. I worked very many hours and that's the way my dad brought me up." J.A. 161.

B. IF PLAINTIFF WAS REQUIRED TO ESTABLISH ANOTHER BASIS FOR, OR ADDITIONAL EVIDENCE OF, IRREPARABLE HARM, THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO AFFORD PLAINTIFF NOTICE AND AN OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT.

The district court conducted a one day evidentiary hearing in this case, on one day notice. The district court represented, and both parties understood, that the hearing was solely to determine whether the temporary restraining order could be extended in order to permit time for discovery and a full blown hearing. See, J.A. 134-136. For purposes of extending the temporary restraining order only, the district court stated that:

> I am not sure that it would make sense to insist that the plaintiff present evidence. The plaintiff has provided affidavits describing, in general terms, the impact of the ordinance on its operations . . . Certainly, the defendant is entitled to see the contracts the plaintiff relies on. Beyond that, I'm not sure that we need to hear from the plaintiff. . . . . . I am prepared to assume for purpose of the analysis here that there has been a substantial impairment . . . So in that context, I don't see a need for a lengthy evidentiary hearing.

J.A. 128-131 (emphasis added). The court had previously stated that it would assume irreparable harm because a determination of irreparable harm would require a lengthy hearing. J.A. 100; 139-40.

Subsequent to the hearing, both parties continued under the impression that the hearing was to determine the extension of plaintiff's temporary restraining order pending a full hearing on plaintiff's application for preliminary injunction. See, Record 18 ("Defendants' Post Hearing Memorandum In Opposition To Plaintiff's Motion For Extension of Temporary Restraining Order"). The court made no indication that it would no longer rely upon plaintiff's affidavits to establish irreparable harm and substantial impairment and limited the parties post hearing briefs to specific other issues. J.A. 338-39.

The court was entitled to rely upon the affidavits submitted for the purpose of the t.r.o. Semmes, 429 F.2d at 1204-1205. The court had indicated that this was its

intention. J.A. 100; 139-40, 53. In the event it chose not to assume irreparable harm, the court was authorized, and should have, either extended the Temporary Restraining Order for an additional ten days to permit the presentation of evidence or vacated the restraining order pending a full hearing on plaintiff's application for preliminary injunction. Sec. & Exch. Com. v. Unifund, 910 F.2d 1028, 1034 (2d Cir. 1990)(nothing in F.R.C.P. Rule 65 prevents a district court from continuing a T.R.O. while reserving decision on a motion for preliminary injunction); Semmes, 429 F.2d at 1204-1205.

The court's failure to permit plaintiff to present evidence and argument regarding irreparable harm, and subsequent determination of that issue adversely to plaintiff, constitutes reversible error. Singleton v. Wulff, 428 U.S. 106, 120-21, 96 S.Ct. 2686 (1976)("This is essential in order that parties have the opportunity to offer all the evidence they believe relevant to the issues . . . Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have."). In this case, the prejudice to plaintiff is manifest in the court's findings. Had plaintiff been given the opportunity, it could have established the impact of the Ordinance both in terms of business lost and its inability to meet its financial obligations as a result of that loss of business. In addition, plaintiff should have been afforded the opportunity to present legal argument regarding irreparable harm and substantial impairment as it applied to the facts of this case.

C. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT PLAINTIFF MAY NOT BE ABLE TO ESTABLISH SUBSTANTIAL IMPAIRMENT OF ITS CONTRACTS[9].

In order to meet its burden to establish a violation of the Contract Clause, plaintiff need only provide evidence that the law substantially impairs the obligations and duties of an existing contract. W.B. Worthen Co. v. Kavenaugh, 295 U.S. 56, 60, 55 S.Ct. 555 (1935). The complete destruction of plaintiff's contracts unquestionably constitutes "substantial impairment." See, Id.; Spannaus, 438 U.S. at 246; United States Trust Co., 431 U.S. at 28-29.

However, the district court misapplied this court's holding that "[w]hen an industry is heavily regulated, regulation of contracts may be foreseeable; thus, when a party purchases a company in an industry that is already highly regulated

[9] Plaintiff does not contest the district court's assumption that plaintiff could demonstrate a substantial impairment of its contracts within the meaning of the Contract Clause test. J.A. 490. The court's footnote that "plaintiff may be unable to show substantial impairment" is not controlling in this appeal because it is both inconclusive and contrary to the court's assumption. Rosen v. Siegel, 106 F.3d 28, 32 (2d Cir. 1997)(remanding on appeal from grant of injunction because district court failed to make explicit findings which prevented appellate court from a "clear understanding of the ground or basis of the decision of the trial court.") However, to the extent that defendants rely on the court's footnote, the basis for the court's statement constitutes a misapplication of the law.

in the particular to which he now objects, that party normally cannot prevail on a Contract Clause challenge." Sanitation and Recycling Indus., 107 F.3d at 993 (citation omitted)(emphasis added). In this case, there is no dispute that the Town has never previously regulated plaintiff or even required any licensing procedure. J.A. 180; J.A. 237.

In the absence of any supporting authority, the district court extended the 'notice doctrine' to encompass (1) dicta in the decision of another district court judge, in an unrelated Carbone type challenge; and (2) a statutory grant of broad authority that had never previously been exercised, C.G.S. § 7-148(c)(4)(H). J.A. 488, 490, n.9. However, neither of these facts implicates the substantiality of the impairment of plaintiff's contracts.

1. The "Home Rule" Statute Did Not Place Plaintiff On Notice That The Town Could Displace It Under The\ Circumstances Present In This Case.

C.G.S. § 7-148 provides, among other things, that the Town may "provide for and regulate the collection and disposal of garbage." The court erroneously held that this statute placed plaintiff on notice that the Town could illegalize plaintiff's business, and take exclusive control of waste collection, at any time. J.A. 488. An incantation of police power, in itself, is not sufficient to support state impairment of private contracts. The Contract Clause imposes a limit on lawmaking authority "even in the exercise of its otherwise legitimate police power." Spannaus, 438 U.S. at 242 (emphasis added).

Thus, the Town must establish that "the power possessed embraces the particular exercise of it in response to particular conditions." Home Bldg. & Loan

Ass'n. v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231 (1934). Thus, the defendants must establish that (a) the "power to provide for and regulate the collection and disposal of garbage" encompasses the power to exclusively take over the waste collection industry to raise revenue; (b) a condition of public need exists that would give rise to the exercise of such power; and (c) that the conditions that exist form a sufficient ground upon which to exercise the power so as to abrogate contracts. Id.

The trial court erred in failing to place this burden upon defendants. In addition, the defendants have not, and cannot, meet this burden. First, the power to "regulate" does not authorize the Town to prohibit the lawful exercise of plaintiff's business.[10]

---

[10] To the extent the defendants contend that the power to "provide for" garbage collection constitutes authority to exclusively "provide for" garbage collection, anyone who provides entertainment, amusements, concerts, celebrations and cultural activities, low or moderate income housing; hospitals; clinics; institutions for children and the aged; comfort stations; recreation places; markets; and parking lots must be said to "understand there is a risk they could be displaced by the Town at some point." J.A. 386; See C.G.S. §§ 7-148(4)(C)(E)(I); 7-148(6)(A)(i). There is no authority to support this finding and,

indeed, the historical practice of municipalities that do "provide for" garbage collection has been to do so on a competitive level with other private waste haulers. cf., USA Recycling v. Town of Babylon, 66 F.3d 1272, 1278, n.5 (2d Cir. 1995), cert. den'd, 1996 U.S.Lexis 2432, 116 S.Ct. 1419 (1996) (noting New York statute that explicitly authorized county to "displace competition with . . . monopoly" and "exclusively control all solid waste")

> 'Regulate' and 'prohibit' are not synonymous terms but have different meanings. To regulate a business implies that the business may be engaged in or carried on subject to established rules or methods, while to prohibit is to prevent the business from being engaged in or carried on entirely or partially . . . The power to regulate does not include the power to prohibit or suppress.

Yaworski v. Canterbury, 21 Conn.Sup. 347, 350, 154 A.2d 758 (1959)(emphasis added)(invalidating town ordinance that prohibited transportation of waste into the town from any other town as in excess of authority delegated under C.G.S. § 7-148.)[11] To evaluate municipal authority, the court 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, 192 Conn. 399, 401-402, 471 A.2d 961 (1984). Where the legislature intended to authorize "prohibition," it did so explicitly. See C.G.S. § 7-148(6)(B)(iv); (6)(C)(iv); (7)(A)(iii); (7)(A)(vi), (vii).

Second, the mere potential that authority to prohibit would be exercised is insufficient. Spannaus, 438 U.S. at 245, 249-50(even though pension plans were subject to regulation, the state had not previously regulated the plans, so the state law was not foreseeable); Veix v. Sixth Ward Building & Loan Assoc., 310

[11] In the context of zoning regulations, the power to regulate may encompass the power to prohibit uses but only prospectively. Lampasona v. Planning & Zoning Com. of North Stonington, 6 Conn.App. 237, 504 A.2d 554 (1986); Petruzzi v. Zoning Bd. of Appeals, 176 Conn. 479, 408 A.2d 243 (1979).

U.S. 32, 38, 60 S.Ct. 792 (1940) (regulation must occur in "industry that is already highly regulated in the particular to which [the plaintiff] now objects.")(emphasis added); Holiday Inns Franchising, Inc. v. Steven Nelson and Tass Enterprises, Inc., 29 F.3d 383 (8th Cir. 1994), cert. denied, 513 U.S. 1032, 115 S.Ct. 613 (previous regulation on different subject matter insufficient); cf. Sanitation and Recycling Indus., 107 F.3d at 994 (where city had regulated waste hauling industry for past forty years).

Moreover, even if the potential to regulate includes the power to retrospectively prohibit the operation of a lawful business, plaintiff can only be deemed to be on notice that the Town would exercise that authority where it was necessary to protect the public health and safety. See, e.g., Sanitation and Recycling Indus., supra (regulation of waste management business in response to evidence of coercive conduct.) The Supreme Court squarely addressed this issue in Blaisdell, where the court stated that, while every contract is made in subordination of the police power, the mere existence of such powers are not sufficient to justify the abrogation of contracts in the absence of "public necessity for their execution." Id.[12]

In addition, the authority delegated to a municipality to regulate private business may only be exercised in order achieve the purpose for which this authority was delegated. See, Dobbins v. Los Angeles, 195 U.S. 223, 240-41, 25

[12] Thus, in Blaisdell, the Court did not rely upon the police power alone to justify the impairment of the plaintiff's contracts, but held that the police power could be exercised so as to impair private contracts because an emergency furnished the "necessity" for its execution. Id. at 447.

S.Ct. 18 (1904). In Dobbins, supra, the court held that a municipality could only utilize its delegated power to control gas rates in furtherance of the purpose of the delegation - to maintain fair and reasonable prices - and not to compel the sale of a utility to competitor or business rival. Id. In this case, purpose of the Town power to regulate garbage collection is public health and safety, not to direct all waste to a local incinerator for fiscal reasons. Yaworksi, supra. Thus, plaintiff cannot be deemed to be on notice that its contracts would be dissolved for this purpose.

Finally, the state may only delegate the power it possesses - power that is subject to the constraints of the Contract Clause. Spannaus, 438 U.S. at 242. The state's inherent power to protect the public welfare does not extend to the absolute destruction of private contracts in response to any economic condition. United States Trust Co. at 21-22, 26-27, citing, Lynch v .United States Trust Co., 292 U.S. 571, 580, 54 S.Ct. 840 (1934)(need for money is no excuse for repudiating contractual obligations); Association of Surrogates, 940 F.2d at 773. Thus, C.G.S. § 7-148 cannot constitute a delegation of authority, known by plaintiff, to the Town, to monopolize the waste hauling business based upon fiscal concerns.

To the extent the "home rule" statute is construed to authorize the prohibition of plaintiff's business, it is invalid. "Where a statute . . . 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." New Milford v. SCA Services of Connecticut, Inc., 174 Conn. 146, 151, 384 A.2d 337 (1977)(holding law delegating authority to deny permits to solid waste disposal facilities invalid for failure to contain express standards).

2. Dicta In Connecticut Carting Did Not Place Plaintiff On Notice That Its Contracts Were Subject To Retroactive Termination.

The District Court also erroneously stated that "Judge Dorsey's decision striking down East Lyme's flow control ordinance in December 1995 put plaintiff on notice that the members of SCRRA needed to find another way to satisfy their minimum commitments to the Preston facility and could undertake to provide municipal waste collection." J.A. 489. The dicta does not state that creating a government monopoly, solely for fiscal reasons, is a constitutionally adequate alternative under the Contract clause or under the Commerce Clause.[13]

In addition, neither Connecticut Carting, nor any other precedent has held that a town may retrospectively invalidate existing contracts for fiscal reasons alone. Even assuming arguendo that the dicta in Judge Dorsey's decision placed plaintiff on notice that the Town would enter the waste collection business, nothing in the decision put plaintiff on notice that the Town would do so without notice and by retrospectively invalidating all of plaintiff's existing contracts within

[13] The statement referred to by the district court was: "Nondiscriminatory alternatives exist for funding East Lyme's obligation, including . . . general tax revenues, collection and disposal of commercial waste by the town or contracting with a single hauler to collect and dispose of town's waste. Thus it cannot be said that the fee is the only available of meeting the obligation." Connecticut Carting Co. v. Town of East Lyme, 946 F.Supp. 152, 156-157 (D.Conn. 1995).

the Town. The district court has committed clear error by applying the "notice" doctrine in this case. Church of Scientology, 794 F.2d at 44.

3. THE IMPAIRMENT OF PLAINTIFF'S CONTRACTS IS SUBSTANTIAL EVEN IN LIGHT OF THE HOME RULE STATUTE AND CONNECTICUT CARTING.

Plaintiff's contracts were substantially impaired even assuming arguendo that 'notice' encompasses Connecticut Carting and the "home rule" statute. Unlike any previous case, plaintiff's contracts **have not only been rendered utterly worthless, its previously lawful business has been declared illegal**. The complete destruction of plaintiff's contracts is the "outer limit" of the proscriptions of the Contract Clause. See, Kavenaugh, 295 U.S. at 60; United States Trust Co., 431 U.S. at 26-27 (complete destruction of contracts is "outer limit"); Blaisdell,290 U.S. at 447(law could not extend to complete destruction of contracts even in light of the existence of police power and the severe economic emergency of the Depression). Thus, the complete destruction of plaintiff's contracts, even in light of the alleged police power and dicta, is 'substantial.'

"Also relevant to the determination of the degree of impairment is the extent to which the challenged provision provides for gradual applicability of grace periods." Sanitation and Recycling Indus., 107 F.3d at 994. In Spannaus, despite previous regulation and the existence of police power, the Court found severe impairment because "there is not even any provision for gradual applicability of grace periods." Id., 438 U.S. at 247. In this case, the Ordinance was adopted on April 21, 1996 and, as of July 1, 1997, rendered plaintiff's previously legal business illegal. The immediacy of the impairment is extreme in light of plaintiff's twenty-eight years in business and should thus be deemed

'substantial.'

D. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE ORDINANCE WAS JUSTIFIED BY A SIGNIFICANT PUBLIC PURPOSE.

"The severity of the impairment measures the height and hurdle the state legislation must clear." Spannaus, 438 U.S. at 245. Where, as here, the government imposes a substantial impairment on private contracts, the record must reflect that the ordinance is necessary to serve a significant public purpose. Spannaus, 438 U.S. at 247(emphasis added).[14] In order to meet the burden to establish a "significant public purpose" the Town must establish that the law is "aimed at remedying an important general social or economic problem rather than providing a benefit to special interests." Sanitation and Recycling Indus., 107 F.3d at 993 (citation omitted).

Unless the record discloses that the law is "necessary," there is no presumption favoring legislative judgment. Spannaus, 438 U.S. at 247. Moreover, complete deference to a legislative assessment of reasonableness and necessity is not appropriate where, as here, the State's self interest is at stake. United States Trust Co., 431 U.S. at 25-26.

The Town failed to meet its burden to establish that the Ordinance was

[14] See also, Condell, 983 F.2d at 419; Association of Surrogates, 940 F.2d at 772-73; E & E Hauling, Inc. v. Forest Preserve District, 613 F.2d 675, 680-81 (7th Cir. 1980)

enacted to meet a legitimate public purpose. The facts do not support a finding that the purpose of the ordinance related to safety, efficiency or equity. J.A. 490. Rather, precisely like the law at issue in Carbone, supra, the sole purpose of the Ordinance was to impermissibly direct waste and revenue to a favored facility.

The Ordinance itself, which is conclusive in determining the purpose of the Ordinance, does not provide for the "safe and efficient collection and disposal of solid waste on an equitable user fee basis." J.A. 490\[15] Bread Political Action Committee v. Federal Election Comm'n, 455 U.S. 577, 581, 102 S.Ct. 1235 (1982). In the absence of clear indication of the purpose of a law, the court may look to legislative history. Weinberger v. Wiesenfeld, 420 U.S. 636, 648, 95 S.Ct. 1225 (1975). However, the court may not, as the district court did in this case, rely upon post hoc statements of those involved in the process. Bread Political Action Committee, 455 U.S. at 582, n.3; Doe v. Pataki, 1997 U.S.App.Lexis 22369 *47(when the inquiry into motives goes beyond objective manifestations, it becomes "a dubious affair indeed."). Weinberger, supra, at 648, n.16.

However, even assuming arguendo that the purpose of the ordinance related to health and safety, the Town's alleged concerns are not legitimate public necessities that justify the destruction of plaintiff's contracts. Energy conservation and environmental concerns do not justify the abrogation of contracts. United States Trust Co., 431 U.S. at 28-29. The Court has refused to

---

[15] The Ordinance simply provides that, "effective July 1, 1997" all "solid waste generated within the Town shall be removed, transported and/or disposed of only by the Authority, or refuse collectors with whom the Authority has contracted or awarded franchises." J.A. 451-52.

"accept this invitation to engage in a utilitarian comparison of public benefit and private loss, the Court has not "balanced away" the limitation on state action imposed by the Contract Clause." Id.

Moreover, in light of this court's decision in B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992), it is clear that the Town's "Superfund" claim is nothing more than a pretense. First, these alleged concerns are found nowhere in the information presented to the public. Second, the Town witness testified that health and safety was not a concern. J.A. 238. Third, the Ordinance does nothing to ensure the safe disposal of hazardous waste: (a) the Ordinance does not contain a single provision regarding the location that waste must be disposed; (b) the Regulations do not control the disposal of hazardous waste but reiterate the existing state and federal requirements (J.A. 468, § 7.2); and (c) the only location to which waste is directed, Preston, does not accept hazardous or toxic materials. J.A. 427-28, § 202(f).

As in Gov't Suppliers Consolidating Services, 975 F.2d 1267, 1279-80 (7th Cir. 1992) cert. denied, 506 U.S. 1053, 113 S.Ct. 977 (1993) defendants "produced the slightest evidence before the district court that health risks are actually posed by the [prohibited practice] . . . it did not demonstrate that such risks, if they do exist, could not have been avoided by means less drastic than the outright ban." Consequently, as in Gov't Suppliers, defendants have failed to meet their burden to demonstrate that public health and safety forms a legitimate basis for their destruction of plaintiff's contracts.

Moreover, the only evidence presented regarding health and safety

concerns was after-the-fact testimony. J.A. 211-214; 228-231. The error and irony of this disingenuous claim is readily apparent. As defendants are well aware, a municipality is subject to Superfund, or CERCLA liability, only where there is a sufficient nexus between the municipality and the hazardous substance, "one that does not exist in cases where the government unit is responsible only for promulgating disposal regulations or permitting disposal facilities," but which does exist where the municipality arranges for the disposal of solid waste. B.F. Goodrich Co., 958 F.2d at 1199 (emphasis added). It is the Ordinance itself, which has, for the first time, given rise to the potential for Superfund liability of the Town.

Additionally, there is no evidence that disposal of all waste at the incinerator is efficient. The district court explicitly noted that the incinerator's fees are extraordinarily high and that there was no evidence to explain the disparity between the incinerator's fees and the fees charged by other disposal facilities. J.A. 485, n.5. There is also no evidence that the purpose of the Ordinance was to impose equitable user fees. The district court's finding that, in the absence of the Ordinance, residential tax payers would be required to "pay for collection and disposal of . . . commercial waste through an increase in their property taxes" is clearly erroneous. J.A. 489. The evidence directly contradicts this finding: prior to the Ordinance, the commercial population paid for the collection and disposal of their own waste through contracts with private haulers. The waste was not even disposed of at the incinerator funded by the Town. J.A. 400-403.

Moreover, equity to residents does not support the violation of plaintiff's

constitutional right. See, Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 112 S.Ct. 2009, 2015 (1992); Gov't Suppliers, 975 F.2d at 1284; B.F. Goodrich, supra, at 1199(burden on taxpayers is not a sufficient ground to judicially graft an exemption onto a statute).

The admitted sole purpose of the ordinance at the time it was enacted was to direct all waste to the favored incinerator and thereby direct revenues to the incinerator. See, J.A. 245; J.A. 238; J.A. 400-403. Because defendants presented no probative evidence that the purpose of the ordinance was to serve the legitimate goal of safe, efficient, and equitable waste disposal, the courts finding of fact was erroneous as a matter of law.

Raising revenue is not a legitimate public purpose to abrogate plaintiff's contracts. Condell, 983 F.2d at 419-420(emphasis added); see also, Surrogates, 940 F.2d at

774 (noting danger of slippery slope were fiscal crises to justify contract impairment); See also, Carbone, 511 U.S. at 393 ("By itself, of course, revenue generation is not a local interest that can justify discrimination against interstate commerce."); United States Trust, 431 U.S. at 25-26. In following United States Trust, this court in Association of Surrogates reaffirmed that avoiding a tax increase was not a sufficient purpose to abrogate existing contracts. Id. at 773. Thus, the State's effort to avoid its financial obligations by taking over plaintiff's business and thereby compelling commercial entities to pay inflated fees and dispose of their waste at the incinerator is impermissible.

The use of broad authority to "provide for or regulate" found in Connecticut's "home rule" statute, if interpreted to authorize abrogation of private contracts to generate revenue, would permit a town, having issued municipal bonds to finance a public hospital, and obligating itself to subsidize the hospital's costs, to declare all physician contracts within the town void; permit only physicians who contract with the public hospital to continue their practice; require all towns residents to obtain medical treatment at the public hospital; and thereby finance its obligations by ensuring town access to all medical service profits generated within the town. See, Footnote 12, supra. This is exactly the conclusion this court anticipated and sought to avoid in Association of Surrogates, supra. Id, 983 F.2d at 418 (noting that, were the State permitted to abrogate contracts based on fiscal concerns, the State's "perennial fiscal crises" would continually justify such abrogation.)

Likewise, directing tipping fees, or the waste that generates them, to a private facility is impermissible special interest legislation. See, Spannaus, 438 U.S. at 247-48 (legislation aimed at a specific business is not "enacted to protect a broad societal interest"); Carbone, 511 U.S. at 394-95 (governments may not use their regulatory power to favor local enterprises). Although Carbone involved a Commerce Clause challenge, its holding is instructive. There, as in this case, the alleged public purpose of the law was to direct waste, and revenue generated by the waste, to a state sponsored facility. In that context, the Court stated "by itself, of course, revenue generation is not a local interest that can justify discrimination against interstate commerce." Carbone, at 393. Revenue

generation also cannot justify the abrogation of contracts. Association of Surrogates, supra.

E. THE TOWN FAILED TO MEET ITS BURDEN TO ESTABLISH THAT THE ORDINANCE WAS EITHER NECESSARY OR RATIONALLY RELATED TO ANY ALLEGED PUBLIC PURPOSE.

The district court did not even purport to require the Town to establish that the wholesale illegalization of plaintiff's business was "necessary" to meet the alleged public interests as required in Contract Clause analysis. See, Spannaus, 438 U.S. at 247; Condell, 983 F.2d at 420. The finding that "'there is no evidence that the Town ignored other feasible alternatives" is not sufficient to establish necessity. J.A. 490; Waste Management of Pennsylvania, Inc. v. Shinn, 938 F.Supp. 1243, 1256 (D.N.J. 1996)(State cannot prove 'necessity' by looking at a series of one-dimensional alternatives in isolation and only attempting to prove that no one technique can possibly do the job)

The ordinance cannot be deemed to bear a rational relationship to the claimed "public safety" purpose because it does nothing to further this alleged goal. As the Supreme Court noted in Carbone, the Ordinance cannot be deemed necessary to public health and safety as a number of alternatives exist for addressing the health and environmental problems alleged to justify the ordinance, "[t]he most obvious would be uniform safety regulations." Carbone, 511 U.S. at 393. The Town's complete failure to impose a single safety regulations prior to enacting the ordinance further undermines that this was even a consideration of the Town in adopting the ordinance.

The ordinance cannot be deemed to bear a rational relationship to the alleged "efficiency" purpose. Unlike the case in Babylon, supra, where a Town study concluded

that it could save consumers between $7 million to $8 million per year by controlling garbage collection and disposal, Babylon, 66 F.3d at 1278-79, in this case, the Town is simply assuring that the cost to commercial entities and residents is one of the highest in the northeast. J.A. 485, and n.5.

Finally, the ordinance was not rationally related or necessary to avoid raising taxes. The problem could have been addressed by an adjustment to the budget as the Town had consistently done before. J.A. 244; J.A. 432, §301(d); J.A. 441, § 505; J.A. 241; 269-70 (Town had never met its minumum commitment). In addition, the Town could have informed the SCRRA that it would not be able to meet its minimum commitment in light of Carbone (J.A. 415-424, § 101)[16] or challenged the "minimum commitment" requirement of its contract as illegal flow control. J.A. 198; 243; 443-44, § 512; J.A. 445, § 516 (severability); J.A. 445-48, § 517 (arbitration).

F. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE ORDINANCE WAS "REASONABLE AND APPROPRIATE."

[16] See, footnote 5, supra.

The district court found that, under the facts of the case, which included the previous district court decision by Judge Dorsey and the "home rule statute," the Town should have provided at least one to two years notice to waste haulers prior to rendering their businesses illegal. J.A. 490-91. The Town's failure to provide for a sufficient "grace period" renders the law "unreasonable" under the Contract Clause analysis. See, Spannaus, 438 U.S. at 247; Sanitation and Recycling Indus, 107 F.3d at 993. As in Spannaus, supra, the Ordinance at issue takes decades worth of dedication into a business, and reliance upon settled expectations, and immediately and retroactively destroys them. See, Spannaus, at 247[17]. Under these circumstances, any presumption favoring "legislative judgment as to the necessity and reasonableness of a particular measure simply cannot stand." Id., at 247.

The court nevertheless concluded that the Ordinance was reasonably implemented. In doing so, the district court relied implicitly upon the testimony of the Town's witness that the Town considered the interests of the haulers in framing the ordinance. J.A. 489. This statement is based on the witnesses' testimony that the Town "expected that existing haulers, including plaintiff, would submit proposals and that more

[17] Neither Sanitation and Recycling Indus., nor Babylon imposed such retrospective alterations. See, Sanitation and Recycling Indus.,107 F.3d at 990-91(grace period to apply for new licenses and contracts continued until either they expired by their terms or two years after enactment of the law.); Babylon,66 F.3d at 1279 (town refused to renew licenses but permitted existing licenses to remain in effect until their natural expiration.)

than one of them would continue to provide service in the Town." J.A. 482.[18]

[18] As previously stated, it is the Ordinance as implemented, not the post hoc statements of one individual, which is relevant. See, Bread Political Action Committee, supra, at 58081, 582, n.3; Weinberger, supra, 420 U.S. at 648 (recitation of benign purpose does not shield against inquiry into actual purpose and underlying scheme).

The statement of this witness was not verified by any documentation produced concurrently with adoption of the Ordinance. However, the limited evidence produced by defendants indicates that the interests of waste haulers was not considered. J.A. 400-403. More importantly, the Ordinance itself does not support the alleged consideration of the Town in that (1) it does not mandate the creation of any more than "one" district; (2) it does not require the use of a private hauler but simply authorizes the Authority to "enter into contracts or grant franchises"; and (3) it does not mandate, or provide procedures, for the award of private contracts. J.A. 451-52. Moreover, the speculation that plaintiff may have received the government contract is questionable in light of the Town's admission that it refused to contract with any party that challenged the constitutionality of its actions.[19] J.A. 224; 266.

"A law that works substantial impairment of contractual relations must be specifically tailored to meet the social ill it is supposedly designed to ameliorate." Sanitation and Recycling, 107 F.3d at 993, citing, Spannaus, 438 U.S. at 243. The Ordinance is overbroad because renders all forms of garbage collection and disposal within the Town illegal. J.A. 451-52. The Ordinance prohibits plaintiff from continuing its "roll off" business although the waste generated from "roll off" work may not be disposed of at the incinerator. J.A. 221. The 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.

G. THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO AFFORD PLAINTIFF AN OPPORTUNITY TO REBUT THE TOWN'S EVIDENCE OF LEGISLATIVE PURPOSE AND

---

[19] In addition, the mere potential to enter a government contract does not mitigates the substantiality of the impairment of plaintiff's private contracts or provide evidence that the Ordinance is reasonable. See, International Steel & Iron Co. v. National Surety Co., 297 U.S. 657, 664-65, 56 S.Ct. 619 (1936)(statutory replacement for contract remedy violates Contract Clause.)

REASONABLE IMPLEMENTATION.

It is fundamental that, prior to a decision, the parties have an opportunity to conduct discovery to rebut the Town's claims. Rosen v. Siegel, 106 F.3d 28 (2d Cir. 1997); Berger v. United States, 87 F.3d 60 (2d Cir. 1996). In this case, the district court denied plaintiff's request for permission to conduct discovery prior to the evidentiary hearing. J.A. 134-35. The court's failure to afford plaintiff the opportunity to conduct discovery prior to ruling on plaintiff's application for preliminary injunction is prejudicial error. Berger, supra.

II. THE DISTRICT COURT ERRONEOUSLY DENIED PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION AS TO ITS COMMERCE CLAUSE CLAIM.

At oral argument, the district court, relying explicitly on Babylon, 66 F.3d 1272, supra, held that plaintiff could not expect to succeed in obtaining an injunction on the basis of its Commerce Clause challenge to the Ordinance. J.A. 130-31. The court erroneously applied Babylon, supra, to preclude plaintiff's claim.

The Supreme Court, in Carbone, supra, held that an ordinance with the design and effect of hoarding solid waste, and the demand to get rid of it, for the benefit of a preferred processing facility violates the Commerce Clause. Carbone, 511 U.S. at 392. The Ordinance at issue in this case, admittedly, has the design and effect of hoarding solid waste for the benefit of the Incinerator. See, J.A. 245; 238. All of the exhibits presented by the Town to the public related solely to the necessity to raise revenue to offset the Town's debt to the incinerator. J.A. 400-403.

In Carbone, as in this case, the purpose of both ordinances was to retain the processing fee charged at the facility to amortize the cost of the facility. Carbone, at 386-87; J.A. 409-450. However, the court in Carbone soundly rejected the need for revenue as a justification to direct waste to the facility stating that "having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulations to give that project an advantage over rival businesses from out of state." Id. at 394.[20] For the same reasons, the Ordinance in this case should have been struck down as a violation of the Commerce Clause.

Babylon, supra, does not establish the validity of the Ordinance in this case. In sharp contrast to this case, in Babylon, the town took to heart the "Supreme Court's admonition in Carbone that if special financing is necessary to ensure the long-term survival of the incinerator, then the town may subsidize the facility through general taxes or municipal bonds." Babylon, 66 F.3d at 1292 (citation omitted). The town of Babylon contracted with a consortium of local waste haulers and provided an incentive for them to dispose of their waste at the private facility through a 100% subsidy of the incinerator's tipping fee. Id. at 1291-92 (Town is exercising government function when it "spends its tax

[20] The Town specifically chose to take over the waste collection business to give the Incinerator an advantage over rival businesses. J.A. 262-63(Town rejected subsidization because it would still leave the incinerator subject to the competitive "spot" market).

revenues to purchase services for town residents.") Based on this evidence, the court held that the Town was a market participant in the waste disposal business and had not discriminated against interstate commerce. Id.

By contrast, in this case, the Town has chosen not to utilize taxes to "purchase services for town residents," and not to provide any incentive to dispose of waste at the Incinerator. Neither the Ordinance nor the incineration contract (J.A. 409-50), constitute market participation. See, SSC Corp. v. Town of Smithtown, 66 F.3d 502, 512 (2d Cir. 1995)(ordinance is not market participation); Babylon, 66 F.3d at 1282 (same); CRRA v. Commissioner of the Dept. Of Environmental Protection, 1994 Conn.Super. LEXIS 1195 (Holding Connecticut regional resource recovery authorities are not market participants in the incinerators that they finance); J.A. 430, § 204.

In addition, by the Ordinance, the Town does not "use economic incentives to benefit local businesses," Babylon, 66 F.3d at 1291, but acts to implement a contractual mandate of delivery to the Incinerator. J.A. 493-497. The Town has unconstitutionally utilized its regulatory powers to eliminate any business that will not agree to dispose all of the waste it collects at the local incinerator. Carbone, at 394-95 ("State and local governments may not use their regulatory powers to favor local enterprises by prohibiting patronage of out-of-state competitors of their facilities.").

Further, the Town's conduct is not within the ambit of this court's reasoning in Babylon that:

the payment of taxes in return for municipal services is not comparable to

> a forced business transaction that the ordinance in Carbone and Smithtown required, and that rendered those ordinances discriminatory against interstate commerce. In short, because Babylon is not selling anything, it cannot be considered to be a favored local proprietor as in Carbone.

Babylon, 66 F.3d at 1283. In this case, the Town is selling something: the right to operate a waste hauling business in the town of Stonington. The price to be paid is a commitment to (a) deliver all waste to the Incinerator; (b) pay the Town's obligation to the incinerator through tipping fees; and (c) not challenge the constitutionality of the Town's conduct.[21]

Neither directing all waste to the Incinerator, nor revenue generation, is a "local interest that can justify discrimination against interstate commerce." Carbone, 511 U.S. at 383. Just as importantly, unlike in Babylon, Connecticut law does not "make clear that the Town is fulfilling a governmental duty" when it takes exclusive control over the waste collection industry. Compare, C.G.S. § 7-148(4)(H) and Babylon Code § 133-40(A)(2) (1991); See, Yaworski, 21 Conn.Sup. at 350 (grant of authority to "regulate" is not authority to "prohibit"); SCA Services of Connecticut, Inc., 174 Conn. at 151 (statutory grant of authority to prohibit the exercise of an otherwise lawful business must be explicit and contain directives).

In SSC Corp., issued the same day as the decision in Babylon, this court

---

[21] The one waste hauling business that challenged the ordinance ended up with the Town monopoly after it agreed to withdraw its lawsuit. J.A. 224.

held that "Carbone compels us to find that Smithtown's flow control ordinance facially discriminates against interstate commerce because it directs all town waste to a single local disposal facility." SSC Corp., 66 F.3d at 514. The Ordinance at issue in this case, no less than the one in SSC Corp. directs all waste to a single local disposal facility. The fact that the Ordinance "may not in explicit terms seek to regulate interstate commerce," is irrelevant, "it does so nonetheless by its practical design and effect." Carbone, 511 U.S. at 394.

The facts establish that this case is precisely on point with Carbone in that "the avowed purpose of the ordinance is to retain the processing fees charged at the [incinerator] to amortize the cost of the facility. Because it attains this goal by depriving competitors, including out-of-state firms, of access to local markets . . the flow control ordinance violates the Commerce Clause." To the extent it is interpreted broadly to validate the Ordinance in this case, Babylon is contrary to settled and controlling Supreme Court precedent. Neither invocation of the "core government function" mantra, nor the state's laudable interest to "develop trash control systems that are efficient, lawful and protective of the environment" suffice to circumvent the Commerce Clause. Carbone, 511 U.S. at 385-86.

In Babylon, this court rejected the notion that Carbone stripped local governments of their authority to collect and dispose of waste. Babylon, 66 F.3d at 1275-76. What Carbone did do, was make clear that this authority is limited by the proscriptions of the Commerce Clause: towns may not exercise this authority to allow only the favored operator to process waste. Carbone, 511 U.S. at 392. Babylon is an erroneous application of the law if it is interpreted as an articulation

that towns have unlimited authority to control waste collection and disposal for the sole purpose of obstructing interstate commerce, and in the absence of any taxing scheme that would indicate the provision of a government service.

The "central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." Carbone, 511 U.S. at 390. The Ordinance at issue in this case is thus precisely the type of law that the Constitution prohibits. Thus, Babylon cannot be validly extended to validate the Ordinance.

CONCLUSION

For the foregoing reasons, the district court erred in not granting injunctive relief. Appellant respectfully requests that this court reverse the decision of the district court and enjoin the Ordinance on the ground that it violates both the Contract Clause and the Commerce Clause. Alternatively, appellant respectfully requests that this court reinstate the temporary restraining order and remand the case to the district court to conduct a hearing, following discovery, on plaintiff's Application for Preliminary Injunction.

Respectfully submitted,

ELIOT B. GERSTEN
JOHN P. CLIFFORD, JR.
GERSTEN & CLIFFORD
214 Main Street
Hartford, CT 06106-1892
Tel. (860) 527-7044
and

AVIVA CUYLER
ATTORNEY-AT-LAW
5686 Lakeville Highway
Petaluma, CA 94954

Counsel for Appellant
Filed: September 17, 1997
Resubmitted: September 24, 1997