NEW MEXICO LAW REVIEW

Volume 21
Issue 1 *Winter 1991*

Winter 1991

Overcoming Obstacles to the Siting of Solid Waste Management Facilities

Bruce J. Parker

John H. Turner

OVERCOMING OBSTACLES TO THE SITING OF SOLID WASTE MANAGEMENT FACILITIES

BRUCE J. PARKER*
JOHN H. TURNER**

> . . . shape with a lion body and the head of a man,
> A gaze blank and pitiless as the sun,
> Is moving its slow thighs, while all about it
> Reel shadows of the indignant desert birds.
> The darkness drops again; but now I know
> That twenty centuries of stony sleep
> Were vexed to nightmare by a rocking cradle,
> And what rough beast, its hour come round at last,
> Slouches towards Bethlehem to be born?[1]

The apocalyptic vision of the beast slouching toward Bethlehem in the classic poem, *The Second Coming*, symbolized the deep concern of William Butler Yeats over the fate of western civilization. In the wake of World War I and Freud's theories challenging the concept of free will, Yeats had much to worry about.

Were Yeats alive today, the source of his dark inspiration may have come from the latest symbol of modern society's perpetual struggle to rid itself of the excretions of growth and affluence. Difficult regulatory, political, and social issues are implicated in the question of how best to control the staggering amount of garbage Americans generate each year.

I. THE NATURE OF THE PROBLEM

According to the latest estimates by the United States Environmental Protection Agency ("EPA"), 180 million tons of solid waste were generated by individual households and neighborhood businesses in 1988—enough to fill a line of ten-ton garbage trucks stretched halfway to the moon. Our per capita waste yield, four pounds per person per day, nearly double the yield in 1960, is the highest in the world. Without source reduction, the amount of waste generated is projected to increase to 216 million tons (or 4.2 pounds per person) by the close of this century.[2] The equation is quite simple: as our gross national product

---

* General Counsel to National Solid Wastes Mangement Association; B.A. 1965, University of California (Berkley); J.D. 1968, University of Oklahoma School of Law. This article is not intended to depict the views of the National Solid Wastes Management Association or any of its members.

** Director, State Regulatory Affairs, for Browning-Ferris Industries, Inc.; B.S. 1978, University of Alabama; J.D. 1981, Vanderbilt University.

1. YEATS, *The Second Coming*, in THE RINEHART BOOK OF VERSE 322 (1965).

2. *See* FRANKLIN ASSOC. LTD., CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1990 UPDATE (June 1990) (report prepared for U.S. EPA).

grows, so does our waste stream. If we are to believe Isaac Newton's observation that matter is neither created nor destroyed, we always will be burdened with mountains of garbage.

This garbage "beast" does not slouch toward Bethlehem, but travels by truck, ship, and train in all directions, looking for places of final rest. Few will forget the famous 1987 "Garbage Barge," the MOBRO, and its cargo of 3,186 tons of New York garbage. The MOBRO was stranded at sea for five months because states and foreign countries alike denied it entry. Daily convoys of refuse trucks cross county and state lines en route from New Jersey and New York to distant disposal sites, often hundreds of miles from points where the waste was generated. According to a report by the New York Legislative Commission on Solid Waste, New York is sending large volumes of its solid waste to Kentucky, Ohio, New Mexico, Pennsylvania, Virginia, and West Virginia.[3] By 1995, all permitted landfills within the State of New York will reach full capacity.[4]

Without question, there is a solid waste disposal crisis in many areas of the country today, and the list of affected locations is growing rapidly.[5] Approximately seventy-five to ninety percent of all refuse generated in the United States is disposed of in landfills. The EPA projects that of the 6,000 landfills presently operating, 2,000 will close within four years because of tighter environmental regulations—causing an overall yearly capacity loss of 56 million tons.[6] At current construction rates, additional landfill space will be available for less than half of this capacity shortfall. In the early 1970's, between 300 and 400 municipal solid waste landfills were built each year. During the last ten years, the number dropped to somewhere between 50 and 200. Since 1978, seventy percent of all landfills in the United States, approximately 14,000 facilities, have shut their doors. Forty percent of the nation's municipal solid waste landfills are located in only five states—California, Maine, New York, Texas, and Wisconsin.[7]

Many areas of the country are already experiencing shortages in landfill capacity. For example, in the Chicago metropolitan area, five landfills have closed since 1987, and local officials estimate that the remaining sites will reach full capacity by 1995.[8] The number of landfills in Indiana is estimated to drop from 150 to 53 from 1980 to 1992.[9] Department of Environmental Protection officials in Connecticut expect most of the state's landfills to operate for only two more years. Currently, eighty-eight of the state's cities ship their rubbish to other states for disposal.[10]

---

3. NATIONAL SOLID WASTES MANAGEMENT ASS'N, SPECIAL REPORT: LANDFILL CAPACITY IN THE YEAR 2000 5 (1989) [hereinafter NSWMA SPECIAL REPORT] (available at *New Mexico Law Review*).

4. *Id.*

5. *See generally id.*

6. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MUNICIPAL SOLID WASTE LANDFILL SURVEY (1986).

7. NSWMA SPECIAL REPORT, *supra* note 3, at 3.

8. *Id.* at 5.

9. *Id.*

10. *Id.*

Since 1976, the number of landfills in New Jersey has dropped by more than two-thirds, and eleven New Jersey counties send their garbage to out-of-state facilities.[11] In Pennsylvania, fifty-seven of the state's sixty-seven counties send waste to other states.[12]

This critical shortage of disposal capacity did not occur overnight. Rather, it arose as a consequence of conflicting federal, state, and local priorities. Responding to public concern about underground water pollution, federal EPA and state officials have taken steps to strengthen environmental safeguards in solid waste landfills. The EPA promulgated long-delayed regulations pursuant to Subtitle D of the Resource Conservation and Recovery Act ("RCRA").[13] The regulations concern the location, design, and operation of solid waste facilities and establish new requirements for groundwater monitoring and "post-closure" care.[14]

As a result of the heightened emphasis upon technological standards, the cost of building new landfills, or expanding old ones, has begun to rise dramatically. Despite higher environmental standards, local officials often have been reluctant to approve new landfill construction permits or have faced stiff resistance from their constituents. The result is a *de facto* moratorium on the construction of additional or expanded facilities even when they meet or exceed the strictest present or anticipated regulations. As a result, many projects languish for many years in the "permitting process," and few facilities are actually built.[15] If existing facilities continue to close at their current rate (11.2 million tons per year of lost capacity) and new facilities are built at the same pace as in recent years (only four million tons annually), the nation's disposal requirements will exceed existing capacity by 1998.[16]

To address the serious need to conserve scarce landfill space and to develop more effective waste management practices, Congress and the

---

11. *Id.*
12. *Id.*
13. 42 U.S.C. §§ 6901-6992K (1988).
14. The EPA issued, on October 9, 1991, a comprehensive set of rules to implement Subtitle D of RCRA. 56 Fed. Reg. 50,978 (1991). The rules address landfill location restrictions, operations, the design of facilities, groundwater monitoring and corrective action, closure and post-closure care, and financial assurance mechanisms. The rule is succinctly summarized in Repa, *EPA Promulgates Long Awaited Landfill Rules*, WASTE AGE, Oct. 1991, at 69. The Subtitle D rules will, upon implementation by the states of programs approved by the EPA, likely lead to the closure of a large number of landfills, mostly facilities that cannot meet the new expensive and comprehensive requirements. The requirements will help to ensure safe, environmentally sound land disposal of municipal solid waste nationwide. *See generally* OFFICE OF SOLID WASTE, UNITED STATES EPA, THE SOLID WASTE DILEMMA; AN AGENDA FOR ACTION 14 (1989) (facilities which "do not meet Federal or state standards for protection of human health and the environment" will likely close); *id.* at 17-18 (landfills will remain a necessary part of the nation's waste management system); OFFICE OF TECHNOLOGY ASSESSMENT, UNITED STATES CONG., FACING AMERICA'S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE? 1, 4 (more stringent landfill standards, while beneficial, increase the need for landfill capacity development). For a detailed discussion of the RCRA, *see* Engel, *Environmental Standards as Regulatory Common Law: Toward Consistency in Solid Waste Regulation*, 21 N.M.L. REV. 13 (1990).
15. NSWMA SPECIAL REPORT, *supra* note 3, at 4.
16. *Id.*

EPA have encouraged state authorities to adopt an "integrated waste management system" that combines four essential elements: reduction at the source, recycling, waste-to-energy, and landfills. Most of the major industrial states, and many others, have substantially amended their solid waste management laws within the past several years in order to implement this progressive planning concept. At present, however, the process is paralyzed by the mistaken belief that communities can reduce and recycle their way out of the garbage problem. But, any successful "integrated waste management system" depends upon replacing older landfills with new, technically advanced ones. Source reduction, recycling, resource recovery, and landfilling are not inconsistent approaches. Indeed, until new solid waste disposal capacity comes on line, particularly in the large industrial states and in developing "waste sheds," the solid waste problem will *not* disappear. Indeed, the solid waste disposal system will break down.[17]

Until we address the *cause* of our present garbage woes by replacing lost disposal capacity while simultaneously forcing recycling and constructing waste-to-energy facilities, we are left to face the *symptoms* of the garbage crisis. In a speech before the National Conference of State Legislatures, William D. Ruckelshaus, Chairman of Browning-Ferris Industries, Inc. and a former Administrator of the EPA, summed up the problem succinctly:

> The problem of waste in America is not that we do not know *how* to solve it. No, our problem is political: that is, it has to do with values, public priorities and trade-offs. It is an intersection problem in which private enterprise is trying to mesh with a set of public processes, and there is sand in the gears. Where such problems exist in society, we typically erect institutions and processes to deal with them. We haven't done that very well with solid waste disposal, with the predictable result. Where you have political conflict but no constitutional framework for resolving it, the conflict festers and appears intractable. At that point, private enterprise is stymied; it can't do the job it was hired to do. So what next?[18]

---

17. The problem is, of course, a by-product of the so-called "Not In My Backyard" syndrome. *See, e.g.*, Byers, *Now Entering the Age of NIMBY?*, WASTE AGE, Jan. 1990, at 36. The syndrome's effect on the siting of hazardous waste disposal and treatment facilities has been treated at length. *See* Bacow & Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265 (1982); Bingham & Miller, *Prospects for Resolving Hazardous Waste Siting Disputes Through Negotiation*, 17 NAT. RESOURCES LAW. 473 (1984). *See generally* M. O'Hare, L. Bacow & D. Sanderson, FACILITY SITING AND PUBLIC OPPOSITION (1983). For a proposed Federal approach, see Turner, *EPA Must Become Active in Siting*, WASTE AGE, Mar. 1989, at 61. Some commentators suggest that the syndrome affects virtually all efforts to promote socially-beneficial industrial activities. *See, e.g.*, Delogu, *"NIMBY" is a National Environmental Problem*, 35 S.D.L. REV. 198 (1990); *see also* Katz, *NIMBYism Is Coming But . . .*, WASTE AGE, Jan. 1990, at 40 (landfill siting efforts have as a consequence of the NIMBY syndrome become difficult and, in many cases, expensive).

18. William Ruckelshaus, Remarks at the Meeting of National Conference of State Legislatures 3 (August 10, 1989) (available at *New Mexico Law Review*) (emphasis in original).

Until states develop workable regulatory and institutional systems to allow for the orderly permitting of new and safe disposal facilities, private enterprise will be required to look to the courts for assistance in forcing the facility siting process. This clearly is not the best solution. The remainder of this article examines legal theories that have supported challenges to state and local facility siting restrictions, surveys the siting legislation of several states, and highlights steps that can be taken to contain the beast.

II. JUDICIAL RESPONSES TO ADVERSE FACILITY SITING DETERMINATIONS

Given the significant expense involved in siting landfills, the difficulty political bodies experience in making unbiased decisions in the face of virulent local opposition, and the expansion of state solid waste management laws and regulations, courts have become heavily involved in solid waste facility siting controversies. Several recent decisions have overturned local siting or expansion objections, ruling that landfills may be sited or expanded despite local opposition. The opinions supporting facility establishment and expansion in the face of the "not in my backyard" syndrome are based on the preemption and constitutional due process doctrines, as well as on principles of zoning law.

A. Preemption of Local Ordinances

A number of courts have concluded that local restraints on the siting of solid waste landfills can be preempted either directly by statutory language or indirectly by implication.[19] The earliest decisions in this area

---

19. Judicial treatment of the issue of state statutory or regulatory preemption of local powers is consistent with the approach to federal preemption of state authority. *See, e.g.*, California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (express federal preemption); Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986) (enunciating the various tests applied pursuant to the federal Supremacy Clause); Hines v. Davidowitz, 317 U.S. 52, 67, 68 (1941) (defining the implied preemption doctrine under federal law as an inquiry whether "under the circumstances of [a] particular case, [a state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). In People v. Mueller, 8 Cal. App. 3d 949, 88 Cal. Rptr. 157 (1970), the California Court of Appeals defined the typical breadth of the preemption doctrine under state law. It noted that

> [p]reemption by state law exists when one of three tests is met: "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of the local ordinance on the transient citizens of a state outweighs the possible benefit to the municipality."

Id. at 953-54, 88 Cal. Rptr. at 160 (citation omitted). Several of the challenges to local environmental requirements have invoked the preemptive effect of *both* federal and state law. *See, e.g.*, Ensco, Inc. v. Dumas, 807 F.2d 743, 744 (8th Cir. 1986); Rollins Envtl. Servs. of La., Inc. v. Iberville Parish Police Jury, 371 So. 2d 1127 (La. 1979).

The Second Circuit Court of Appeals recently held that a Connecticut town could apply its zoning regulations to a proposed remediation site despite the comprehensive provisions of Subtitle C of RCRA and prior actions of the United States and Connecticut environmental protection agencies. North Haven Planning & Zoning Comm'n v. Upjohn Co., 921 F.2d 27 (2d. Cir. 1990), *cert. denied*, 111 S. Ct. 2016 (1991).

concerned allegations that local regulations, particularly zoning ordinances, were preempted by comprehensive state hazardous waste management laws or regulations. These opinions set the stage for subsequent preemption determinations based upon evolving and extensive state solid waste management programs.

In *Stablex Corp. v. Town of Hooksett*,[20] a developer challenged the legality of ordinances adopted by a New Hampshire municipality which required that proposed hazardous waste facilities be subject to a popular vote. After reviewing the comprehensive hazardous waste management program established under Subtitle C of RCRA, the New Hampshire Supreme Court turned to the municipal hazardous waste facility review process set forth in New Hampshire's hazardous waste management statutes. The court concluded that the federal and state legislative and regulatory scheme for hazardous waste management was comprehensive and that the state legislature clearly intended that the New Hampshire program supersede contrary local zoning regulations.[21]

The court rejected the town's contention that New Hampshire's traditional grant to localities of home rule enabling powers in order to enact local zoning ordinances and regulations provided cities and towns concurrent authority to regulate the disposal of hazardous waste.[22] Finding that "[t]owns may not regulate a field that the State has preempted,"[23] the court reasoned that local ordinances could not contravene the state's comprehensive approach to hazardous waste management. The court concluded that

> the State hazardous waste statute . . . arose from the legislature's serious concern over the lack of a comprehensive statewide program to deal with the growing problem of hazardous waste disposal. We find that the legislature, responding to the options offered by the federal government in the Resource Conservation and Recovery Act of 1976, devised a comprehensive and detailed program of statewide regulation, which on its face must be viewed as preempting any local actions having the intent or the effect of frustrating it.[24]

The pervasive scope of hazardous waste regulation also prompted the Louisiana Supreme Court to overturn a local ordinance that prohibited the disposal of hazardous waste within the boundaries of a parish. The court's ruling in *Rollins Environmental Services v. Iberville Parish Police Jury*[25] rejected the parish's claim that "ineptness or inefficient enforcement of State statutes justifies the intrusion of a parish into a field occupied

---

20. 122 N.H. 1091, 456 A.2d 94 (1982).

21. The *Stablex* court emphasized the breadth of the statutory provisions providing for the siting of hazardous waste facilities. *Id.* at 1097-99, 456 A.2d at 100.

22. *Id.* at 1104, 456 A.2d at 101.

23. *Id.* (citing J.E.D. Assoc., Inc. v. Town of Sandown, 121 N.H. 317, 319, 430 A.2d 129, 130 (1981)).

24. *Id.* at 1101-02, 456 A.2d at 100. In 1985, the New Hampshire Supreme Court reaffirmed its conclusion in *Stablex* in Applied Chemical Technology, Inc. v. Town of Merrimack, 126 N.H. 45, 490 A.2d 1348 (1985).

25. 371 So. 2d 1127 (La. 1979).

by the State's general law."[26] In invalidating the ordinance, the court pointed to the existence of "affirmative and positive preemption by the state and federal government in the field of hazardous waste regulation."[27]

Courts in jurisdictions with extensive solid waste management programs have similarly had little difficulty finding that local ordinances are either wholly or partially preempted by the operation of state law. In *Jamens v. Township of Avon*,[28] a private applicant sought a conditional use permit from the township for the operation of a combined gravel pit and landfill. After the permit was denied, the applicant obtained a landfill permit from the Michigan Department of Natural Resources. The Michigan Court of Appeals upheld a lower court's injunction against enforcement of the township zoning ordinance, concluding that state authorization of a particular location could not be superseded by local regulation. The Michigan Supreme Court later reached much the same conclusion in *Granger Land Development Co. v. Clinton County Board of Zoning Appeals*,[29] finding state preemption of a local zoning ordinance by implication based on the comprehensive nature of Michigan's solid waste laws and regulations.

In *City of Shelton v. Commissioner of Department of Environmental Protection*,[30] the Connecticut Supreme Court likewise concluded that a local ordinance preventing operation of a landfill by a public body was preempted by comprehensive state solid waste statutes. The court rejected the argument that the statutes were constitutional because they were in accordance with a Connecticut constitutional provision authorizing municipal home rule. It declared, as did the New Hampshire court in *Stablex*, that when the legislature deals with matters that are primarily of statewide concern, it may regulate them free of any constraint contained in a home rule charter provision. The court went on to note:

---

26. *Id.* at 1132. The court further reasoned that a contrary determination would spur a proliferation of local ordinances, with deleterious results:

> The recent evolution of environmental legislation at the federal and state levels speaks in unmistakable terms that regulation of hazardous wastes is a matter of broad national and state concern. From a review of this legislation it is apparent that the matter is such that spotty municipal and parochial concern would be ineffective. It is not difficult to conclude that if Iberville Parish is permitted to prohibit the disposal of industrial hazardous waste within its borders there will be, in short order, similar ordinances in every parish of the State.

Id.

27. *Id.* at 1134. For other examples of the application of the doctrine of preemption in the context of hazardous waste management programs, see Clarmont Envtl. Reclamation Co. v. Wiederhold, 2 Ohio St. 3d 214, 442 N.E.2d 1278 (1972); Envirosafe Servs. of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 735 P.2d 998, 1001 (1987) (state hazardous waste management legislation, "a comprehensive statutory scheme of the kind which implicitly evidences legislative intent to preempt the field," preempted county ordinance governing hazardous waste disposal); Rollins Envtl. Serv. (N.J.), Inc. v. Township of Logan, 209 N.J. Super. 556, 508 A.2d 271 (App. Div. 1986), *cert. denied*, 105 N.J. 510, 523 A.2d 157 (1986) (preemptive effect of New Jersey's Solid Waste Management Act on local ordinance addressing disposal of polychlorinated bipheyls).

28. 71 Mich. App. 64, 246 N.W.2d 416 (1976).

29. 135 Mich. App. 154, 351 N.W.2d 908 (1984).

30. 193 Conn. 506, 479 A.2d 208 (1984).

> The regional and state wide solution of these problems [of solid waste disposal] involves a delicate political balance among the competing interests of numerous individual communities. The resolution of such conflicts is appropriately confided to the General Assembly, where the whole population of the state is represented.[31]

The analysis applied in *Shelton* to examine the relationship between state and local requirements regarding solid waste disposal facilities is consistent with the approach taken in cases involving preemption by federal law.

New Jersey courts have consistently and vigorously applied the doctrine of preemption to repudiate local restraints on solid waste disposal facilities that contravene state statutes. The New Jersey Supreme Court, in *Ringlieb v. Township of Parsippany-Troy Hills*,[32] held that the Solid Wastes Management Act, a comprehensive plan controlling all facets of solid waste disposal, preempted inconsistent municipal regulations. In subsequent decisions, the court has persistently embraced an expansive theory of preemption. For example, it has invalidated a township's denial of authorization to construct an access road to a privately-operated landfill in light of a conflicting state order.[33] The New Jersey cases demonstrate judicial unwillingness to permit concurrent state and local landfill site regulation.[34]

---

31. *Id.* at 523, 479 A.2d at 217. The court also emphasized that
> [t]hese statutes evidence a legislative intent to commit the difficult regional problems of solid waste disposal to regional and statewide solution. The legislature could reasonably have determined that only a decision-making body with a mandate to consider the needs of more than one community could adequately balance the competing concerns of various localities within the state. Local zoning regulations, such as Shelton's, which operate to exclude the facilities that the [Connecticut Resources Recovery Authority] has found necessary, and the [Department of Environmental Protection] has found environmentally acceptable, frustrate the explicit purposes of the state statutes and are therefore preempted.

Id. at 518, 479 A.2d at 215. The court summarized the preemption analysis by concluding that
> [a] local ordinance is preempted by a state statute whenever the legislature has demonstrated an intent to occupy the entire field of regulation on the matter; or . . . whenever the local ordinance irreconcilably conflicts with the statute. Whether an ordinance conflicts with a statute or statutes can only be determined by reviewing the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives.

Id. at 517, 479 A.2d at 214 (citations omitted).

32. 59 N.J. 348, 283 A.2d 97 (1971).

33. Township of Chester v. Department of Envtl. Protection, 181 N.J. Super. 445, 438 A.2d 334 (Super. Ct. App. Div. 1981) (zoning ordinances requiring site plan approval and submission of environmental impact statement were preempted by the Solid Waste Management Act); *see also* Town of Kearny v. Jersey City Incinerator Auth., 140 N.J. Super. 279, 356 A.2d 51 (Super. Ct. Ch. Div. 1976); Township Committee v. Board of Chosen Freeholders, 213 N.J. Super. 179, 516 A.2d 1140 (Super. Ct. Law Div. 1985); Ocean County Utilities Auth. v. Planning Board, 223 N.J. Super. 461, 538 A.2d 1307 (Super. Ct. App. Div. 1988) (sludge management facility public authority not subject to local zoning ordinance; requirement deemed preempted by Solid Waste Management Act).

34. Courts occasionally have found certain local regulatory determinations concerning landfill siting to be consistent with state solid waste management laws and regulations. In Hulligan v. Columbia Township Bd. of Zoning Appeals, 59 Ohio App. 2d 105, 392 N.E.2d 1272 (1978), for example, the Ohio Supreme Court examined a local ordinance which required municipal approval of a sanitary landfill site. The court referred to the "dual purposes" of state environmental protection

The primacy of the statewide solid waste management plan over local actions contrary to its purpose was reaffirmed by the New Jersey court's ruling in *Southern Ocean Landfill, Inc. v. Mayor & Council of the Township of Ocean*.[35] Reacting to the court's earlier decision in *Ringlieb*, the legislature enacted an amendment to the Solid Wastes Management Act providing that nothing in the statute precluded the right of a local government to adopt health or environmental protection ordinances or regulations "more stringent than" the Act. The court found the supplemental legislation to be facially invalid, stating that

> [t]he legislative reaffirmation of some limited local authority over landfill operations would not sanction an ordinance provision or regulation which is in direct conflict with the overall legislative plan . . . . [T]he section is offensive to the concept of regionalization of facilities, one of the key provisions in the Solid Waste Management Act.[36]

A local ordinance that specifically prohibited landfills was also found to be in direct conflict with the Act. In *Township of Little Falls v. Bardin*,[37] the Appellate Division of the Superior Court of New Jersey denied the township's claim that municipalities have zoning jurisdiction over solid waste facilities pursuant to municipal land use law. The court concluded that the Solid Wastes Management Act preempted all local regulation in the field of solid waste disposal, including zoning ordinances. The court declared that

> [t]he regional emphasis [of the Act] could not be clearer. Local regulation is preempted. Even if a municipality could properly enact a zoning ordinance concerning solid waste disposal, it cannot exercise its zoning powers so as to collide with expressed policy goals of state legislation. The ordinance in question, by completely prohibiting sanitary landfills, quite obviously frustrates the objectives of the Solid Waste Management Act.[38]

Some opponents of siting efforts have attempted to utilize the doctrine of nuisance to circumvent preemptive state laws. In *Sharon Steel Corp. v. City of Fairmont*,[39] the West Virginia Supreme Court of Appeals

---

legislation and local zoning requirements. The purpose of the former, the court reasoned, is to protect and enhance environmental quality within the state, while the intent of the latter is to ensure the health, safety, and welfare of the community. Finding the goals harmonious rather than inconsistent, the court concluded that no conflict existed necessitating preemption. *See also* Nelson v. Department of Natural Resources, 96 Wis. 2d 730, 292 N.W.2d 655 (1980); Indiana Waste Sys. v. Board of Comm'rs, 180 Ind. App. 385, 389 N.E.2d 52 (Ct. App. 1979); Durvey Sand & Gravel, Inc. v. Town of Londonderry, 121 N.H. 501, 431 A.2d 139 (1971); City of Fargo v. Harwood Township, 256 N.W.2d 694 (N.D. 1977). The recent decisions have, however, generally reflected a pro-preemption trend. In Town of Beacon Falls v. Posick, 17 Conn. App. 17, 549 A.2d 656 (Ct. App. 1988), for example, the Connecticut Court of Appeals found, after an extensive review of the law relating to solid waste disposal facilities in Connecticut, that a local regulation prohibiting solid waste disposal facilities was preempted by the state's Solid Waste Management Act. Similar reasoning led the Maine Supreme Court to invalidate a local ordinance that prohibited waste disposal at privately-owned facilities. Midcoast Disposal, Inc. v. Town of Union, 537 A.2d 1149 (Me. 1988).

35. 64 N.J. 190, 314 A.2d 65 (1974).

36. *Id.* at 195, 314 A.2d at 67-68.

37. 173 N.J. Super. 397, 414 A.2d 559 (1989).

38. *Id.* at 418, 414 A.2d at 569.

39. 334 S.E.2d 616 (W. Va. 1985).

determined that a city may, by ordinance, ban the storage or disposal of hazardous waste merely by declaring such activities to be a "nuisance." The court reasoned that local ordinances based on nuisance considerations are valid even if the waste is managed in full compliance with federal and state waste management laws and the waste management practices neither cause nor threaten injury to individuals or property. The ordinance upheld by the court stated that "[i]t shall be unlawful for any person to permanently dispose or attempt to permanently dispose of hazardous waste within the city."[40] "Permanent disposal" was defined to include storage within the city "for a continued period of 5 years."[41] A violation of the ordinance was declared to be both a nuisance and a misdemeanor punishable by a fine and imprisonment.

Sharon Steel contended that because the ordinance made unlawful conduct specifically encouraged under RCRA and by the corresponding West Virginia Hazardous Waste Management Act, it should be held preempted. The court rejected this argument in light of the so-called "savings clause" in RCRA.[42] The court reasoned that the provision was not intended to preempt states from allowing a common law cause of action for nuisance. While that proposition is undoubtedly correct, the West Virginia court missed the point, and the effect, of the local ban. The ordinance did not merely seek to codify what would, in common law, constitute a private nuisance; rather, it unconditionally outlawed the permitted and otherwise lawful disposal of hazardous waste, despite directives set forth in RCRA and West Virginia law which preempted such local control of hazardous waste facilities. By narrowly interpreting the scope of the preemption doctrine, the court impermissibly expanded the elements of a common law cause of action for nuisance.

In West Virginia, as in most states, an essential element of a private nuisance claim is proof that an injury to a plaintiff's property interest constitutes a substantial interference to the use and enjoyment of the interest.[43] The ordinance upheld by the West Virginia court did not make it unlawful to interfere with an individual's use of his land, nor did it prohibit acts which cause personal injury or property damage as a result of improper use. The court essentially expanded the traditional common law cause of action, the only one which RCRA narrowly preserved under its savings clause. In so doing, the West Virginia court mischaracterized the ordinance by claiming that it "is directed at those [hazardous waste

40. *Id.* at 619.

41. *Id.* at 620.

42. 42 U.S.C. § 6972(f) (1988). The section reads as follows:

> Nothing in this section shall restrict any right which any persons (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid wastes or hazardous wastes, or to seek any other relief (including relief against the Administrator or a State agency).

43. *See, e.g.*, Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970); Village of Wilsonville v. SCA Servs., Inc., 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

disposal facilities] that pose a substantial present or potential hazard to human health or the environment . . . ."[44]

While the *Sharon Steel* court gave short shrift to the doctrine of preemption, state courts generally have asked the following questions in order to determine whether a local ordinance or regulation should fall:

(1) Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance or prohibition forbid what the legislature has permitted or does the local action permit what the legislature has forbidden)?
(2) Was the state law intended, either expressly or impliedly, to be exclusive in the field?
(3) Does the subject matter reflect a need for uniformity?
(4) Is the state scheme so pervasive or comprehensive that it precludes the coexistence of municipal regulation?
(5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?

By repudiating local ordinances that attempt to regulate facility siting in a manner inconsistent with state law, the courts—virtually without exception—have affirmed the maxim that where the state has enacted a comprehensive regulatory scheme, no local actions or ordinances shall be permitted to contravene it. Moreover, the above-mentioned criteria strongly support the rejection of local actions adversely affecting the siting of solid waste disposal facilities whenever a state has in place laws or regulations that comprehensively address the issue. The purpose of the preemption doctrine is to ensure that subordinate branches of government do not interfere with the operation of comprehensive and exclusive regulatory schemes.

B. Constitutional Due Process

The due process clauses of the federal and state constitutions have been interpreted over the years to require that both a fair procedure ("procedural due process") and reasonable and justified standards ("substantive due process") be present whenever government contemplates restricting the use of private property. The constitutional right to due process applies in civil actions as well as criminal proceedings. The courts have found that this guarantee is infringed when a statute or regulation is unduly vague, unreasonable, or overbroad. It is primarily on the basis of the "void for vagueness" doctrine that modern courts have applied the due process clauses to invalidate restrictions on the siting of solid waste landfills.

The United States Supreme Court has long held that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of

---

44. *Sharon Steel Corp.*, 334 S.E.2d at 625.

law."[45] A classic example of the application of the void for vagueness doctrine appears in the decision of the Alabama Supreme Court in *Ross Neely Express, Inc. v. Alabama Department of Environmental Management*.[46] There, the court addressed the validity of two air pollution control regulations. One required the use of "reasonable precautions to prevent particular matter from becoming airborne."[47] The other prohibited "the discharge of visible fugitive dust emissions beyond the lot line of the property in which the emissions originate."[48] In addressing the first regulation, the court recognized that "[l]egislation may run afoul of the due process clause because of a failure to set up any sufficient guidance to those who would be law-abiding, or to advise a defendant of the nature and cause of an accusation he is called on to answer, or to guide the courts in the law's enforcement."[49] While the court admitted that "reasonableness has been upheld as a legal standard in some cases," it concluded that the regulation was impermissibly vague.[50]

The court seemingly applied a slightly different test in invalidating the second regulation. It proclaimed that

> such a regulation is clearly overbroad, encompassing every situation in which visible or fugitive dust emissions move across the lot line, without regard to damage, entry, or inconvenience caused, reasonable attempts to control, etc. This invades the area of protected freedom, severely restricting the use of property, and creates a situation where discriminatory enforcement is almost inevitable.[51]

In fact, the court's test was, at least in terms of the result, indistinguishable from the void for vagueness doctrine.

Statutes, regulations, and local ordinances governing the issuance of permits, zoning requirements, and parental visitation rights have frequently been subject to invalidation under the void for vagueness doctrine. In *Davis v. Smith*,[52] for example, the Arkansas Supreme Court ruled that a statute authorizing the involuntary termination of parental rights if the parents could not provide their child a "proper home" was void for vagueness under the Arkansas and federal constitutions. The court ruled that the statute left "the discretion vested in judges so broad that arbitrary and discriminatory parental terminations are inevitable."[53] The court also found that "even in cases of statutes regulating business, the exaction of obedience or required conformity to a standard which is so vague and indefinite amounts to no rule or standard at all."[54]

In *State ex rel. Casey's General Stores, Inc. v. City Council of Salem*,[55] the Missouri Court of Appeals applied the void for vagueness doctrine

45. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).
46. 437 So. 2d 82 (Ala. 1983).
47. *Id.* at 83 (citation omitted).
48. *Id.*
49. *Id.* at 84.
50. *Id.* at 85.
51. *Id.* at 85-86.
52. 266 Ark. 112, 583 S.W.2d 37 (1979).
53. *Id.* at 123, 583 S.W.2d at 44.
54. *Id.* at 119-20, 583 S.W.2d at 41.
55. 699 S.W.2d 775 (Mo. App. 1985).

to repudiate a liquor license ordinance which prohibited the issuance of such licenses to stores "located outside the business district of the city" where the term "business district" was not defined in the statute. Similar reasoning was employed in *Town of Hobart v. Collier*.[56] There, a zoning ordinance declared an entire municipality to be "residential" in nature, but stated that "industries and trades which are commonly known as objectionable and obnoxious may be admitted with the approval of the Town Board."[57] The ordinance, which was enacted after the town learned that the plaintiff planned to purchase property to operate an automobile junkyard, contemplated that future business would be permitted in the town only at the board's pleasure.[58] The trial court held that the ordinance was invalid because it failed to provide standards or guidelines regarding which uses other than residential ones would be permitted.[59] The Wisconsin Supreme Court agreed, holding that the ordinance was invalid on its face:

> A zoning ordinance or regulation should be clear and specific, and where such a regulation is vague and indefinite it may be held invalid. The regulation should prescribe a definite standard and furnish a uniform rule of action to govern the conduct of administrative officials; and the application of the regulation may not be left to the arbitrary will of governing authorities.[60]

The Louisiana Supreme Court also condemned subjective, ambiguous zoning requirements in *Summerell v. Phillips*.[61] The plaintiff in *Summerell* had satisfied all requirements for the issuance of a permit to construct a mobile home park.[62] The building official, however, refused to issue a permit, relying on recently adopted resolutions of the city-parish council placing a moratorium on the construction of mobile home parks in rural areas.[63] A district court found the moratorium to be unconstitutional and ordered the issuance of a permit.[64] In response, the city-parish council adopted a new ordinance creating a zoning classification restricting the

---

56. 3 Wis. 2d 182, 87 N.W.2d 868 (1958).
57. *Id.* at 184, 87 N.W.2d at 869.
58. *Id.* at 185, 87 N.W.2d at 870.
59. *Id.*
60. *Id.* at 188, 87 N.W.2d at 871-72; *see also* J.W. Const. Co. v. Board of Adjustment of the Township of Freehold, 119 N.J. Super. 140, 149, 290 A.2d 452, 457 (1972) ("A zoning ordinance must be clear and explicit in its terms, setting forth adequate standards to prevent arbitrary and indiscriminate interpretation and application by local officials."); Slattery v. Township of Caldwell, 83 N.J. Super. 317, 199 A.2d 670, *cert. denied*, 43 N.J. 130, 202 A.2d 703 (1964) (challenge to amendment to township's zoning laws which changed the uses allowed near proposed federal highway; the ordinance did not designate where the highway would be, and no map was attached to or made a part of the ordinance. In declaring that the ordinance was void for vagueness, the New Jersey Superior Court, Appellate Division, held that "[z]ones or districts must be described with reasonable certainty and must have definite boundaries so that the ordinance may be applied practically. . . . Where it is not possible to define with certainty the boundaries of the zone from the ordinance itself and a zoning map, the ordinance cannot be enforced and is invalid.").
61. 282 So. 2d 450 (La. 1973).
62. *Id.* at 451.
63. *Id.*
64. *Id.*

construction of mobile home parks to certain defined zones.[65] The building official moved the district court for a new trial on the basis that he could not issue plaintiff's permit in light of the new ordinance.[66] The trial court granted a new trial, at which plaintiff's petition for a writ of mandamus was denied.[67] The plaintiff then appealed, questioning the constitutionality of the new ordinance.[68] The case was remanded to the district court.[69]

In the meantime, plaintiff, after meeting all requirements of the new ordinance, applied for a zoning reclassification as required by the ordinance.[70] The council denied the application.[71] On remand, the district court ruled that the new ordinance was unconstitutional because it failed to set forth standards for the establishment of zoning classifications, and the state supreme court affirmed.[72]

In recent years, courts have also applied the void for vagueness doctrine to invalidate statutes, administrative regulations, and municipal ordinances which utilize overbroad or unclear standards for the siting of landfills. In *Browning-Ferris Industries of Alabama, Inc. v. Pegues*,[73] a federal district court ruled that Alabama's "Minus Act" violated the Fourteenth Amendment of the United States Constitution. Browning-Ferris had begun geological testing of sites in Lowndes County, Alabama in 1981 in order to determine an appropriate location for the siting of a hazardous waste treatment facility.[74] The company subsequently acquired options to purchase land in the county and began the "lengthy and complex process" of obtaining necessary permits.[75] During that time, the Alabama legislature passed the Minus Act, which provided that:

> [N]o commercial hazardous waste treatment or disposal site not in existence on or before November 19, 1980 [sic] shall be situated without resolution [by the Legislature] giving approval therefore. Provided, however, legislative approval shall not be required for industries with on-site treatment, storage, and disposal of their own hazardous wastes.[76]

While the court acknowledged that "the due process clause does not empower the judiciary to sit as a 'super legislature' to weigh the wisdom of legislation,"[77] Judge Hobbs did not hesitate to invalidate the Act.

> The constitutional vice of the Minus Act is the complete absence of standards. There simply are no guidelines spelled out in the provision

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 451-52.
71. *Id.* at 452.
72. *Id.*
73. 710 F. Supp. 313 (M.D. Ala. 1987).
74. *Id.* at 314.
75. *Id.*
76. ALA. CODE § 22-30-5.1 (1981).
77. *Pegues*, 710 F. Supp. at 315.

> that the legislature must individually approve any facility devoted solely to the storage of hazardous waste. In other words, the statute does not provide the faintest clue as to what an applicant should do or refrain from doing in order to secure legislative approval. If one applicant for a license is preferred over another as the result of a political favor or for no logical reason at all, the disappointed applicant is without redress under the Minus Act because the discretion of the Legislature is standardless and boundless . . . . A further basis for overturning this provision of the Minus Act is that it is unconstitutionally vague. In one sense, the provision in the Act is not at all vague. That is, there is nothing vague about the mechanism for approval: there must be a resolution by the legislature prior to establishment of a new Alabama hazardous waste facility. However, the criteria for such legislative approval are vague to the point of being nonexistent. Commercial regulatory statutes are impermissibly vague if they provide "no rule or standard at all." Other statutes which have been struck down as unconstitutionally vague have contained ambiguous standards which are subject to more than one interpretation . . . . Ambiguity would represent an improvement in this Act. Although the utter lack of guidelines does not represent an "ambiguous" statute, this cannot be an acceptable answer to the charge of constitutional vagueness.[78]

The court compared the standardless Minus Act with criteria traditionally applied in evaluating candidates for admission to the Bar and with licensing systems for liquor stores.[79] According to the court, the Minus Act was more offensive than a bar application requirement invalidated by the United States Supreme Court in *Schware v. Board of Bar Examiners*,[80] which precluded the admission of would-be lawyers lacking "good moral character."[81] The court rightly concluded that while "the Constitution does not foreclose legislative restrictions on hazardous

---

78. *Id.* (citations omitted).

79. The court reasoned that:

> The arbitrariness of such a standardless statute is readily perceived if, for example, the Legislature enacted a statute that provided that no more lawyers could be licensed in Alabama unless their licensing was individually approved by the Legislature. Although the admission of more hazardous waste facilities would probably by regarded by most as somewhat more of a public concern than the admission of more lawyers, this is not the point. The state can and does put restrictions on hazardous waste facilities as well as on the admission of lawyers, but it may not provide that a waste facility or lawyer may be licensed only on the approval of the Legislature with no standard, rules, or guidelines as to which legislative applicants would be favored. In both the hypothetical legislative restriction on lawyers presented here, as well as in the actual situation which confronts BFI, applicants would have made enormous investments of time and money only to be potentially stymied by an arbitrary standardless process. It would be difficult to conceive of a statute which is more susceptible of arbitrariness in violation of the Fourteenth Amendment than one that gives absolute discretion to a legislature to allow licensing but provides no clue for determining the basis on which a license would be granted.

Id.

80. 353 U.S. 232 (1957).

81. *Id.* at 234.

waste facilities,"[82] the "Legislature must announce some reasonable standards which will guide its deliberations or the deliberations of an appropriate agency . . . in determining which applicants are approved, and these standards must bear at least some rational relationship to a legitimate state purpose."[83]

---

82. *Pegues*, 710 F. Supp. at 317.

83. *Id.* The Alabama Supreme Court recently took a different approach to the void for vagueness doctrine in Waste Contractors, Inc. v. Alabama, 565 So. 2d 623 (Ala.), *cert. denied*, 111 S. Ct. 153 (1990). The Alabama Court of Appeals had determined that a county's denial of a new solid waste landfill site, after a previous approval, was unconstitutional given the absence of specific standards for the county commission to follow. Waste Contractors, Inc. sought a declaration that Alabama's Solid Wastes Disposal Act, ALA. CODE § 22-27-1, was arbitrary and capricious in light of the absence of specific guidelines and criteria for county or local governments to follow in the issuance of waste disposal facility permits. The Act provides that if a governmental entity undertakes the responsibility for providing disposal services to the general public

> and does so by contracts and mutual agreements for disposal of solid waste then those agreements are reviewable by the affected state or county health officer and subject to cancellation upon 30 days' notice from that officer, with the concurrence of [the Alabama Department of Environmental Management], if the contracts or agreements are found not to be in the best interests of the health, safety, and welfare of the affected citizenry.

Waste Contractors, Inc., 565 So. 2d at 625. The Alabama Court of Appeals, in analogizing the Act to the Minus Act, found the legislation to be unconstitutional. The Alabama Supreme Court, however, held that the Disposal Act is "distinguishable from the Minus Act and does not, in fact, suffer from a complete absence of standards." *Id.* at 626. The court reasoned: "A statutory scheme like that set forth in the Act for the approval or disapproval of disposal sites must be viewed as a whole in determining whether it provides adequate standards." *Id.* The court ignored the issue presented by the litigation, which was whether the Act was unconstitutionally vague and capricious because of its failure to establish guidelines or criteria for *county and local governments* to follow. Instead, the court relied upon the notion that the Act was not "standardless" because

> [a] county or local government cannot, without certain approvals [from state officials], provide a solid waste collection and disposal facility. Any contract or agreement entered into by a governmental entity is reviewable by the health department and by [the Alabama Department of Environmental Management ("ADEM")]. Consequently, any governmental entity undertaking to provide such services would likely consider health department and ADEM standards when it considers a request for approval of the site. Furthermore, under the Act no site can be permitted unless it is found to be in the best interests of the health, safety, and welfare of the affected citizenry.

Id. (citations omitted).

The court failed to recognize that the vagueness and ambiguity inherent in the standardless approach to city-county approvals is, in fact, magnified by the Act's failure to provide articulated standards for *state* approval. The Alabama court neglected to cite, much less distinguish, its earlier opinion in Ross Neely Express, Inc. v. Alabama Dep't of Envtl. Management, 437 So. 2d 82 (Ala. 1983), which is discussed *supra* notes 46-51 and accompanying text. It also drew a highly debateable distinction between the Minus Act and the Solid Wastes Disposal Act based on the notion that the latter did not suffer from "a complete absence of standards." 565 So. 2d at 626. It seems clear that the Solid Wastes Disposal Act sets forth no criteria for state and local officials to follow in making *their* determinations. At best, the statute merely advises local officials that their determinations will be subject to review by state public health and environmental agencies. Nowhere does the legislation notify local decision-makers as to the standards the Alabama legislature expects will be followed in making decisions on the establishment of landfills.

The Alabama court also employed questionable reasoning in rejecting the plaintiff's allegation that the county commission had, without benefit of a hearing, overturned its decision to approve the landfill. The court recognized that the commission's revocation of the permit deprived the plaintiff of property without due process of law, but reasoned that the commission's initial decision — which was also reached without a public hearing — had violated the rights of "affected" citizens of the county. The court opined that the two due process violations, in effect, cancelled each other out. Yet the court ignored a number of decisions, such as Save Our Dunes v. Alabama Dep't of

Overly broad terminology in a state solid waste landfill siting statute led to invalidation of the measure in *Geo-Tech Reclamation Industries, Inc. v. Hamrick*.[84] The plaintiff challenged the following provision in West Virginia's Solid Wastes Management Act:

> [T]he director may deny the issuance of a permit on the basis of information in the application or from other sources including public comment, if the solid waste facility may cause adverse impacts on the natural resources and environmental concerns under the director's purview in chapter twenty of the Code, destruction of aesthetic values, destruction or endangerment of the property of others, or is significantly adverse to the public sentiment of the area where the solid waste facility is or will be located.[85]

Plaintiff's application for a landfill operating permit was denied by the director of the West Virginia Department of Natural Resources on the ground that the proposed facility had engendered "adverse public sentiment."[86] The director's letter denying the application stated:

> [T]he Department has received approximately 250 letters representing individual citizens, businesses, and groups in the [area near the proposed landfill]. All are vehemently opposed to the project. We have also received a petition in which similar feelings were expressed by many more hundreds of local citizens . . . . Due to the significant concern voiced by the residents in the area, I believe it is inappropriate to continue further technical review and am denying the permit application on the basis of adverse public sentiment, as prescribed in § 20-5F-4(b). The staff review of the Part I application has not revealed any insurmountable technical problems with the site.[87]

The disappointed applicant challenged the constitutionality of the "public sentiment" provision. He argued that the section violated the constitutional right of due process by impermissibly delegating legislative authority to local citizens.[88] A federal district court accepted the plaintiff's argument, reasoning that "this provision is on its face violative of due process rights guaranteed under the United States Constitution insofar as it allows a few citizens to deny an individual the use of his property."[89]

Envtl. Management, 834 F.2d 984 (11th Cir. 1987) and Simons v. Gorsuch, 715 F.2d 1248 (7th Cir. 1983), which have held that persons lacking a property interest in the land at issue ought not be afforded due process protections. In addition, the court mistakenly concluded that "two wrongs defeat a right." No court has held that government, having first violated the Constitution with regard to one party, can on that basis alone ignore procedural safeguards that ought to be afforded another. The United States Supreme Court has refused to hear the procedural due process issue. Waste Contractors, Inc. v. Lauderdale County, 565 So. 2d 623 (Ala.), *cert. denied*, 111 S. Ct. 153 (1990).

84. 886 F.2d 662 (4th Cir. 1989).

85. W. VA. CODE § 20-5F-4(b) (1989).

86. *Hamrick*, 886 F.2d at 663.

87. *Id.*

88. *Id.* at 664. Plaintiff relied upon the decisions in Eubank v. City of Richmond, 226 U.S. 137 (1912) and Washington *ex rel.* Seattle Title Trust v. Roberge, 278 U.S. 116 (1928).

89. Geo-Tech Reclamation Indust., Inc. v. Potesta, No. 2:87-0671, slip op. at 3 (S.D. W. Va. Dec. 22, 1988). In concluding a brief opinion, the judge wrote:

The Fourth Circuit Court of Appeals, however, found "no reason" to decide whether the statute "works an impermissible delegation of power to local residents because the statute suffers from a more profound constitutional infirmity."[90] Condemning the overbroad and unclear language of the statute, the court instead invalidated the provision on the basis of the void for vagueness doctrine and forcefully addressed the unbridled abuse that can—and does—result from the absence of standards. The court enunciated the test to be applied in such cases:

> The question raised in this case, . . . is whether § 20-5F-4(b) does in fact further this laudable purpose [of regulating the siting and operation of solid waste disposal facilities] or whether it is instead "arbitrary and capricious, having no substantial relation" to its purported goal. The state argues that the statute's adverse public sentiment clause promotes its stated purpose by allowing citizens to comment upon a proposed landfill's impact on community pride, spirit, and quality of life. But, with commendable candor, the state also recognizes that many who may speak out against the landfill will do so because of self-interest, bias, or ignorance. These are but a few of the less than noble motivations commonly referred to as the "Not-in-My-Backyard" syndrome.
>
> West Virginia argues that § 20-5F-4(b) nonetheless protects the administrative permit process from such base criteria for decision-making by vesting final authority in the Director who must exercise his or her discretion in determining whether adverse public sentiment is "significant." We are unable, however, to discern within the language of § 20-5F-4(b) any meaningful standard by which the Director is to measure adverse sentiment. Indeed, the facts of these consolidated cases plainly show that the Director made no effort to cull out the wheat from the chaff of public opposition to these permits. And in the absence of any such effort, whether it be mandated by the statute or attempted as a matter of administrative policy, we can find no substantial or rational relationship between the statute's goal and its means . . . . Nothing in the record suggests, nor can we conceive, how unreflective and unreasonable public sentiment that "a dump is still a dump" is in any way rationally related to the otherwise legitimate goal of protecting community spirit and pride . . . . The Director has been commanded, without the benefit of any legislative standard by which to separate public sentiment grounded upon reasoned considerations substantially related to civic spirit from irrational public sentiment or whim, to react upon adverse public sentiment in issuing waste facility operating permits. The potential that, by virtue of § 20-

---

> [T]he Court, perceiving no rational basis for permitting a few to restrict the use of another's property, finds W. Va. Code § 20-5F-4(b), to be an unconstitutional delegation of power. . . . Summary judgment should be granted and W. Va. Code § 20-5F-4(b), be declared violative of the United States Constitution, insofar as it permits public sentiment to be the determining factor in not granting a permit for developing a solid waste facility.

Id. at 4-5.

90. *Hamrick*, 886 F.2d at 665.

> 5F-4(b), sensitive administrative decisions regarding waste disposal will be made by mob rule is too great to ignore.[91]

Zoning classifications which affect the siting of solid waste disposal facilities have come under attack as well. In *Fulton County v. Bartenfeld*,[92] the Georgia Supreme Court reviewed Fulton County's denial of a permit for the construction and operation of a municipal solid waste landfill. The county commission referred to public opposition, the commissioner's personal dislike of landfills, and the commissioner's "personal belief that 'there really is no appropriate acceptable location for a landfill.'"[93] The court noted the superior court's findings that the applicant "indisputably has complied with all requirements prescribed by the county zoning ordinance for issuance of the permit" and received approval, albeit subject to local zoning requirements, from the Georgia Department of Natural Resources.[94] The county board, however, had denied the application on the basis of limited testimony, which the court described as "generalized fear, not specifically shown to exist under the facts of this case, that landfills inevitably lower property values and create traffic problems."[95] In summarizing the problem, the court maintained that

> [a]bsolute and uncontrolled discretion by governing authorities to issue licenses invites abuse, and [the] exercise of discretion by states and local governments must be tempered with "ascertainable standards by which an applicant can intelligently seek to qualify for a license . . . ."[96]

The court found that

> since the applicant here has complied with all objective conditions and prerequisites set out in the local zoning ordinance for obtaining issuance of the permit, and since the board of commissioners' denial thereof constitutes an act of discretion which is lacking in any articulable, objective ground of support, the appellee has a clear legal right to issuance of the permit, thereby entitling applicant to issuance of the writ commanding grant of the application by the local authorities.[97]

In overturning the county commission's determination, the court viewed the void for vagueness doctrine as one embedded in the constitutional concept of substantive due process.

A court in Washington County, Arkansas recently invalidated a local ordinance prohibiting the siting of solid or hazardous waste disposal facilities within two miles of any lakes, rivers, creeks, or other water sources within the county.[98] The litigation was brought by Sunray Services, Inc. Sunray had, after an extensive search for an appropriate site for a

---

91. *Id.* at 666 (citations omitted).
92. 257 Ga. 766, 363 S.E.2d 555 (1988).
93. *Id.* at 767, 363 S.E.2d at 557.
94. *Id.* at 768, 363 S.E.2d at 558.
95. *Id.* at 771, 363 S.E.2d at 559.
96. *Id.* at 769, 363 S.E.2d at 558 (citation omitted).
97. *Id.* at 771, 363 S.E.2d at 559.
98. Sunray Services, Inc. v. Washington County, Arkansas Chancery Court No. 90-338 (Decree and Memorandum Opinion issued Aug. 3, 1990).

landfill, acquired land in Washington County. After several meetings concerning Sunray's request for geographic site approval, the Washington County Quorum Court enacted the restrictive ordinance. Sunray presented testimony that proximity to a water source is, alone, not a reliable basis for predicting whether a landfill may affect nearby streams or rivers. The court found that "the experts convincingly established that rational factors to consider in siting a landfill include a study of the geology of the land, the degree of slope, the direction in which ground water flows and the texture of the soil."[99] Noting that the ordinance "was not based upon rational and objective factors but rather upon negative attitudes and fears, community opposition and adverse public sentiment,"[100] the court further reasoned that the ordinance was "arbitrarily and irrationally adopted" and that it "effectively denied all potential landfill operators and potential users of land for landfill purposes the right to pursue an application process without naming factors which inherently threaten the public health, welfare, safety and environment regardless of proper siting, design and operation of the landfill."[101] The court, citing *Geo-Tech*, held that the local ordinance was inconsistent with state law, violated the constitutional guarantee of due process, and created an "unlawful classification against landfill operators and users of land for landfill purposes" in violation of the Equal Protection Clause of the United States Constitution.

The decisions in *Browning-Ferris*, *Geo-Tech*, *Bartenfeld*, and *Sunray Services* demonstrate the vitality of due process arguments to those seeking the nullification of unfair and burdensome restrictions on the siting and permitting of waste management facilities. In particular, courts have utilized the void for vagueness component of due process to countermand landfill siting statutes, regulations, and ordinances that, due to their abstract and indefinite nature, permit the use of nebulous subjective factors and foster arbitrary action.

C. *Traditional Zoning Law Principles*

Recent decisions have employed well-acknowledged principles of zoning law—particularly those related to non-conforming uses—in reversing local determinations opposing the siting or expansion of a municipal solid waste landfill. In *Township of Chartiers v. William H. Martin, Inc.*,[102] the Pennsylvania Supreme Court determined that a township could not prevent a landfill, which existed under a local zoning ordinance as a

---

99. *Id.* at 8. The court declared that "one could just as logically reason that since an automobile operated in a defective condition or by a drunk driver can kill or maim, all vehicles should be prohibited from coming within two miles of the county." *Id.*

100. *Id.*, decree at 6.

101. *Id.* The court's reasoning was in some respects consistent with the rationale of courts that have recently interpreted, in the context of land use disputes, the "takings" clauses of the Federal and state constitutions. *See, e.g.*, Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 UCLA J. ENVTL. L. & POL'Y 139 (1988): Note, *The First Application of the Nollan Nexus Test: Observations and Comments*, 13 HARV. ENVTL. L. REV. 585 (1989).

102. 518 Pa. 181, 542 A.2d 985 (1987).

legal non-conforming use, from increasing its maximum daily volume of waste and expanding the size of the facility. The court noted that, pursuant to the so-called "natural expansion doctrine," a non-conforming use can, to an extent, expand as a matter of right.[103] Pennsylvania courts had previously applied the natural expansion doctrine to reach the proposition that "a non-conforming use cannot be limited by a zoning ordinance to the precise magnitude thereof which existed at the date of the ordinance . . . ."[104] In first enunciating the doctrine, the Pennsylvania Supreme Court stated:

> [The] business had been established at its present location long before the passing of the zoning ordinance and was actively conducted at the time the ordinance went into effect; accordingly, as the property was then used for lawful purposes, the city was without power to compel a change in the nature of the use, or prevent the owner from making such necessary additions to the existing structure as were needed to provide for its natural expansion and the accommodation of increased trade, so long as such additions would not be detrimental to the public welfare, safety and health.[105]

Because the landfill owner was not seeking to extend its operations beyond the original boundary lines, the court in *Chartiers* concluded that the operator had an absolute right to increase the daily volume of intake without the necessity of obtaining a variance because the operator was not changing the intended use of the property and was not expanding the use beyond the area which was contemplated for such use at the time the landfill became non-conforming.[106]

The natural expansion doctrine also served as the basis of the Georgia Supreme Court's opinion in *Speedway Grading Corp. v. Barrow County Board of Commissioners*.[107] The *Speedway* court ruled that the expansion of an existing landfill onto eight adjoining lots which had been zoned residential was permitted as of right. The standard articulated in *Township of Chartiers* and *Speedway Grading Corp.* reflects the flexibility inherent in the natural expansion doctrine. Particularly in cases in which a landfill possesses a state-issued permit granting an authorization to expand or increase the volume of waste accepted, owners or operators may find protection in the face of local opposition through the tenants of zoning law.

---

103. *Id.* at 184, 542 A.2d at 988.

104. Humphreys v. Stuart Realty Corp., 364 Pa. 616, 73 A.2d 407 (1950); *see also* Note, *The Expansion Doctrine in Pennsylvania*, 22 U. PITT. L. REV. 747 (1961).

105. *In re* Gilfillan's Permit, 291 Pa. 358, 362, 140 A. 136, 138 (1927).

106. *Township of Chartiers*, 518 Pa. at 185, 542 A.2d at 989.

107. 258 Ga. 693, 373 S.E.2d 205 (1988). For other examples of the application of the natural expansion doctrine, see Sturgis v. Winnebago County Bd. of Adjustment, 413 N.W.2d 642 (Wis. App. 1981); Syracuse Aggregate Corp. v. Weise, 434 N.Y.S.2d 150, 414 N.E.2d 651 (1980); Hawkins v. Talbot, 80 N.W.2d 863 (Minn. 1957). For a comprehensive overview of the modern-day role of zoning, see Rice, *Zoning and Land Use*, 40 SYRACUSE L. REV. 141 (1989). *See also* Williams, *Planning Law in the 1990s*, 31 ARIZ. L. REV. 471 (1989).

III. LEGISLATIVE INITIATIVES

Legislative initiatives relating to solid waste disposal facility siting are both recent and varied. In many cases, the "not in my backyard" syndrome has overpowered state and local governments which, rather than permitting new facilities or developing realistic solid waste management plans, have hobbled the siting process. Legislative bodies have frequently sought to diminish public opposition by increasing participation in the siting process. In many instances such approaches have had the opposite effect of galvanizing local opposition, resulting in enhanced local siting control.

A few states, however, have sought to achieve a delicate balance of public interests through structured siting initiatives intended to provide an efficient, economical process that results both in the siting of needed landfills and the protection of the public interests implicated by a siting determination. The municipal solid waste landfill siting initiatives of several states are detailed below.

A. Oregon

In 1979, the Oregon Legislature enacted the so-called "Super Siting" bill in an effort to assure future disposal capacity.[108] The legislation declares that the siting of landfill disposal sites is a matter of statewide concern.[109] It emphasizes that while local governments have the primary responsibility for planning solid waste management, the state has the obligation to assist local governments in establishing sites and in creating waste management plans.[110] The statute provides that upon request by a local government, the Department of Environmental Quality may assist, with the assistance of the Environmental Quality Commission, the locality in establishing a landfill site and/or actually issuing permits within the boundaries of the municipality.[111] Once the siting decision is made, or a permit is issued, the determination is binding on all local units of government, *i.e.*, it can not be overturned by zoning ordinances or other local action.[112]

The Act further provides that within certain counties the Environmental Quality Commission may determine on its own that a landfill site is needed and may *order* a locality to establish a site within a specific period.[113] If the local government fails to act, the Environmental Quality Commission may order the Department of Environmental Quality to establish the disposal site, notwithstanding any city, county, or local government charter or ordinance to the contrary.[114]

---

108. Act of July 25, 1979, ch. 773, 1979 Or. Laws 1028 (originally codified at OR. REV. STAT. § 459.065).
109. OR. REV. STAT. § 459.065 (Supp. 1990).
110. *Id.* §§ 459.017, 459.047.
111. *Id.* § 459.047.
112. *Id.* § 459.095.
113. *Id.* § 459.049 (1).
114. *Id.* § 459.049(3), (4).

Moreover, the Environmental Quality Commission is empowered to adopt rules regarding public comment on determinations of need for landfill sites and to provide for public hearings in the area affected by a proposed site.[115] The 1979 legislation was supplemented in 1985 by a statute which required the Environmental Quality Commission and the Department of Environmental Quality to locate and establish a solid waste disposal site in the tri-county Portland metropolitan area.[116] The legislation was intended to guarantee the siting of a new landfill to replace one which would reach capacity by 1990. A new site was chosen in June 1987.

B. Massachusetts

With the passage of the Solid Waste Act of 1987,[117] the Massachusetts Legislature significantly amended the state's solid waste siting laws. The Solid Waste Act considerably expanded the state's role in the siting process by requiring the Department of Environmental Quality Engineering ("DEQ") to establish criteria for determining whether a proposed site would constitute a danger to public health, safety, and the environment. While the legislation was intended to facilitate facility siting, it has in practice permitted the imposition of subjective criteria for judging sites and has tolerated local vetoes over site selection.

The Department of Environmental Quality review process is triggered by the submission, simultaneously to the DEQ and the Massachusetts Board of Health, of an "application for site assignment."[118] A copy of the application must also be submitted to the board of health of any municipality within one-half mile of the proposed site. Any municipality within that distance is considered an "abutter" and is granted certain procedural rights during the siting process.[119]

Within sixty days of receipt of the application, the DEQ must issue a report stating whether the proposed site meets criteria established under the Act "for the protection of the public health and safety and the environment."[120] The siting criteria include factors such as the location of flood plains and wetland protection areas, the impact of the site upon road use in the area, and the proximity of rare or endangered species.[121] The report must be available to the public "in a timely fashion prior to any public hearing concerning the site application."[122]

The Department of Public Health, within the same sixty-day period, must complete its own review of the application and comment to the DEQ "as to any potential impact of a site on the public health and

115. *Id.* § 459.051.
116. The legislation was codified at OR. REV. STAT. § 459.051 (Supp. 1990).
117. MASS. GEN. LAWS ANN. ch. 16, §§ 18-24A (West 1991).
118. *Id.* ch. 111, § 150A.
119. *Id.*
120. *Id.*
121. *Id.* ch. 111, § 150A (1/2).
122. *Id.* ch. 111, § 150(A).

safety."[123] The Department may also produce a public report, in the case of the expansion of "an existing facility or the assignment of a place as a site for a [sic] existing facility or the assignment of a place as a site for a facility,"[124] and provide its report and any written comments prepared for the DEQ to the local board of health.[125]

The local—but not the Commonwealth—Board of Health is charged under the statute with the duty to conduct a public hearing within thirty days of its receipt of the DEQ's assessment report.[126] Within forty-five days of the date of the hearing, the Board must issue "its decision on whether to assign a site for the facility, accompanied by a statement of reasons therefor and publish notice of said decision including determinations of each issue of fact or law necessary to the decision."[127] The Board is not permitted to issue an "assignment" unless the DEQ's report confirms that the siting criteria are satisfied.[128] Moreover, while the statute provides that the Board "shall" assign "a place requested by an applicant . . . unless it makes a finding, based on the siting criteria . . . that the siting thereof would constitute a danger to the public health or safety or the environment,"[129] the Board is authorized to consider additional "concerns, if any, relative to the public health and safety cited by the [Massachusetts] department of public health."[130]

The Massachusetts process thus envisions a multistage process for the siting of municipal solid waste landfills. The Department of Environmental Protection and the Massachusetts Department of Public Health conduct an evaluation of the site's suitability.[131] Upon completion of the Commonwealth's review process and the issuance of a favorable suitability report, the appropriate board of health begins its own review.[132]

The Massachusetts approach suffers from a fundamental deficiency. It permits localities to "veto" effectively the determination by the state that a site satisfies all appropriate criteria. Moreover, the Environmental Policy Act provides for the assessment by local boards of health of an "application fee,"[133] ostensibly used to defray the cost of the technical review of applications and the conduct of public hearings, which in the case of landfills may exceed $40,000.

C. *Texas*

Although Texas has approximately 600 licensed landfills, the state has experienced some difficulty in siting facilities near its burgeoning urban

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

centers. In order to expedite the process of siting newer, technologically advanced landfills near metropolitan areas, the state has encouraged utilization of an environmental mediation technique known as the "Keystone Process." This method, also called the preapplication local review process, takes place outside a legislative or regulatory framework and occurs *before* the developer applies for any necessary permits. It attempts to resolve issues of public concern by the formation of a local review committee. The Keystone Process was first utilized in Texas in the early 1980s by the Gulf Coast Waste Disposal Authority. The review committee met with the developer before the permit application was submitted, and a report prepared by the committee was forwarded to the permitting agency. The use of this non-binding process was judged a success in that instance, given that the review committee resolved seventeen of the twenty-five issues raised.

D. Wisconsin

In Wisconsin, where negotiation and arbitration have been the staples for the past several years, over twenty new landfills have been sited since passage of comprehensive legislation in 1982.[134] As one commentator notes:

> Landfill operators and communities in Wisconsin probably have had the deepest and widest experience of any group in the waste industry in reaching [negotiated siting] agreements. The State's siting law requires anyone who plans to expand or construct a landfill or hazardous waste treatment, storage, or disposal facility to negotiate with the host community's government. These agreements, between landfill developers and local governments, cover issues unrelated to compensation: hours of operation, acceptable wastes, nuisance control, lighting, vehicle routes, aesthetic screening, post-closure site use, and recycling. The compensation is a major part of getting the agreement finalized.[135]

Wisconsin utilizes a two-phase permit process. First, the developer must prove to the Department of Natural Resources that the proposed landfill will comply with department requirements.[136] Other siting issues are addressed by the second siting phase: negotiation and arbitration. Here, the developer must negotiate with all affected municipalities to resolve or mitigate expected economic, social, environmental, and other impacts associated with the proposed landfill.[137]

---

134. *See generally* Shuff, *Bribes Work in Wisconsin*, WASTE AGE, Mar. 1989, at 51.

135. *Id.* For a different view of the Wisconsin approach, see Zieve, *How Wisconsin's Siting Law Works*, WASTE AGE, Jan. 1990, at 113. *See also* Note, *Down in the Dumps and Wasted: The Need Determination in the Wisconsin Landfill Siting Process*, 1987 WIS. L. REV. 543. The mechanism also applies to hazardous waste facilities. *See generally* Holznagel, *Negotiation and Mediation: The Newest Approach to Hazardous Waste Facility Siting*, 13 B.C. ENVTL. AFF. L. REV. 329 (1986).

136. WIS. STAT. ANN. § 144.444 (West 1989).

137. *Id.* § 144.445.

The legislation includes a broad definition of "affected municipalities." The term is defined as a local government in which the proposed site will be located or one whose boundaries are within 1,200 feet of the proposed site.[138] If negotiations break down, a mediator may be called in, or the parties may seek arbitration.[139] In arbitration, one final offer is chosen, without modification, over the other.[140]

Accordingly, the two-part permit issuance process involves the State Department of Natural Resources' review of the permit application and the simultaneous negotiation by the applicant with affected communities over non-regulatory matters. Other key features of the Act include a rigid timetable imposed on all parties,[141] a limitation on the subjects that may be included in an arbitration award,[142] a default process in the event any party fails to meet its responsibilities agreed to through negotiation,[143] and a limitation on those who may participate in the negotiation process.[144]

In 1984, the legislation was amended to require that the facility applicant demonstrate "need."[145] The Department of Natural Resources is required to issue a determination of need at the same time a final determination of feasibility is issued.[146] If the Department of Natural Resources determines there is insufficient need for a facility, the application must be denied even if it is deemed feasible.[147]

E. Connecticut

The State of Connecticut established the Resource Recovery Authority, a quasi-governmental agency, approximately a decade ago. The purposes of the Authority are multi-faceted and include

> the planning, design, construction, financing, management, ownership, operation and maintenance of solid waste disposal, volume reduction, and resource recovery facilities and all related solid waste reception, storage, transportation and waste-handling and general support facilities considered by the Authority to be necessary, desirable, convenient, or appropriate in carrying out the provisions of the state solid waste management plan and in establishing, managing and operating solid waste disposal and resource recovery systems and their component waste-processing facilities and equipment.[148]

The Resource Recovery Authority has, to date, sited only resource recovery facilities,[149] although it has authority to site municipal waste and ash

---

138. *Id.* § 144.43(1).
139. *Id.* § 144.445(8)(b), (10)(a)-(b), (i).
140. *Id.* § 144.445(10)(q).
141. *Id.* § 144.445(10)(d), (f).
142. *Id.* § 144.445(8)(b).
143. *Id.* § 144.445(10)(i).
144. *Id.* § 144.445(10)(a).
145. *Id.* § 144.44(2)(nm).
146. *Id.* § 144.44(2)(om).
147. *Id.*
148. CONN. GEN. STAT. ANN. § 22a-262 (West 1988).
149. *See generally* Charles, *Connecticut's Agency Presents Solutions*, WASTE AGE, Nov. 1990, at 56.

landfills.[150] On July 5, 1989, Governor O'Neill signed into law a bill intended to expedite the siting of landfills for the disposal of incinerator ash.[151] Public Act No. 89-384 limits potential landfill disposal sites to four areas, two on either side of the Connecticut River.[152] The Act prohibits the location of sites within a municipality hosting both a resource recovery facility and an ash disposal site, or within four miles of an ash disposal site owned by the Resource Recovery Authority.[153] The law includes additional provisions seeking to ensure that sites are identified by the state's Department of Environmental Protection as satisfying hydrogeological, environmental, and physical criteria.[154] The Resource Recovery Authority, in order to obtain technical information regarding a proposed site, must conduct environmental monitoring and testing activities.[155] The Resource Recovery Authority must also provide for the establishment of buffer zones between the selected site and residential dwellings and surface waters.[156]

F. New Hampshire

New Hampshire's solid waste management law states that each town shall either provide, or assure access to, an approved solid waste facility for its residents.[157] The Act further provides that upon a municipality's failure to provide an approved disposal facility, the state's Division of Waste Management "shall conduct an investigation of opportunities for joint action with other towns, the availability of private facilities, and possible facility sites within the town."[158] The Division then seeks to reach an amicable agreement with the municipality;[159] failing that, the Division is empowered to conduct public hearings and "either order the town to participate in an existing or planned approved facility, or . . . recommend that land within the town be taken by eminent domain for the establishment of an approved facility."[160] If the Division of Waste Management determines that land should be taken, it may institute eminent domain proceedings and shall be responsible for the facility's design and construction.[161]

IV. DEVELOPING EFFECTIVE SITING PROGRAMS

A work group of the National Governors Association recently surveyed state approaches to hazardous waste facility siting. The National Governor's Association report[162] emphasized that

---

150. *Id.*
151. CONN. GEN. STAT. ANN. § 22a-285a (West 1988).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. N.H. REV. STAT. ANN. § 149-M:13 (1990).
158. *Id.* § 149-M:15(I).
159. *Id.* § 149-M:15 (II).
160. *Id.* § 149-M:15 (IV).
161. *Id.* § 149-M:15 (VI), (VII).
162. Houghton, *Siting New Treatment and Disposal Facilities*, National Governors Association (1989) (available from author).

> [a]lthough increased use of waste minimization efforts by industry is likely to ease capacity pressures over the coming years, the need for safe, well-designed and properly sited waste management facilities is not going to disappear. The community opposition to the siting of new facilities "in their backyards" also is not likely to go away. In the face of these conflicting pressures, states anticipating a need for new capacity will have to find constructive ways of addressing community concerns and facilitating the development of needed facilities.[163]

The work group found the following practices or policies indicative of a flawed state siting program:

> A state siting process that is subject to strong local preemption powers not firmly grounded in environmental, health, and safety concerns, together with the state's inability to appeal or rectify such preemption.
>
> The absence of a siting program having clearly defined steps and procedures; a lack of sufficient opportunity for public review and comment; the absence of clear time lines between permit review, comment, and approval or denial.
>
> The enactment of rules that may be viewed as discriminatory, such as placing limits on facility size or the type of waste allowed at the facility based on origin of the waste, or outright prohibition of waste management facilities if not based on environmental, health, and safety concerns. (This would not include limitations that may be agreed to by the facility developer and the host community as part of siting process negotiation.)
>
> A state having sufficient demand for new hazardous waste capacity accompanied by a history of failed siting efforts.[164]

Clearly, state *solid waste* management programs are equally in need of reform. Governments must do their part to ensure the siting of needed facilities. The National Governor's Association report concluded that off-site commercial facilities are more likely to be sited when "maximum use is made of the various techniques available for dealing with public concerns, including meaningful, constructive public participation in the siting process, and use of technical assistance grants, compensation, and mitigation measures where appropriate."[165]

The solid waste disposal industry can also do its part to facilitate the siting process. One of the largest publicly-held companies engaged in providing waste services recently embarked on a "community partnership" program in New York State. The principle of the program is simple: the company starts with the premise that no site is pre-selected by it. It instead explores the technical and environmental feasibility of a site only after a community states that it desires a facility. The program assumes that the community has the initial and fundamental choice whether or

---

163. *Id.* at 4.
164. *Id.* at 29.
165. *Id.* at 25.

not to locate a facility within its borders. Finally, the company believes that a community must share in the economic benefits derived from the operation of the landfill.[166]

In the one-year period ending June 30, 1991, twenty municipal solid waste landfills closed in New York, while none opened. As of that date, forty-seven of the state's sixty-seven counties lacked a fully permitted landfill. Throughout the state, only 169 landfills were in operation (in contrast to 294 in 1986). Cooperative efforts between communities and the industry can significantly reduce the need for litigation and help promote an easing of the nation's disposal capacity crisis.

Landfills are a necessary part of an effective, integrated waste management approach. We must, as a society, place greater emphasis on reducing the volume of rubbish *before* it is produced. In addition, troublesome compounds such as lead and cadmium—which ultimately may pose a threat to groundwater when they are discarded as part of ordinary trash—should be minimized in common manufacturing processes, and alternative substances should be substituted. With significant rates of public participation, many communities with recycling programs are able to recover as much as twenty or twenty-five percent of their commercial and residential waste. Successful recycling programs also require stable and viable markets for the commodities so that they may be returned to commerce. Municipal solid waste may be sent to waste-to-energy plants, which use state-of-the-art pollution control equipment to ensure environmental protection and recover the heating value of garbage as steam or electricity. Clearly, however, the success of an integrated approach which emphasizes source reduction, recycling, and resource recovery must depend upon adequate landfill capacity. Without landfills, communities simply will not be able to dispose of unrecycled waste or manage the ash that emerges from waste-to-energy facilities. The EPA predicts that landfills will receive a large portion of the country's waste into the next century. Unless new facilities are built in the near future to meet the demand, public officials will find the beast at their door.

---

166. The company proposed an economic development fund for use in any New York community that agrees to host a landfill or recycling facility. The fund's value to the community would be in addition to host fees, taxes, and the economic development associated with construction of the facility. The exact mechanism used to establish the fund would be determined by the community. One method would be for a town to create an economic development corporation, or an industrial development agency, to receive funds. This cash flow, guaranteed for twenty years, could allow the agency to issue bonds to finance major capital improvements, create recreational opportunities, enhance cultural resources or parks, or satisfy other community needs. Making these improvements could, in turn, help to attract other businesses and industries. The advantages of setting up such a fund are that the money can be dedicated early in the project life, and the bonded capital improvements can also be made early on. The community would retain complete control of the economic development process by directing what investments are made.

Several recent studies have, in a similar vein, concluded that the siting and operation of a municipal solid waste landfill has no adverse effect upon residential or commercial property values. Indeed, in some cases property values *increase* as a result of the facility. *See, e.g.*, Bleich, Findlay, & Phillips, *An Evaluation of the Impact of a Well-Designed Landfill on Surrounding Property Values*, THE APPRAISAL JOURNAL, Apr. 1991, at 247; *see also* RESEARCH PLANNING CONSULTANTS, INC., EFFECTS OF SANITARY LANDFILLS ON THE VALUE OF RESIDENTIAL PROPERTY ii (Dec. 1983).