Appellate Division — Third Department Docket No. 531616

New York Supreme Court
Appellate Division—Third Department

JENNIFER DUNCAN,
on behalf of herself and all others similarly situated,

Plaintiff-Respondent,

– against –

CAPITAL REGION LANDFILLS, INC.,

Defendant-Appellant.

BRIEF OF THE TOWN OF COLONIE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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INTRODUCTION

Plaintiff-Respondent Jennifer Duncan's putative class action alleges that the Town of Colonie Landfill ("Colonie Landfill" or "Landfill") is causing nuisance odors that are impacting residents throughout Colonie and beyond. While the Landfill is operated by Defendant-Appellant Capital Region Landfills, Inc. ("Capital Region"), it is owned by Amicus Town of Colonie ("Town" or "Colonie"). And the Town holds all the permits governing the Landfill's operations and relies on it to provide critical waste management services to its residents. Colonie has a unique and compelling interest in this appeal, as Ms. Duncan's expansive lawsuit threatens to destroy the traditional restrictions on tort claims and invite private plaintiffs to pursue actions against vital public works.

Not every alleged nuisance is actionable in tort. New York courts have long imposed limits on public nuisance and negligence claims that reduce the burden on public infrastructure, consider the reasonable expectations of society, and recognize government's role in regulating industry. Government regulatory oversight has expanded dramatically with time, reinforcing the need to respect these enduring principles limiting common law claims.

This amicus brief, which represents the interests of Colonie and of similarly situated local governments and public authorities that own or operate

public works across New York State, explains the importance of finding that Plaintiff-Respondent's claims cannot be maintained under settled tort law. The boundaries on actions by private plaintiffs are essential to ensuring that landfills and other public works may continue to provide necessary services to local communities and the greater region without facing debilitating private lawsuits. To give weight to the special injury requirement for bringing a private action for public nuisance, and to establish a reasoned limit on the duty owed by a municipally-owned landfill in negligence, the Court should reverse the trial court's decision and dismiss the public nuisance and negligence claims.

In recognition of the considerable burden on defendants that would result if any private plaintiff could seek redress for a public harm, New York courts only permit private actions for public nuisance where a plaintiff has a unique injury that is not shared by an entire community. General, widespread injuries of property value diminution and interference with the use and enjoyment of land—common to all residents across 15 square miles—cannot constitute the required special injury. These allegations of sweeping harms are intended to be remedied by government agencies, which are best suited to address claims of occasional odors from municipally-owned landfills and public works.

Allegations of harm to the general public are also not suitable for claims sounding in negligence. The Court of Appeals has declined to find negligence duties that would result in the crushing exposure Ms. Duncan seeks to impose here. The Colonie Landfill provides a critical public service, and Plaintiff-Respondent's broad-based claims threaten the ability of this and other municipally-owned landfills to operate and serve the needs of New York State residents and businesses.[1]

The Court should not supplant governmental regulatory and enforcement authority over the Landfill's operations that address the harms alleged here. Respecting the limits on private actions in tort, the Court should dismiss Plaintiff-Respondent's Amended Complaint.

INTEREST OF *AMICUS CURIAE*

Amicus Town of Colonie—like other local governments and public authorities—has an interest in preventing the unchecked expansion of common law public nuisance and negligence claims against public works. The Town owns and holds the permits for the Colonie Landfill located at 1319 Loudon Road in the City of Cohoes, which provides critical waste management services to the local community and greater region. R. 36, R.

[1] Colonie rejects the notion that its Landfill is causing nuisance odors throughout the community but understands that, for purposes of this appeal, the Amended Complaint's factual allegations must be accepted as true.

52.[2] Since 2011, the Town has engaged with a private operator—Defendant-Appellant Capital Region—to manage and operate the Landfill on the Town's behalf pursuant to a long-term operating agreement.[3] The operating agreement provides the Town with an annual revenue stream and covers future landfill closure costs, which are significant.[4]

The Colonie Landfill is a valuable asset for the community and the surrounding region. The Landfill processes up to 820 tons of waste six days a week, serving a 59.7 square mile area covering several municipalities. R. 43. The Town's 2018 Solid Waste Management Plan shows that the facility plays a central role in the Town's long-term plan to manage waste.[5] In addition to municipal solid waste disposal and recycling, other waste management operations on site include a solid waste transfer station, a yard waste processing facility, a materials recovery facility, a regulated medical waste

[2] References to "R. __" are to the Record on Appeal filed by Defendant-Appellant Capital Region Landfills, Inc.

[3] *Conners v. Town of Colonie*, 108 A.D.3d 837 (3d Dep't 2013) (upholding validity of operating agreement).

[4] Office of New York State Comptroller, *Local Governments and the Municipal Solid Waste Landfill Business* at 11 (December 2018), available at https://www.osc.state.ny.us/files/local-government/publications/pdf/landfills-2018.pdf.

[5] Town of Colonie Local Solid Waste Management Plan, prepared by CHA Consulting, Inc, Revised April 2018 ("Colonie Solid Waste Management Plan"), available at https://www.dec.ny.gov/docs/materials_minerals_pdf/colonietownlswmp2018.pdf.

storage and transfer facility, a household hazardous waste transfer station, a landfill gas-to-energy plant, and other equipment.[6] The continued operation of the Colonie Landfill is particularly important given the slated closure of other landfills in the area, including the City of Albany Rapp Road Landfill, which is expected to close by 2026 and already has limited hours.[7] The New York State Department of Environmental Conservation ("NYSDEC") recognizes the importance of the Colonie Landfill in managing waste in the region and in fact has found that if the Colonie Landfill closed, "local landfill options would be unable to handle the volume of waste generated" and localities would bear increased costs and greenhouse gas emissions as waste would need to be hauled many miles away. *Town of Waterford v. NYSDEC*, Nos. 528560, 528595, 2020 WL 6324747, at *4 (3d Dep't Oct. 29, 2020).

Plaintiff-Respondent's lawsuit directly impacts the Town's ability to continue to provide these critical public services. Plaintiff-Respondent's putative class of thousands of private individuals seeking damages and injunctive relief threaten to strain already tight municipal resources and hinder

[6] Town of Colonie Solid Waste Facility Operating Agreement, dated August 4, 2011, available at https://www.colonie.org/departments/envservices/solid-waste-facility-agreement#agreement.

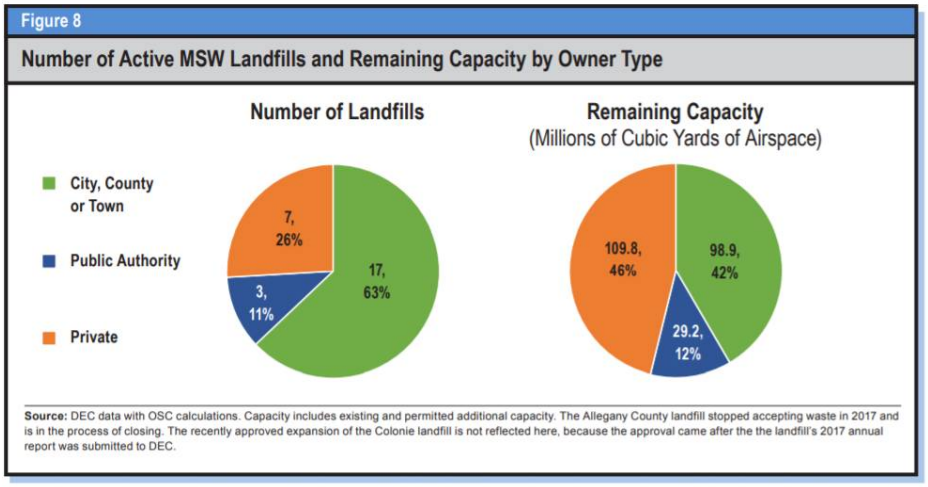
[7] Rapp Road Waste Management Facility, available at http://www.albanylandfill.com/; *Local Governments and the Municipal Solid Waste Landfill Business* at 10.

the Town's ability to provide this essential service to residents and businesses throughout the region. Colonie was operating at a significant deficit before it entered into the long-term operating agreement with Defendant-Respondent Capital Region in 2011. The Town relies on the annual revenue from the Landfill to help balance the Town's budget.

Plaintiff-Respondent's claims also threaten the ability of similar municipally-owned waste management facilities to operate around the state. In 2018, New York State's municipal solid waste landfills accepted over nine million tons of solid waste for disposal.[8] Local governments, like the Town, exercise significant responsibility for waste management within the state. As of 2018, local governments and public authorities owned 20 out of the 27 municipal solid waste landfills.[9] Moreover, over half of the state's remaining landfill capacity is in landfills owned by local governments and public authorities.

[8] NYSDEC, *2018 MSW Landfill Capacity Chart*, Municipal Solid Waste Landfills, available at https://www.dec.ny.gov/chemical/23723.html.

[9] *Local Governments and the Municipal Solid Waste Landfill Business* at 1.



Local Governments and the Municipal Solid Waste Landfill Business at 7.

Colonie has an important interest in maintaining the historical limits on public nuisance and negligence claims, which limits defer to local and state governments to regulate large-scale nuisance impacts of this nature. Allowing Plaintiff-Respondent's claims to proceed will negatively impact the ability of Colonie and other municipally-owned landfills to continue to provide essential public services to meet waste disposal needs in their communities and throughout the State. The Town respectfully requests the Court reverse the trial court decision and dismiss Plaintiff-Respondent's Amended Complaint.

ARGUMENT

I. The Court should affirm New York's strict limitations on public nuisance claims.

A. New York law does not allow private plaintiffs to pursue a public nuisance claim based on claims of widespread, shared harm.

New York law does not permit Ms. Duncan to maintain a public nuisance claim against a valuable waste management facility on behalf of all residents within 15 square miles where that community shares the same alleged injuries. Allowing this proposed class action to proceed would flout the special injury requirement and invite private plaintiffs to pursue lawsuits that unreasonably burden public works. This Court should apply the settled rule that not all nuisances are actionable and dismiss Plaintiff-Respondent's public nuisance claim. *See Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 40 (4th Dep't 1932) ("Residents of industrial centers must endure without redress a certain amount of annoyance and discomfiture which is incident to life in such a locality. Such inconvenience is of minor importance compared with the general good of the community.").

In recognition that public nuisances interfere with the rights of a "considerable number of persons" and could lead to a "multiplicity of lawsuits," New York courts limit private actions for public nuisance. *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280,

292, 294 (2001). A private plaintiff may not sustain a public nuisance claim without special injury—injury of a different kind from that experienced by the community. *Id.* at 292. "[I]n the absence of special damage, a public nuisance is subject to correction only by a public authority." *Leo v. Gen. Elec. Co.*, 145 A.D.2d 291, 294 (2d Dep't 1989); *Copart Indus., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 41 N.Y.2d 564, 568 (1977) (as a public nuisance is "an offense against the State," it is properly remedied by a government agency (citing N.Y. Penal Law § 240.45)). This essential restriction on public nuisance causes of action—repeated in decades of case law—avoids unreasonably burdening defendants and preserves the government's role in remedying public harms. *532 Madison*, 96 N.Y.2d at 292.

General and widespread injuries affecting "a whole community, or a very wide area within it," therefore are not special. *Id.* at 293. Applying this principle, the Court of Appeals has held that plaintiffs do not have a special injury where the alleged harms are shared by huge subsets of the general public. In *532 Madison*, the Court held that proposed classes of businesses and a subclass of residents did not plead special injury because they experienced the same economic losses from building collapses and street closures as "the communities that live and work" in the affected areas. 96 N.Y.2d at 286–87, 293–94. Similarly, in *Burns Jackson Miller Summit & Spitzer v. Lindner*,

pecuniary damages suffered by a proposed class of businesses as a result of a city-wide public transit strike were not a special injury. 59 N.Y.2d 314, 334 (1983). The Court explained that these economic losses—"though differing as to the nature of the expense or the particular contract from which greater profit was expected"—were common to the community of businesses and professionals. *Id.* at 334–35.

Relying on these precedential cases, this Court has also held that injuries shared by large groups with similar interests are not a special injury. About six months ago, the Third Department dismissed a private action for public nuisance where the plaintiff homeowners claimed that a parking area on an adjoining property created a safety hazard by blocking their line of sight when they exited their driveway. *Duffy v. Baldwin*, 183 A.D.3d 1053, 1053, 1055 (3d Dep't 2020). This Court concluded that the risk of a collision was not special as it was shared by all "pedestrian[s], cyclist[s, and] motorist[s]." *Id.* at 1055; *see also Wheeler v. Lebanon Valley Auto. Racing Corp.*, 303 A.D.2d 791, 793–94 (3d Dep't 2003) (resident plaintiffs could not prosecute private action for public nuisance as the community of residents were similarly impacted by noise from a racetrack); *Concerned Citizens of Cedar Heights-Woodchuck Hill Rd. v. DeWitt Fish & Game Club, Inc.*, 302 A.D.2d 938, 938 (4th Dep't 2003) (private plaintiffs could not maintain a public

nuisance claim against a shooting range as noise and lead shot had caused common harms to the "residents in their community").

Here too Plaintiff-Respondent cannot maintain a public nuisance claim based on allegations of general and widespread harm to all residents in the surrounding area. R. 94–95. As in each of the cases described above, Plaintiff-Respondent does not have a special injury because injuries to property rights are common to this entire community. *See also Allen v. Gen. Elec. Co.*, No. 2001/03711, 2003 WL 22433809, at *1, *4 (Sup. Ct. Monroe Cty. Sept. 29, 2003) (dismissing public nuisance claim where all homeowners surrounding toxic waste spill experienced property value diminution), *aff'd*, 16 A.D.3d 1095 (4th Dep't 2005).[10] This Court should thus reverse the trial court's decision and reinforce the limits on private actions for public nuisance.

B. The Court should not supplant the role of governmental agencies in addressing public nuisances.

Private actions for public nuisance are inappropriate to address allegations of large-scale public impacts from highly regulated facilities. As New York courts have recognized in dismissing such claims, a putative class

[10] The Third Department recognized that alleged impacts from widespread odors are typically not a special injury in a recent decision dismissing a challenge to the NYSDEC's approval of the expansion of the Colonie Landfill. *Town of Waterford*, 2020 WL 6324747, at *2–3. As this Court explained, "displeasure with the sights and smells of the landfill" are "not ordinarily specific to the individuals who allege it, and . . . different in kind or degree from the public at large . . . ." *Id.* (internal quotations omitted).

claiming widespread harms from odors should not supplant the well-established oversight and enforcement authority of NYSDEC. *See Copart*, 41 N.Y.2d at 568; *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 481–82 (E.D.N.Y. 2003) (public nuisances are "subject to prosecution generally, if not exclusively, at the hand" of governmental agencies as "state actor[s] [are] both in the best position and [have] a responsibility to protect the public"). Plaintiff-Respondent's request for injunctive relief further threatens to interfere with NYSDEC's primacy in this area. As a matter of public policy, this Court should defer to NYSDEC's special expertise and authority to address these purported odor impacts by adhering to the strict limits on public nuisance causes of action.[11]

The Town and Capital Region have invested significant resources in innovative and environmentally-responsible means of minimizing the potential for odors and ensuring compliance with NYSDEC's regulatory and permit requirements. The Town is the holder of the solid waste management and Title V permits for the Landfill—a critical public asset. R. 36, R. 52.

[11] This Court has recognized NYSDEC expertise in evaluating potential odor impacts from the Colonie Landfill. *Town of Waterford*, 2020 WL 6324747, at *3 (NYSDEC is "entitled to deference on . . . technical assessments" concerning impacts from "sights, smells and sounds" and "rationally determined that petitioners had not shown the existence of ongoing substantive and significant issues regarding the landfill expansion" (internal quotations omitted)).

These permits and the associated regulatory requirements govern all aspects of the Landfill's operations, including solid waste management, air emissions, gas collection and control, and flaring of landfill gas.[12] NYSDEC solid waste regulations specifically prohibit nuisance odors, 6 NYCRR § 360.19(i), and the Landfill's permits require the Landfill maintain a hotline for odor complaints, which it must report to NYSDEC, among other requirements. R. 44, 47. NYSDEC has also placed a full-time environmental monitor on site. R. 41; *see also* Br. for Def.-Appellant at 7–9. As these measures show, the Town, Capital Region, and state regulators take Plaintiff-Respondent's allegations that the Landfill is causing odors seriously.

If the Court defers to NYSDEC's primary role in regulating the purported odor impacts, Ms. Duncan is not without remedy. In addition to NYSDEC's enforcement authority under the Landfill's permits, members of the public have the ability to request NYSDEC initiate a permit amendment proceeding based on "newly discovered material information or a material change in environmental condition" or "noncompliance with previously issued permit conditions, orders of the commissioner, any provisions of the

[12] *See* N.Y. Envtl. Conserv. Law ("ECL") § 27-0703 (establishing NYSDEC authority over regulation of waste management and disposal practices); 6 NYCRR 200.10 (NYSDEC authority to regulate air emissions under Clean Air Act's New Source Performance Standards at 40 C.F.R. pt. 60, subpart WWW); 6 NYCRR subpart 201-6.

Environmental Conservation Law or regulations of [NYSDEC] related to the permitted activity." 6 NYCRR 621.13(a)(4)-(5), (b). NYSDEC treats material changes to permit conditions or environmental conditions or technology as an application for a new permit that is subject to public notice and comment, providing an additional opportunity for public input. ECL §§ 70-0109(2)(a), 70-0115(2)(b). NYSDEC and the Attorney General also have a broad array of additional legal tools to address public nuisance claims like Ms. Duncan's, including summary abatement, injunctive suits, and civil and administrative sanctions. *See* ECL §§ 71-0301, 71-2703; N.Y. Penal Law § 240.45.

The Court should allow NYSDEC to continue to oversee and enforce its regulations and state-issued permits governing widespread public nuisance claims of this nature. Respecting established public nuisance principles will ensure the Town's permits are not improperly subjected to collateral interference from private litigants seeking damages and injunctive relief. The Court should defer to NYSDEC's unique experience and expertise in solid waste management and, as envisioned by the Court of Appeals, dismiss Plaintiff-Respondent's public nuisance claim. *See 532 Madison*, 96 N.Y.2d at 292–94.

II. The Court should uphold historical limits on common law negligence.

The Court should not impose a duty from the Colonie Landfill to the general public to prevent alleged off-site nuisance odors as a matter of public policy. New York Courts traditionally decline to impose negligence duties where the social utility of the actor's conduct and magnitude of the potential burden in finding a duty outweigh the potential social benefit of doing so. *See 532 Madison,* 96 N.Y.2d at 292 (negligence claims dismissed; to allow claims of thousands of professional, commercial, and residential tenants impacted by building collapse would result in crushing exposure); *Celebrity Studios, Inc. v. Civetta Excavating Inc*., 72 Misc. 2d 1077, 1081 (Sup. Ct. N.Y. Cty. 1973) (declining to impose liability on builder for legal construction-related noise in a manner that "would effectively proscribe all construction activities"). Those circumstances are present here.

The Colonie Landfill, like other municipally-owned landfills around the state and country, provides an essential public service to meet the demand for waste disposal. The Town's Landfill has been operating since the 1960s and is located in a commercial and industrial zoned area. It currently serves a population of over 100,000, including residents, schools and colleges, airports, and a significant number of other commercial, industrial, and institutional

establishments.[13] As set forth above, the Colonie Landfill is a steward for the community and takes significant steps to ensure it serves the public's needs while taking innovative and environmentally responsible approaches to waste management.

Landfills, like other public works, are not expected to have zero off-site impacts. *See In the Matter of the Dep't of Sanitation of the City of N.Y.*, No. 2-6105-00666/00001, 2012 WL 3790983 (Decision of the Commissioner July 2, 2012) (intermittent odors from composting facility not a public nuisance). The potential for these impacts are accounted for and regulated through local and state permits and regulatory requirements. To recognize negligence claims of the scale that Ms. Duncan proposes would immobilize landfills and other lawfully permitted public infrastructure and undermine municipalities, such as the Town of Colonie, seeking to provide these critical municipal services.

The growing number of nuisance and negligence cases in New York State brought by Plaintiff-Respondent's counsel alone demonstrates this risk. *See*, *e.g.*, *Davies v. S.A. Dunn & Company, LLC*, No. EF2019-262993 (Sup. Ct. Rensselaer Cty.) (putative class action against S.A. Dunn Landfill in Rensselaer County); *Britton v. Seneca Meadows Inc.*, No. 50649-2016 (Sup.

[13] Colonie Solid Waste Management Plan at 4–8.

Ct. Seneca Cty.) (putative class action against Seneca Meadows Landfill in Seneca County); *Vandemortel v. New England Waste Servs. Of N.Y., Inc.*, No. 126121-2019 (Sup. Ct. Ontario Cty.) (putative class action against Ontario County Landfill in Ontario County); *Hickey v. Allied Waste Niagara Falls Landfill, LLC*, No. E165227/2018 (Sup. Ct. Niagara Cty.) (putative class action against Niagara Falls Landfill and Recycling Center in Niagara County); *D'Amico v. Waste Management of New York*, No. 18-CV-06080 (W.D.N.Y.) (putative class action against High Acres Landfill and Recycling Center in Monroe County). These cases are part of national trend of large putative nuisance class actions against industries with potential off-site impacts. *See* Br. for Def.-Appellant at 37, n.8. Additional municipally-owned landfills will inevitably be targeted, further threatening the ability of New York State to provide sufficient disposal capacity for its residents. *See Local Governments and the Municipal Solid Waste Landfill Business* at 7 (54 percent of remaining landfill capacity is in landfills owned by local governments and public authorities).

The Court should recognize the social utility of the Colonie Landfill and the outsized burden Plaintiff-Respondent's proposed broad-based negligence duty would impose on the Landfill and similar public works operations, and dismiss Plaintiff-Respondent's negligence claim.

CONCLUSION

The Court should uphold the strict limits on common law public nuisance and negligence claims. Widespread nuisance claims based on fleeting impacts are and should continue to be addressed by the local and state agencies that have the experience and expertise to regulate such impacts. Local governments, like Colonie, play a critical role in solid waste management in the state. To allow the expansion of common law public nuisance and negligence claims will place an unreasonable burden on these facilities, strain already limited municipal resources, and interfere with local government's ability to perform this essential public function. The Court should reverse the trial court decision and dismiss Plaintiff-Respondent's Amended Complaint.

Dated: November 16, 2020

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