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Local Environmental Protection: Problems and Limitations

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LOCAL ENVIRONMENTAL PROTECTION: PROBLEMS AND LIMITATIONS

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I. INTRODUCTION

Effective environmental protection may require increased local control through municipally enacted and administered ordinances. Municipalities, due to their proximity to the problem, are often best able to define the ecological dangers and effect the most equitable solutions in terms of a balance between local environmental protection and the realities of municipal economics. Therefore, local action should be recognized as an alternatize to both lack of action by, as well as a permissible supplement to existing programs of, the state and federal governments.[1]

Recent environmental ordinances have sought to limit or prohibit phosphates from detergents,[2] tax non-biodegradable and non-reusable containers,[3] control smoke emissions[4] and control local solid waste disposal.[5] Two basic legal issues arise concerning the ability of such measures to withstand judicial attack. First, municipality must act in a manner consistent with the power delegated to it by the state.[6] Second, assuming the municipality has acted within its delegated authority, the municipal legislation must also conform to state and federal constitutional standards.

This article seeks to investigate the nature and extent of these two limitations to local action with respect to several recent cases. The same factual situation often raises both of these legal questions. Therefore, wherever possible, the same cases are used to illustrate different legal issues.

II. MUNICIPAL POWER TO ENACT ENVIRONMENTAL ORDINANCES

A. Municipal Power

The threshold issue in assessing the validity of a local ordinance is whether the municipal corporation has the authority to legislate

in the particular area. It is fundamental that a municipal corporation is a government created by the state legislature, possessing enumerated powers only.[7] It must act within the bounds of its delegated authority defined by constitutional provisions[8] or legislative enactments.[9] The purpose of delegating home rule authority is to provide municipalities with greater initiative in dealing with their own local affairs. Consistent with this purpose, environmental ordinances have generally been sustained against allegations of action beyond the scope of municipal authority.[10]

For example, in *Ringlieb v. Township of Parsippany-Troy Hills,*[11] the New Jersey Supreme Court was asked to decide whether the Township of Parsippany-Troy Hills had the authority to regulate and control a sanitary landfill within its boundaries. The principal question, discussed *infra,*[12] concerned a state-local government conflict. The threshold right of the township to enact such an ordinance, however, absent similar state action, was apparently recognized by the court as being provided by the New Jersey Constitution.[13] Consistent with the principal of home rule, the New Jersey Constitution provides for a liberal construction of all laws in favor of municipal corporations, stating specifically that ". . . [l]ocal government should be given every advantage to manage and operate its affairs."[14]

Another example of a local ordinance, within the state's constitutional grant to its municipalities, was litigated in *Colgate Palmolive Co. v. Erie County.*[15] Here, the New York Supreme Court[16] considered an Erie County ordinance which set timetables for the reduction and the eventual prohibition of phosphates from detergents sold and used within the county.[17] Again, the principal issue litigated was the relationship between the local enactment and state legislation. Aside from this issue of preemptive state action, however, the basic delegatory authority of the county to act was apparently conceded. Colgate-Palmolive did not allege a lack of such authority, an allegation which would probably have been unsuccessful. This is evidenced, in part, by the specific language of the New York State Constitution, which gives localities considerable powers of local legislation without resort to the state legislature.[18] The granted powers, which are to be "liberally construed,"[19] include the authority to pass local laws which relate to the ". . . safety, health and well-being of persons . . ."[20] of the municipality. All such grants are conditioned on the lack of inconsistency between the local law and state constitutional or statutory law.[21] The court, in re-

sponse to plaintiff's claim of possible harm, recognized its obligation to consider the county's assertions of the injurious affects of phosphates on the health, safety and welfare of its inhabitants.[22] This recognition of local concern, coupled with the provisions of the state constitution, provided Erie County with its initial authority to control phosphates. The preemptive conflict itself is discussed *infra*.[23]

Allview Inn v. Howard County[24] provides an example of municipal authority emanating from legislative delegation. The Maryland Circuit Court for Howard County considered the legality of a county ordinance prohibiting the sale of "throwaway" bottles or containers for soft drinks, beer and malt liquors.[25] Plaintiffs contended that the county lacked the power to regulate the sale of beer and malt liquors and that the alcoholic beverage field had been preempted by the state. As to the first contention—which went to the basic issue of county power absent state conflict—the plaintiffs relied on the specific language of the statute.[26] Article 25A §5(S), allowed the county to pass any ordinance, not inconsistent with state law, as "deemed expedient in maintaining the peace, good government, health and welfare of the county," and specifically prohibited legislation ". . . with reference to licensing, regulating, prohibiting or submitting to local action, the manufacture or sale of malt or spiritous liquors." The county relied on §5(T) of the same article which gave counties the power "to enact local laws . . . for the protection and promotion of public safety, health, morals, comfort and welfare relating to . . . the disposal of waste . . . ." The issue of delegated authority, then, was whether the specific prohibition of §5(S) withheld some of the power seemingly delegated in §5(T). The court held that the Howard County action was not prohibited in that the county council's purpose was not to prohibit or regulate the sale of malt or spiritous liquors, but rather to regulate the disposal of waste material.[27] The second issue of prohibition is discussed and analyzed *infra*,[28] in conjunction with state preemption, an issue also decided in favor of Howard County. The principal point here, however, is that the county had the threshold authority to act. As with *Ringlieb* and *Colgate-Palmolive*, without first establishing this basic authority, the question of state preemption would never have been reached.

The above cases give some indication of the broad interpretation given to home rule grants. However, delegatory authority brings with it limitations. These delegatory restrictions extend not only to

the subject matter of local concern, but also to the means of effecting solutions to these concerns. *Society of Plastics Industry v. New York City*[29] provides an example of municipal action in excess of its home rule police powers. New York City wanted to tax the sale of certain types of non-biodegradable containers. The New York State Constitution limits local legislative authority to the adoption of ". . . all local laws not inconsistent with the consitution or any general laws."[30] It also grants all taxing power in New York State to the state legislature and provides that such taxing power may be delegated to municipalities only through laws which specifically designate the tax to be imposed.[31] The power to tax, then, is not within the general police powers of the state's political subdivisions. Therefore, the city was required to obtain specific legislative permission before it could impose its desired tax. The issues surrounding the request for specially delegated authority are discussed *infra*.[32]

B. State Preemption

One limitation to municipal action is the constraint that municipal ordinances must not conflict with the general laws or constitution of the state.[33] An ordinance found in conflict is considered void because enacted in excess of delegated municipal authority.

In *Ringlieb*[34] the principal issues raised in conjunction with state preemption were those of legislative intent and the need for statewide uniformity.[35] The statute involved, the Solid Waste Management Act, expressed legislative concern for the solid waste problem by calling for more stringent and realistic industrial regulations and recommended ". . . the development and formulation of statewide, regional, county and inter-county plans for solid waste management."[36] The township claimed that the state statute did not preclude the municipality from passing an ordinance regulating the same industry. Although the basis for this position is not clear from the court's opinion, one argument which the township might have asserted would revolve about the exclusion from the statute of the word "towns." The township could have argued that this exclusion had the effect of leaving towns unaffected by its provisions, and therefore that their waste management authority permitted by home rule was either completely unrestricted or, alternately, restricted only by minimum state standards.

The New Jersey Supreme Court, noting the statutory language, held that the state statutes controlling the solid waste industry[37]

were so pervasive as to preempt the entire field and invalidate the township's ordinance regulating solid waste disposal and collection.[38] Specifically, the court asserted that ". . . the State may withhold from, or grant a given power to a municipality . . ." and that the ". . . question of preemption must be determined, absent an express exclusion from the field by the State, by the Court's ascertaining the legislative intent."[39] Pursuant to that mandate, the court concluded that the locality had acted beyond the scope of its delegated powers in that no mention of the legislative concern below the intercounty level implied a legislative intent to bar localities from developing or formulating their own solid waste disposal controls. Therefore, it held that there ". . . seems to be a comprehensive plan on the part of the state to control all facets of this [solid waste disposal] industry."[40]

Ringlieb was also based in part on the court's appraisal of the need for statewide uniformity. Allowing each municipality to regulate, maintain and control its own sanitary landfills—as specified in the Parsippany-Troy Hills ordinance—would, in the court's opinion, result in ". . . conflicting ordinances and requirements of the separate municipalities [which] would bring to a complete halt the sanitary landfill operations in this state [and] the refuse disposal business, all to the detriment of the general health of the general public."[41] The court based its finding on the factual determination that the ordinance resulted in considerable duplication and overlapping which would require duplication of efforts while serving no useful purpose.

It is to be noted, however, that the *Ringlieb* court has not precluded all local action. In situations such as the one in *Ringlieb,* where the legislative intent is unclear, and the locality disagrees with the court's interpretation of that intent, the locality can always appeal to the legislature itself. Presumably, if the court misinterpreted legislative intent, the legislature should be willing to amend the statute in question.[42] This is precisely what occurred as an aftermath of *Ringlieb.* In response to the decision, the legislature amended the solid waste legislation to clarify its intention that the doctrine of preemption was not to apply.[43]

Ringlieb may be contrasted with *Colgate-Palmolive Co. v. Erie County*[44] where the issue was one of express preemption. The New York Supreme Court was asked to determine the relationship between two enactments, one state and one county, both designed to initially limit, and then to prohibit, phosphates from detergents

used and sold within their respective jurisdictions. On March 16, 1971, the Erie County legislature enacted an ordinance which limited the phosphorus content of detergents to 8.7% by weight if sold or used after April 30, 1971 and totally prohibited any phosphorus in detergents sold after January 1, 1972.[45] Subsequent to that enactment, the state legislature imposed its own statewide controls on the sale and use of detergents containing phosphates, but subject to a different timetable. Under the State Environmental Conservation Law, the phosphorus content was restricted to 8.7% by weight after December 31, 1971, with a total ban taking effect on June 1, 1973.[46]

Plaintiff, a manufacturer of detergents, sought through a preliminary injunction a declaration whether the local enactment was in conflict with the Environmental Conservation Law and, therefore, preempted and invalid. The two statutes were identical except that the state's compliance schedule was slower. The state preemption provision explicitly states that ". . . the state fully exercises the exclusive right to regulate and control . . . ingredients . . . [and that] [i]n order to assure statewide uniformity, such regulation and control by any political subdivision of the state of such products is prohibited on or after the effective date of this subdivision . . . ."[47]

Based upon this statutory language, the county ordinance would have been held to have been preempted by the state. Both laws regulate the same subject matter in the same way. The legislative intent is explicitly stated. The county law, however was saved from invalidity solely as a result of the additional language in the Environmental Conservation Law, which stated that ". . . any such regulation and control in effect on [June 1, 1971] shall be unaffected by this subdivision."[48] Colgate maintained that the total ban decreed by the County ordinance was invalid because it became operative after June 1, 1971, the first date of preemptive control. The court, however, disagreed and held that, by virtue of the fact that the Erie County ordinance was in effect on June 1, 1971, even though only as to the 8.7% limit, the entire ordinance was to be given effect, including those provisions which became operative after June 1, 1971. Hence, the ordinance was upheld. However, any local legislation enacted subsequent to the deadline would be expressly preempted.

Absent such express preemptive provisions, the mere existence of similar state and local enactments does not necessarily lead to a conflict. *Allview Inn v. Howard County*[49] is indicative of the ability

of state and local governments to work concurrently for the common good.[50] As discussed *supra,* the Howard County council prohibited the sale of "throw-away" bottles or containers for soft drinks, beer and malt liquors.[51] Plaintiffs, sellers of such beverages in non-returnable containers, asserted that the ordinance regulated beer and malt liquor sales and therefore was invalid as impinging upon the state's exclusive right to legislate in the area of alcoholic beverage control. Plaintiffs supported their contention with a state statute which prohibited counties from legislating ". . . with reference to licensing, regulating, prohibiting or submitting to local option, the manufacture or sale of malt or spiritous liquors"[52] and authorized the state Comptroller to adopt and publish rules and regulations regarding labelling, advertising and setting deposit rates on returnable beer containers.[53] The county, on the other hand, relied on the state's enabling legislation in the area of solid waste disposal.[54]

The *Allview Inn* court held that while local regulations must yield to state legislation where there is a conflict, "[t]he mere fact that the state has legislated upon a particular subject does not necessarily deprive the [locality] of its power to deal with the subject by [its own] ordinances."[55] The issue of whether the state and county acts were conflicting or concurrently applicable was held to depend upon the legislative intent and purpose, and not solely upon the literal statutory terms.[56] Generally, a state law will not be construed as impliedly taking away existing local power unless there is evidenced a clear and unambiguous conflict between the purposes, effects or enforcement procedures of the respective measures. If a local ordinance and a state statute can be construed to give effect to both, the courts will do so.[57] As stated in the earlier discussion on delegated authority, the *Allview Inn* court determined that the county purpose was the regulation of waste disposal, not the prohibition or regulation of malt or spiritous liquors. The court further found that the county action did not usurp the state's legislative power in the alcoholic beverage field, and that there was no conflict, in that the bill did not regulate deposits but merely forbade the sale of containers upon which a deposit is not charged.

The *Allview Inn* court's reasoning has important applications in the environmental law area. State and local governments are often under similar pressures and exhibit similar concerns. Local governments may gain flexibility through local ordinances that are consistent with state standards. However, the facts in *Allview Inn* may

distinguish it from other environmental situations. Not only was the intent of the couny ordinance different from that of the state law, but the effect of compliance with the statutes was also different. Even if prohibited from using throwaway containers, the liquor and beer industry could still operate, without county interference, and manufacture and sell liquor and beer. If beer could only be sold in throwaway bottles, the issues would be different. In such a case, it is submitted, a direct conflict with the state statute would be found and the local ordinance would be held to be preempted and invalid.

C. *Specific Enabling Legislation*

Society of Plastics Industry v. New York City[58] is indicative of the dangers of exceeding the state's delegation of authority. New York City did not have the authority to tax the sale of non-biodegradable containers, the power to tax being explicitly reserved by the state.[59] In the absence of general home rule authority, a municipality can act only pursuant to a specific enabling act. Therefore, the city received special power to tax in this situation. The Enabling Act authorized the city to impose ". . . [t]axes on the sale of containers made in whole or in part of rigid or semi-rigid paper board, fibre, glass, metal, plastic or any combination of such material . . . intended for use in packing or packaging any product intended for sale."[60] The purpose of such authorization was to ". . . promote the recycling of containers and reduce the cost of solid waste disposal. . . ."[61] The act allowed New York City to grant specific tax credits on the basis of percentages of recycled material.[62]

Pursuant to this authorization, New York City passed an ordinance which provided for a tax of two cents on the sale of every rigid or semi-rigid plastic container, and for an allowance of one cent for each taxable container that was manufactured with a minimum of 30% recycled material.[63] No taxes were levied on the other items listed in the state's enabling legislation.

Many of the issues surrounding the scope of the delegation of authority involve statutory interpretation as to whether or not the municipality has acted in a manner consistent with the intent and details of the specific delegation. Plaintiffs attacked the ordinance on a number of grounds, one being that the city, if acting pursuant to its taxing authority, must impose a tax on the entire taxable class as designated by the state. According to plaintiffs' argument,

the city ordinance, by exempting from taxation all containers made of metal, glass, fibre and paper board, should be held invalid as a deviation from its delegated authority.[64] The defendant city sought a liberal construction of the enabling act which would allow it to "pick and choose" from the enumerated list of taxable items.[65] Defendant based its argument, in part, on the uniqueness of the ecologically-inspired tax which, according to the city, called for an exception to the general rule of strict construction of enabling legislation.

The New York Supreme Court found no merit in the city's contention and held that, under the Enabling Act, the city did not have the right to "pick and choose." Quoting the language of an earlier case,[66] the court cautioned that (1) the state's exclusive power to tax includes ". . . the power to determine the class of persons to be taxed," and (2) that ". . . any taxes imposed by the [City of New York] must be within the express limitations . . ." of the enabling legislation.[67] Such enabling acts are to be strictly construed against the municipality.[68] Treating each type of container material as the subject of a separate tax was held to strain ". . . the plain meaning of the law and contravene the tenet of strict construction of tax statutes."[69]

The court further held that the New York City ordinance actually defeated the purpose and intent of the Enabling Act by reducing the incentive to recycle containers. According to the court, creating a tax on just one type of container allowed manufacturers to switch from the taxed containers to the exempted containers, with no resultant reduction in the volume of containers used or any increase in recycling.[70]

An important issue in *Plastics Industry* is the different approach taken by the New York court in interpreting general home rule grants, on one hand, and specific enabling legislation on the other. The former are given a liberal construction[71] whereas the latter are usually given a strict construction.[72] The court stated that "[h]ome rule principles are simply inapplicable in the determination of the scope of delegated local tax powers."[73] However, these two positions are not necessarily inconsistent. Since all municipal power emanates from the state, a municipality should possess only that power the state intended to give it. A home rule grant is designed to give the locality that power required to deal with local problems. These problems often cannot be identified in advance. Therefore, to best

advance the legislative purpose in the absence of express language to the contrary, this type of delegation should be liberally construed consistent with legislative intent.

On the other hand, a specific enabling act, by nature, is designed to delegate power to allow municipalities to cope with specific problems. The legislative purpose, in this case, would seem to be best served by a more strict construction of the delegating instrument. Here, since the state has already considered the problem, its "solution" should be narrowly interpreted. Hence different standards of interpretation should exist.

Plastics Industry does not necessarily mean that localities cannot "pick and choose" among potentially taxable commodities. But for the limitations imposed by the Equal Protection clause,[74] there is nothing wrong with municipalities' differentiating among products in such a manner. The issue is one of statutory interpretation of the enabling act under consideration.

However, *Plastics Industry* does indicate that municipalities must be careful to act within the limits and requirements of a state's enabling legislation. To solve a given environmental problem, a municipality may require authority beyond its general police powers. If so, the locality should seek as broad a specific grant as possible. Once the state has acted, however, the municipality is constrained to act pursuant to the letter and spirit of the state enactment.

III. Constitutional Limitation to Environmental Ordinances

A. *Equal Protection*

Environmental legislation is often susceptible to equal protection challenge because of alleged unreasonable, arbitrary or invidiously discriminatory classifications. Most environmental enactments involve either taxes, regulations, or prohibitions of some activities to the exclusion of others. For example: (1) a county or state limits the phosphate content in detergents in order to control water pollution,[75] but does not limit any other detergent ingredient; (2) a city taxes certain containers at a higher rate than others in an attempt to limit solid wastes;[76] (3) fines are imposed on a business for smoke emissions, but only above a specific level;[77] (4) only certain aspects of a business believed to relate to the environment are regulated.[78] In each of these cases, some type of discrimination is necessary, such

as a delineation of those activities believed to be dangerous to the environment from those assumed to be non-hazardous.

The basic principles of the equal protection doctrine are well established: any state or municipal legislative classification must be a rational one, bearing a reasonable relationship to a proper legislative purpose. The application of this principle, and the guidelines used in determining reasonableness and proper legislative purpose, are dependent on the specific factual situation, legislation, and jurisdiction involved.

In *American Can v. Oregon Liquor Control Commission,*[79] plaintiffs challenged a state statute which imposed a greater tax on non-reusable beverage containers than it did on those containers certified reusable and prohibited the sale of any containers employing pull top openers.[80] The stated purpose of the act was to promote the use of reusable beverage containers of a uniform design and to facilitate the return of these containers to the manufacturer for reuse.[81] Plaintiffs urged that the Act created unreasonable, arbitrary and constitutionally prohibited classifications that were invidiously discriminatory and devoid of any rational relationship when viewed in light of the Act's stated purpose.

The *American Can* court stated the traditional standards for the review of equal protection challenges, that there is a strong presumption of the validity of a legislature enactment[82] and that, in the absence of infringement of specially protected rights,[83] this presumption of legislative validity may be overcome only by a conclusive showing of arbitrariness.[84] The court held that the Act was not a violation of equal protection "[b]ecause the Oregon State Legislature could have concluded and did conclude that there was, in fact, a rational relationship between the classifications in the Act and the legislative purposes."[85]

Inherent in their conclusion of constitutionality was the finding that the stated purpose—the promotion of reusable containers—was a legitimate state concern. The court upheld without explanation the reasonableness of the legislature's relating of the classifications to the purpose. The legislation is arguably reasonable: the state's police power includes the protection of the health, safety and welfare of its inhabitants; this concern extends to the control of environmental and health hazards such as increased, nondisposable solid wastes; this in turn leads to the need to control the production of excess containers and the need for reusable containers; a law taxing the use of such reusable containers is one rational way of

exercising such control and is therefore reasonable. The court further points out that the ". . . Act is invulnerable to plaintiff's . . . constitutional attack . . . regardless of whether the Court believes that the Act or policy behind the Act to be wise or whether experts agree or disagree as to the results which might be reasonably anticipated by the Act."[86]

The court further held, relative to the question of reasonableness and rational basis, that "[t]he legislature is simply not required to legislate upon all possible litter problems or to attempt to solve the State's entire solid waste problem in one statute."[87] The *American Can* court found support for its decision in *Anchor Hocking Glass Corp. v. Barber*[88] which upheld the constitutionality of a Vermont statute prohibiting the sale of malt products in reusable glass containers even though there was litter other than beer bottles not subject to state sanction. The Vermont court noted that:

> The equal protection clause of the Fourteenth Amendment does not prohibit legislative classification, and the imposition of statutory restraints which are not imposed on another. . . . A particular classification is not invalidated by the Fourteenth Amendment merely because inequalities actually result. Every classification . . . produces inequalities in some degree; but the law is not thereby rendered invalid . . . unless the inequality produced be actually and palpably unreasonable and arbitrary.[89]

The court in *American Can* asserted that *Society of Plastics Industry v. New York City*[90] was contrary.[91] In *Plastics Industry* the New York City tax on plastic containers—without a similar tax on paperboard, glass, fiber and metal containers—was found to contravene state[92] and federal equal protection. After considering possible differences among the container types, the *Plastics Industry* court stated that it ". . . perceives no obvious distinction between plastic containers and all other types."[93] Therefore, it held that the classification did not bear a reasonable relationship to the purpose stated, the promotion of container recycling and the reduction of solid waste disposal costs. In declaring the New York City tax an unconstitutional denial of equal protection, the court was particularly impressed by the argument that the tax on plastics, rather than promoting recycling efforts, merely provides an incentive to switch from plastic containers to a tax exempt type, with no resulting ecological benefit.[94]

At first reading, *Plastics Industry* does appear to conflict with

American Can and *Anchor Hocking Glass Corp.* The later cases held that inequities which are inherent in all classifications were not, in and of themselves, sufficient to invalidate the statute challenged. Yet, the *Plastics Industry* court did not allow the city the ". . . right first to try out [the tax] . . . with respect to one of the authorized types of containers . . ."[95] by holding that the similarity between plastic and other container materials raised inequities sufficient to make the classification unreasonable. In this regard, the *Plastics Industry* court rejected defendant's contention that any justification for separate treatment of plastic containers should be sufficient to justify the ordinance,[96] a contention that seems to have been accepted by the court in *American Can.*

However, the factual and legal situations in *American Can* and *Plastics Industry* can be sufficiently distinguished so that their holdings need not be considered inconsistent.

The first distinction, one of fact, revolves about the reasonableness of taxing only plastic containers. In considering this question, it is assumed that there is no threshold question of the sufficiency of authorized power to legislate. Even with the broad legislative discretion and judicial restraint evident in *American Can,* an enactment will be held to violate equal protection if its classifications are unreasonable and arbitrary. Following the reasoning of the *Plastics Industry* court, the ordinance would probably have failed even under the *American Can* standard since it was seemingly unable to further the purpose of the enabling legislation. Glass, metal, fiber, paperboard and plastic, when used as container material, are all, to a great extent, interchangeable. As stated by the court, the ordinance, rather than helping to solve the solid waste problem, would simply encourage the use of equally as harmful non-plastic containers.[97] A finding of palpable unreasonableness may therefore be justified in *Plastics Industry* but not in *American Can.* Such holdings are not necessarily inconsistent but simply factually distinguishable.

The second distinction, concerning the legislative postures of the state statute in *American Can* and the municipal ordinance in *Plastics Industry,* provides another ground for distinguishing the cases, independent of any absolute determination of the reasonableness of the tax on plastics alone. In *Plastics Industry,* the municipality was held to have acted in excess of its delegated authority. On the other hand the Oregon legislature in *American Can* was held to have acted within the scope of its authority.[98] The *American Can*

court hesitated to weigh the effectiveness of the statute stating that ". . . Courts should not sit as some kind of a super legislature to review the wisdom of the laws enacted . . . ."[99] The court accorded the state wide discretion precisely because it possessed the authority to act. New York City, on the other hand, did not possess this authority and was held to have acted contrary to the intent of the state's delegation. The state, through its enabling legislation, had already decided on a system of classification it deemed reasonable. Applying the rationale of *American Can* to *Plastics Industry* would lead a court to restrain itself from analyzing an act's effectiveness, and, in the absence of constitutional limitations, to give support to the determination of the superior legislative body.[100] The Enabling Act is presumed to present a standard of reasonableness. The city, acting contrary to that standard, is deemed to have acted unreasonably. Although the *Plastics Industry* court did not explicitly justify its finding of an equal protection violation based on this reasoning, much of the court's discussion of reasonableness contains references to the state's objectives and the specific provisions of the Enabling Act itelf.

In summary, states and their political subdivisions are given considerable legislative discretion relative to the question of reasonableness of classifications. The action taken by the locality must nevertheless conform within the constitutional limitations of reasonableness and non-arbitrariness.

B. *Due Process*

Environmental ordinances are also often susceptible to due process challenge. Most environmental legislation adversely effects an individual's or a group's property rights. Such adverse effects are, without more, insufficient to invalidate a municipal ordinance on due process grounds. A municipality in the exercise of its police power is free to adopt a policy reasonably related to promote the public welfare, and to enforce that police by legislation adopted to its purpose.[101] The test of due process is essentially a balancing test, weighing community need against harm to the individual.[102] Therefore due process, although it sets constitutional requirements of reasonableness, nonarbitrariness and definiteness on ordinances, ". . . does not make a [municipality] impotent to guard its citizens against the annoyance of life [just] because the regulations may restrict the manner of doing a legitimate business."[103]

The court in *American Can* upheld the validity of the disproportionate Oregon tax on non-reusable containers against a due process challenge. The purpose of the tax was to promote the use of reusable beverage containers and to facilitate the return of such reusable containers to the manufacturers for reusage.[104] The court held that this was indeed a legitimate and proper governmental concern and that the Act's provisions ". . . show on their face that they bear a rational relationship to the purposes for which the Act was enacted."[105]

A similar result was reached in *Turnpike Realty Company, Inc. v. Town of Dedham*.[106] Here, a zoning by-law was amended so as to restrict the use of petitioner's land by designating it as a Flood Plan District. The *Turnpike Realty* court held that the evidence indicated that there was a reasonable purpose supporting the town's action, the attempted control of seasonal or periodic flooding. In upholding the town's action the *Turnpike Realty* court emphasized that ". . . although it is clear that petitioner is substantially restricted in the use of its land, such restrictions must be balanced against the potential harm to the community."[107]

An example of a successful due process challenge is to be found in *Society of Plastics Industry v. New York City*.[108] In addition to being held invalid as in excess of delegated authority and as a violation of equal protection, the *Plastics Industry* court held the New York City tax on plastics to be a violation of the due process clauses of both the state and federal constitutions. The court emphasized the fact that "[a] statute which interferes with or takes away a person's property must be reasonably calculated to accomplish some proper public purpose."[109] The court found that the tax did not accomplish a proper public purpose. The tax's purpose was to promote the recycling of plastic containers and to reduce the cost of solid waste disposal, yet its affect might have been to encourage the use of equally damaging nonplastic containers.[110] The ordinance was therefore held to violate due process in that ". . . [t]he actual result of the law . . . is the destruction of an industry to the benefit of its competitors without proof of any legitimate public reasons therefore."[111]

C. *Federal Preemption: The Commerce Clause*

The federal constitution requires that a state statute or municipal ordinance must not conflict with federal law.[112] The question of

federal preemption is a recurring one with respect to environmental ordinances. For example, the expansive concept of interstate commerce has tended to classify as interstate many activities otherwise thought of as essentially local in nature.[113] Of fundamental local concern, then, is the question of whether a state or municipality can regulate an activity even though it relates to the preempted area of interstate commerce. This issue of federal preemption is often raised as the result of specific Congressional action.

Although federal power of interstate commerce may be pervasive, it is not, *per se,* exclusive. Conflict is not created solely by virtue of the overlapping of local and federal provisions. Conflicts result only from local action actually preempted by the federal government. Congress often expresses its intent to preempt an area by stating so explicitly. More difficult issues present themselves when Congress remains silent on the issue of preemption. The courts attempt to interpret the probable Congressional intent by considering such factors as the nature and extent of any conflicting provisions in local and federal enactments, the need for a uniform national policy, and the elaborateness of federal control in the given area.

Huron Portland Cement Co. v. City of Detroit[114] is a landmark case concerning the validity of local pollution control ordinances in the presence of existing federal regulations. Here, the constitutional validity of Detroit's Smoke Abatement Code as applied to ships operated in interstate commerce was challenged. The ship's boilers had been approved by the United States Coast Guard in accordance with a comprehensive system of federal regulations. The United States Supreme Court, in sustaining the Detroit Smoke Abatement Code, as applied to ships' boilers, held in part that:

> Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of . . . police power. In the exercise of that power the states and their instrumentalities may act, in many areas of interstate commerce . . . concurrently with the federal government.[115]

Mr. Justice Stewart, speaking to the issue of federal preemption, stated that federal intent to supersede state action is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation but that the purpose and effect of the legislation must be considered. The court distinguished the purposes of the respective acts—seagoing safety in the case of the federal inspection statute and local health protection in the case of the ordinance. The

court, applying the various tests delineated *supra* to ascertain the Congressional intent, upheld the validity of the ordinance noting that ". . . State regulation, based on police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand."[116]

The spirit and philosophy of *Huron* is evident in *Soap and Detergent Association v. Clark*.[117] Here, a Dade County, Florida ordinance that banned all phosphates in detergents and required detergent labels to list all ingredients was held valid despite a commerce clause attack. The decision held water pollution to be a legitimate concern affecting the health, safety and welfare of local citizens and held that the burden on interstate commerce was insufficient to hold the measure violative of the commerce clause.[118] Had the burden been such as to essentially curtail interstate commerce, or had the county discriminated in favor of Florida detergents in an arbitrary manner, the ordinance would have been unconstitutional. Similar results can be found in other recent environmental cases including *Colgate-Palmolive Co. v. Erie County*,[119] *American Can v. Oregon Liquor Control Commission*, [120] and *Society of Plastics Industry v. New York City*.[121]

These cases indicate that the doctrine of federal supremacy does not preclude state and local governments from protecting the health, welfare and safety of their citizens by actions which affect interstate commerce only tangentially.

IV. Conclusion

One effective way of protecting the environment is through local action. Localities, in order to most efficaciously meet their ecological responsibility must be aware of the inherent limitations to their authority. Recognition of the boundaries of their authority will permit local governments to (1) more effectively draft legislation and (2) determine when state and federal legislation control.

Footnotes

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[1] Justice Douglas discusses some of the reasons for the general failure of effective Congressional action in his dissent in Sierra Club v. Morton, 405 U.S. 727, 745 (1972). He asserts that a benevolent Congress is not the answer to our environmental problems due to (1) its remoteness to

the local situation, (2) its ponderous administrative machinery and (3) the undue pressure and control by lobbies whose interests are often at odds with the public interest to be protected.

Many of the same problems unfortunately exist on the state level as well. Rosenbaum, *Expanding Role of Municipal Police Power in Pollution Control: A Pragmatic Approach,* 21 BUFFALO L. REV. 139 (1971).

[2] Colgate Palmolive v. Erie County, 68 Misc. 2d 704, 327 N.Y.S.2d 488 (Sup. Ct. 1971); Soap and Detergent Association v. Clark, 330 F. Supp. 1218 (S.D. Fla. 1971).

[3] Society of Plastics Industry, Inc. v. City of New York, 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct. 1971); American Can v. Oregon Liquor Control Commission, 4 E.R.C. 1584 (Ore. Cir. Ct. 1972).

[4] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[5] Ringlieb v. Township of Parsippany-Troy Hills, 59 N.J. 348, 283 A.2d 97 (1971).

[6] This raises issues of (1) the source of the municipal power, (2) the conditions placed on the delegation, (3) the municipal justification for its actions under such delegations, and (4) the limits of municipal authority. A review of the law of state delegation of power is beyond the scope and intent of this article. For a more complete, general discussion, *see,* Sandalow, *Limits of Municipal Power Under Home Rule: A Role for the Courts,* 48 MINN. L. REV. 643 (1964); Winters, *Classification of Municipalities,* 57 NW. U.L. REV. 279 (1962); 56 AM. JUR. 2d *Municipal Corporations,* §§125–38, 193–98, 423–37 (1971); F. Michelman and T. Sandalow, MATERIALS ON GOVERNMENT IN URBAN AREAS (1970); J. Mileur, *Municipal Home Rule in the United States,* HOME RULE MODERNIZING LOCAL GOVERNMENT IN MASSACHUSETTS (1972).

[7] "In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent power of self government which is beyond the legislative control of the state, but are merely departments of the state, with powers and privileges such as the state has seen fit to grant, held and exercised subject to its sovereign." City of Trenton v. New Jersey, 262 U.S. 182, 187 (1922). *See also,* Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 312–13, 293 A.2d 720, 734 (1972).

[8] The majority of home rule grants are constitutional and may be of one of three general types: (1) self-executing, wherein a municipality is deemed to draw its police power directly from the people, with no legislative action being required; (2) mandatory, requiring legislative delegation; and (3) permissive, allowing such legislative delegation. *See* note 3 *supra,* for a more detailed analysis of the effects of each type of constitutional grant.

[9] Local police power can also be delegated by state legislation. One type of statute is the "legislative" home rule or general enabling act—which, in the absence of constitutional provisions, defines a general

range of local authority. This method of general home rule is the least appealing to the municipalities in terms of residual state control. See J. Mileur, *Municipal Home Rule in the United States, supra* note 6, at 8; 56 AM. JUR. 2d *Municipal Corporations* §425 (1971).

A second type of legislative grant is the more specific enabling act which delegates specific powers to help localities deal with specific problems. *See* text at n.58, *supra.*

[10] There exist conflicting opinions among judges and legal scholars as to the general interpretations that should be given home rule grants. The traditional view, the so-called "Dillon's Rule," seems to call for a strict and narrow construction of all state delegations. Dillon, MUNICIPAL CORPORATIONS, at 448–455 (5th ed. 1911); City of Clinton v. Cedar Rapids and Missouri River Railroad Company, 24 Iowa 455, 475 (1868).

An alternate view is that home rule provisions are given broad and far-reaching interpretation with the courts looking at the obvious intent to confer broad powers to the municipalities. Supporters of this view assert that, although a number of cases speak of home rule grants in restrictive terms, their ultimate decisions have been based on issues other than those of conferred authority. Sandalow, *Limits on Municipal Power Under Home Rule: A Role for the Courts, supra* note 6, at 661–85. There appears to be a trend towards the latter, more liberal, construction of home rule grants.

Note, however, that even in the presence of a liberal construction of state delegations, the broad powers conferred also serve as limits. A municipal ordinance must demonstrate a reasonable relationship to the health, safety and welfare of the citizens.

[11] 59 N.J. 348, 283 A.2d 97 (1971).

[12] *See* text at n.34, *supra.*

[13] N.J. CONST. art. 4, §7, ¶11.

[14] 59 N.J. at 352, 283 A.2d at 99.

[15] 68 Misc. 2d 704, 327 N.Y.S.2d 488 (Sup. Ct. 1971) *aff'd.* 39 App. Div. 2d 641, 331 N.Y.S.2d 95 (1972).

[16] It is noted that in New York the Supreme Court has trial and appellate divisions. The Court of Appeals is the highest court in the state.

[17] Erie County N.Y. Local Law No. 8, March 16, 1971. The ordinance —entitled "A Local Law Prohibiting the Sale of Certain Detergents Containing Phosphorus"—set up a specific time table for the reduction of the phosphorus contents: (a) to 8.7% phosphate by weight as of April 30, 1971 and (b) to 0% phosphate as of January 1, 1972.

[18] N.Y. CONST. art. IX, §2(c).

[19] *Id.* §3(c).

[20] *Id.* §2(c)(10).

[21] *Id.* §2(c)(11).

[22] 68 Misc. 2d at 705, 327 N.Y.S.2d at 490.

[23] *See* text at n.44, *supra.*

[24] 3 E.R.C. 1863 (Md. Cir. Ct. 1972).

[25] Howard County Council Bill No. 7, Legislative Day No. 3 of the 1971 Legislature Session of the County Council.

[26] MD. ANN. CODE art. 25A, §5(S) (1966).

[27] 3 E.R.C. at 1865.

[28] *See* text at n. 49, *supra.*

[29] 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct. 1971).

[30] N.Y. CONST. art. IX, §2(c)(ii).

[31] *Id.* art. III, §1; art. XVI, §1.

[32] *See* text at n.58, *supra.*

[33] N.Y. CONST. art. IX, §2(c) is an example of such a provision.

[34] 59 N.J. 348, 238 A.2d 97 (1971).

[35] Other issues usually raised include the ability of the state and locality to work concurrently and the ability of the locality to solve its own problems without affecting territories outside its jurisdiction.

[36] N.J.S.A. 13:1 E-2 (1970).

[37] N.J.S.A. 13:1 E-1 *et seq.* (1970); N.J.S.A. 48:13 A-1 *et seq.* (1970).

[38] The ordinance, passed while the state acts were in existence, was entitled "An Ordinance Providing for Establishing, Licensing, Operating, Regulating, Maintaining, and Controlling Sanitary Landfills in the Township of Parsippany-Troy Hills."

[39] 59 N.J. at 351–52, 283 A.2d at 99.

[40] 59 N.J. at 350, 283 A.2d at 98.

[41] 59 N.J. at 352, 283 A.2d at 100. This position was also supported in the later New Jersey Superior Court case of County of Bergen v. Department of Public Utilities, 117 N.J. Super. 304, 312, 284 A.2d 543, 547 (1971).

[42] Another reason for the legislature to amend, of course, is a desire to alter its previous intent.

[43] Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Commission, 120 N.J. Super. 118, 124, 293 A.2d 426, 429 (1972).

[44] 68 Misc. 2d 704, 327 N.Y.S.2d 488 (Sup. Ct. 1971).

[45] Erie County, N.Y. Local Law No. 8, §2b, March 16, 1971.

[46] N.Y. ENVIR. CONS. LAW §17 (McKinney 1971).

[47] *Id.*

[48] *Id.*

[49] 3 E.R.C. 1863 (Md. Cir. Ct. 1972).

[50] Analogous issues of conflicting enactments are discussed, and similarly decided, in Municipal Sanitation Landfill Authority, 120 N.J. Super. 118, 293 A.2d 426 (1972) (the statutory grant of regulatory powers over landfill operations to a state agency—discussed in *Ringlieb* and

subsequently modified—was determined not to preclude a local development commission, under its statutory authority to reclaim, plan, develop and redevelop local meadowland areas from regulating sanitary landfills, within its statutory jurisdiction).

[51] Howard County Council Bill No. 7, Legislature Day No. 3 of 1971.

[52] MD. ANN. CODE art. 25A, §5(S) (1966).

[53] *Id.* art. 2B, §§185, 186.

[54] *Id.* art. 25A, §5(T).

[55] 3 E.R.C. at 1866, quoting the language of Edward R. Bacon Grain Co. v. City of Chicago, 325 Ill. App. 245, 253, 59 N.E.2d 689, 693 (1945). Also consider the language of Summer v. Teaneck, 53 N.J. 548, 555, 251 A.2d 761, 764–65 (1969): "The ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act."

[56] 3 E.R.C. at 1865.

[57] In re Hubbard, 41 Cal. Rptr. 393, 396 P.2d 809 (1964).

[58] 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct. 1971).

[59] N.Y .CONST. art. III, §1; N.Y. CONST. art. XVI, §1.

[60] N.Y. TAX LAW art. 29, §1201(f) (McKinney, Supp. 1972–1973).

[61] *Id.*

[62] Specifically, the act set forth the following percentages: 80% for paper and fiberboard, 30%–40% for metal, 20%–30% for glass, and 30% for plastics.

[63] N.Y. City Local Law No. 43, June, 1971.

[64] 68 Misc. 2d at 372, 326 N.Y.S.2d at 795.

[65] In their trial memorandum, the city argued that "considering the purpose sought to be achieved by the Enabling Act, it is inconceivable to believe that the City should not have the same right to exercise its judgment and make distinctions . . . similar to those the State Legislature could make . . . . Obviously, the [State's] intent was to enable the city to try out the possibility of reducing the difficulties and costs of waste disposal created by containers, by imposition of taxes on those categories of containers which presented the greatest waste burdens for the City . . ." and further that the City should be given the right to ". . . first try out this method with respect to one of the auhorized types of containers which presents the greatest problem . . ." 68 Misc. 2d at 372–73, 326 N.Y.S.2d at 795.

[66] United States Steel Corp. v. Gerosa, 7 N.Y.2d 454, 459, 199 N.Y.S. 2d 475, 478, 166 N.E.2d 489, 491 (1960).

[67] 68 Misc. 2d at 370–71, 326 N.Y.S.2d at 793.

[68] 68 Misc. 2d at 371, 326 N.Y.S.2d at 793–94.

[69] 68 Misc. 2d at 373, 326 N.Y.S.2d at 796.

[70] 68 Misc. 2d at 374, 326 N.Y.S.2d at 797.

[71] N.Y. CONST. art. IX, §3(c) directs that the powers granted to the municipalities shall be liberally construed. According to Rosenbaum, *Expanding the Role of Municipal Power in Pollution Control: A Pragmatic Approach,* 21 BUFFALO L. REV. 139, 142 (1971) "[i]n so directing the legislature overruled the strict tenants of the construction against home rule powers that had been traditionally applied."

[72] 68 Misc. 2d at 370, 326 N.Y.S.2d at 793.

[73] 68 Misc. 2d at 373, 326 N.Y.S.2d at 796.

[74] *See* text at n.75–99, *supra.*

[75] Soap and Detergent Association v. Clark, 330 F. Supp. 1218 (S.D. Fla. 1971).

[76] Society of Plastics Industry Inc. v. New York City, 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct. 1971); American Can v. Oregon Liquor Control Commission, 4 E.R.C. 1584 (Ore. Cir. Ct. 1972); Anchor Hocking Glass Co. v. Barber, 118 Vt. 206, 271 A.2d 271 (1954).

[77] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[78] Teagen Company v. Borough of Bergenfield, 119 N.J. Super. 212, 290 A.2d 753 (1972) (requiring that garbage be collected only from certain receptacles).

[79] 4 E.R.C. 1584 (Ore. Cir. Ct. 1972).

[80] ORE. LAWS 1971 ch. 745 (1971).

[81] *Id.* §§6, 8.

[82] *See,* Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935) (a state statute forbidding certain forms of advertising by dentists, but not posing similar restrictions on other professional classes); American Federation of Labor v. American Sash and Door Co., 335 U.S. 538 (1949) (state constitutional amendment providing that no person shall be denied work because of non-union status and forbidding anyone to enter into an agreement to do so); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (city traffic regulation forbidding operation of advertising vehicles on the streets, but excepting vehicles with advertisements and business notices of the owner and which are not used merely or mainly for advertising).

[83] Such "specially protected rights" consist primarily of the rights of free speech, voting, and the freedom from racial discrimination.

[84] 4 E.R.C. at 1587.

[85] *Id.* at 1588.

[86] *Id.*

[87] *Id.*

[88] 118 Vt. 206, 105 A.2d 271 (1954).

[89] 118 Vt. at 211–12, 271 A.2d at 275. (Court quoted language of State v. Auclair, 110 Vt. 147, 160–61, 4 A.2d 107, 113–14 (1939).

[90] 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct. 1971).

[91] 4 E.R.C. at 1588.

[92] N.Y. CONST. art. 1, §11.

[93] 68 Misc. 2d at 376, 326 N.Y.S.2d at 799.

[94] This argument assumes that the two markets are at least somewhat elastic. Although complete elasticity probably does not exist, there is enough cross-elasticity between container materials to carry the argument.

[95] 68 Misc. 2d at 373, 326 N.Y.S.2d at 795.

[96] In raising this issue the defendant-city abandoned its initial contention with respect to the primary purpose of the law—namely, environmental protection—and asserted that the act can be considered merely as a revenue raising statute. 68 Misc. 2d at 375, 326 N.Y.S. 2d at 797–98.

[97] 68 Misc. 2d at 374–75, 326 N.Y.S.2d at 797.

[98] For the purposes of this distinction, the fact that *American Can* involved a state statute, while *Plastics Industry* involved a local enactment is not of prime import. The true distinction to be drawn between the two cases is one of unauthorized action versus authorized action. An equivalent situation would be present if an Oregon municipality had acted within its authority subject to an Enabling Act containing classification identical to those in the state statute.

[99] 4 E.R.C. at 1587.

[100] Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 12, 161 A.2d 705, 710 (1960); Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Commission, 120 N.J. Super. 118, 126, 293 A.2d 426, 430 (1972).

[101] Nebbia v. New York, 291 U.S. 502 (1934); Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926).

[102] Turnpike Realty Company, Inc. v. Town of Dedham, — Mass. —, —, 284 N.E.2d 891, 898 (1972) (*app. pndg.*); Village of Euclid v. Ambler Realty Company, 272 U.S. 359 (1926); Wilbur v. City of Newton, 302 Mass. 38, 39, 18 N.E.2d 365, 366 (1938).

[103] Jack H. Breard v. Alexandria, 341 U.S. 622, 632 (1951).

[104] 4 E.R.C. at 1585.

[105] *Id.* at 1587.

[106] — Mass. —, 284 N.E.2d 891 (1972).

[107] — Mass. at —, 284 N.E.2d at 900.

[108] 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct. 1971).

[109] 68 Misc. 2d at 382, 326 N.Y.S.2d at 804.

[110] 68 Misc. 2d at 374–75, 326 N.Y.S.2d at 797.

[111] 68 Misc. 2d at 382, 326 N.Y.S.2d at 804.

[112] The federal constitution states that "[t]his constitution and the

laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the land and the Judges in every State shall be bound thereby. . . ." U.S. CONST. art. VI.

[113] For example, Wickard v. Filburn, 317 U.S. 111 (1942) and Melford v. Smith, 307 U.S. 38 (1939) (farm production); N.L.R.B. v. Jones and Laughlin Steel Co., 301 U.S. 1 (1937) (collective bargaining at a local plant which produces goods for interstate shipment); United States v. Darby, 312 U.S. 100 (1941) (employment practices of an employer, some of whose goods were later shipped in interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (discriminatory practices of a motel accommodating interstate travelers).

[114] 362 U.S. 440 (1960).

[115] *Id.* at 442.

[116] *Id.* at 448.

[117] 330 F. Supp. 1218 (S.D. Fla. 1971).

[118] *Id.* at 1222.

[119] 68 Misc. 2d 704, 327 N.Y.S.2d 488 (Sup. Ct. 1971).

[120] 4 E.R.C. 1584 (Ore. Cir. Ct. 1972).

[121] 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct. 1971).