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OBSTACLES TO THE FORMATION OF SOLID WASTE LANDFILLS IN MISSOURI

by Anthony P. Farrell¹

Landfills in the state of Missouri and elsewhere are undergoing dramatic economic and necessary changes due to the new Subtitle D² solid waste regulations promulgated under the Resource Conservation and Recovery Act³ ("RCRA"). Proponents of solid waste landfills must be aware that not only will the Environmental Protection Agency ("EPA") and the Missouri Department of Natural Resources ("DNR") be governing their activities, but local zoning bodies and the courts as well.⁴

As municipalities experience shortages of land suitable for solid waste landfills, many look to locating landfills outside of their corporate limits.⁵ This practice, while necessary, leads to several problems that must be overcome, including asserting statutory authority for acquiring the land, complying with the host site's zoning regulations, and public opposition. Zoning authorities often enact requirements for landfills in their jurisdictions which are stricter than those im-

posed by either the state or federal regulatory bodies.

While the capacity of landfills continues to decrease, the volume of wastes that need to be handled has risen.⁶ This paper will address the new Subtitle D regulations and their effects on solid waste landfills in Missouri, specifically focusing on analyzing various judicial decisions which highlight the interplay between zoning and landfills.⁷ The sheer number of cases in Missouri courts in the last few years shows that zoning bodies have been increasingly active in using zoning tools to stop or severely limit the operation and location of solid waste landfills in Missouri.

I. ZONING RESTRICTIONS ON PUBLIC IMPROVEMENTS

Landfills are customarily controlled under zoning regulations through the use of special use permits,⁸ which have a list of requirements that any landfill within the zoning

authorities' jurisdiction must meet before approval. In Missouri, zoning regulations may be enacted by cities, counties, and townships, depending on local preference.⁹

In general, entities that propose a solid waste landfill within the boundaries of another municipality or in an unincorporated area of a county must comply with whatever city or county zoning regulations are applicable to obtain a DNR operating permit.¹⁰ Frequently however, these disputes are determined by the courts under Missouri common law.

A) Exhaustion of Administrative Remedies

One of the major obstacles in overcoming zoning controls in court has been the requirement of exhaustion of administrative remedies.¹¹ This requirement normally applies in Missouri where a "contested case"¹² arises, and the aggrieved party seeks to appeal a decision of an administrative body to a circuit court.¹³ Whether agency actions are "contested cases" is often unclear, but that conclusion usually requires a dispute before an administrative agency where a hearing is required by statute. For a

"contested case the agency must have "(a) regarded or handled the matter as a "contested case" or (b) rendered a "final decision" therein. No "number" was assigned to it [§ 536.067, subds. (2) (a), (3) (a)]; no notice of hearing was given and no

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² Subtitle D is codified at 40 C.F.R. §§ 257-258 (1993) (promulgated as Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50978-01, Oct. 9, 1991), and is based upon 42 U.S.C. §§ 6941-6949 (1988 & Supp. 1993).

³ 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1993) as amended, enacted as the Solid Waste Disposal Act of 1976. The term "solid waste" generally means "any garbage, refuse, ... and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations" 42 U.S.C. § 6903(27) (Supp. (1993)). See James P. O'Brien, *Outline of Portions of RCRA The Resource Conservation and Recovery Act of 1976*, 445 PLJ/LIT 821 (1992).

⁴ Missouri requires a valid DNR permit to operate a solid waste landfill under the Missouri Solid Waste Management Law, Mo. Rev. Stat. §§ 260.200 - 260.345 (1986).

⁵ See Thomas R. Mulroy, Jr., *An Applicant's Guide to Municipal Waste Landfill Siting*, 19 ENVTL. L. REP. (Envtl. L. Inst.) 10285 (1989).

⁶ See Jonathan P. Meyers, *Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal*, 79 GEO. L.J. 567 (1991); ENVIRONMENTAL ALMANAC, WORLD RESOURCES INSTITUTE (1993).

⁷ While hazardous waste landfills are regulated under Subtitle C of RCRA (based upon 42 U.S.C. §§ 6921-6939 (1988 & Supp. 1993)), this Comment will not address the peculiar problems involved in the establishment of hazardous waste treatment, storage, or disposal facilities.

⁸ The special (or conditional) use permits are based on the Standard Zoning Enabling Act and allow a regulatory body to grant or deny applications according to set criteria. See Neil R. Shortlidge and S. Mark White, *The Use of Zoning and Other Local Controls for Siting Solid and Hazardous Waste Facilities*, 7 NAT. RES. & ENV'T. 3, 5 (1993). Missouri cases treat conditional use permits and special use permits interchangeably. See *State ex rel. Steak n Shake Inc. v. City of Richmond Heights*, 560 S.W.2d 373 (Mo. Ct. App. 1977).

⁹ See Chapters 64, 65, 70, and 89 in Mo. Rev. Stat.

¹⁰ Mo. Rev. Stat. §§ 260.209 (Supp. 1993).

¹¹ See Mo. Rev. Stat. §§ 536.100-.150 (1986) of the Missouri Administrative Procedure Act ("APA") for the general procedures to be followed where the specific zoning statutes do not specify the required process.

¹² A "contested case" means "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required to be determined after hearing," Mo. Rev. Stat. § 536.010(2) (1986).

¹³ The procedure for this appeal is at Mo. Rev. Stat. § 536.100-.140. Note that persons purporting to be "aggrieved parties" must have standing and "demonstrate a specific and legally cognizable interest in the subject matter of the administrative decision and show that he has been directly and substantially affected thereby." *State ex rel. Columbus Park Community Council v. Board of Zoning Adjustment of Kansas City*, 864 S.W.2d 437, 440 (Mo. Ct. App. 1993).

hearing was held [§536.067, subd. (3)]; no evidence was taken [§ 536.070]; and there was no decision and order in writing which included or was accompanied by findings of fact and conclusions of law, as required in all contested cases."¹⁴

When the agency action is not a contested case, the aggrieved party may seek judicial review of the decision through a declaratory judgment or other appropriate action.¹⁵ This doctrine has been defended as protecting the courts from determining the merits of an action prior to allowing the administrative body a chance to fully rule upon the issue to conserve judicial resources and to prevent the premature litigation of an issue.

In addition, all Missouri zoning statutes require an appeal to the Board of Zoning Adjustment ("BZA") within three months of an adverse decision.¹⁶ Thus, persons upset with the denial of a proposed change in land use by a zoning authority must typically take the matter up with the BZA prior to bringing a court action.¹⁷

GREEN HILLS v. MADISON TOWNSHIP
In *Green Hills Solid Waste Management Authority, et al. v. Madison Township Plan-*

ning and Zoning Commission,¹⁸ the Western District Court of Appeals held that Green Hills had exhausted all of their required administrative remedies before the township zoning authorities and remanding the case to the circuit court for further proceedings.¹⁹ The case began when the plaintiffs, Green Hills Solid Waste Management Authority ("Green Hills") were frustrated in their attempts to create a solid waste landfill in Madison Township, Mercer County.²⁰ The plaintiffs, composed of thirteen municipalities in northwest Missouri, had purchased land in an unincorporated area of Madison Township for a common landfill (a precursor to regional landfills).²¹ Before Green Hills applied for an operating permit for a non-hazardous solid waste landfill from the DNR, Madison Township enacted zoning regulations largely identical to those in force in Schuyler County.²²

When Green Hills applied for a conditional use permit under the Madison Township Zoning Regulations, the Planning and Zoning Commission denied the request after a 65 day delay.²³ Relying on the provisions of Mo. REV. STAT. § 65.665, Green Hills abandoned their appeal with the township and sought an operating permit from the DNR's Solid Waste Management Program.²⁴

Mo. REV. STAT. § 65.665 and the township zoning statutes in Chapter 65 were previously untested in court. Plaintiffs, through a declaratory judgment action, sought to show that Mo. REV. STAT. § 65.665 granted Green Hills and other public bodies the authority to overrule the denial of plans for a public improvement project by the Madison Township Planning and Zoning Commission.²⁵

Judge Byron Kinder of Cole County Circuit Court granted the defendant's motion to dismiss for failure to exhaust administrative remedies,²⁶ apparently finding that the declaratory judgment action sought review of a "contested case"²⁷ and thus was inappropriate.²⁸ Plaintiffs argued on appeal, inter alia, that: 1) the declaratory judgment action was appropriate since the proceeding before the planning and zoning commission was a non-contested case, and was proper where review of zoning regulations is involved; 2) defendants had waived their jurisdiction and had been overruled under the exercise of Mo. REV. STAT. § 65.665; 3) where constitutional issues are raised, exhaustion of administrative remedies is not required; and 4) the Madison Township Zoning Regulations and the Missouri statutes do not require an appeal to the board of zoning adjustment.²⁹

¹⁴ *State ex rel. Maddox v. Garner*, 459 S.W.2d 40, 42-3 (Mo. Ct. App. 1970); *State ex rel. Wasson v. Schroeder*, 646 S.W.2d 105, 107 (Mo. banc 1983).

¹⁵ See Mo. REV. STAT. §§ 536.050 and 536.150 (1986). See also *Deffenbaugh Indus., Inc. v. Potts*, 802 S.W.2d 520 (Mo. Ct. App. 1990).

¹⁶ See *Miller v. Browning-Ferns Indus.*, 674 S.W.2d 150 (Mo. Ct. App. 1984); Mo. REV. STAT. § 89.100 (1986).

¹⁷ See, e.g., Mo. REV. STAT. § 65.690 (1986).

¹⁸ No. WD 47510, 1994 WL 16538 (Mo. Ct. App. Jan. 25, 1994), petition for reh'g granted May 3, 1994, opinion superseded on rehearing by No. WD 47510, 1994 WL 533142 (Mo. Ct. App. Oct. 4, 1994), petition for reh'g or transf. filed Oct. 19, 1994. (Both opinions are nearly identical.) The author assisted in the preparation of the appellate briefs in this case for Anderreck, Evans, Milne, Peace & Baumhoer in Jefferson City with co-counsel S. Mark White of Freilich, Leitner & Carlisle of Kansas City.

¹⁹ 1994 WL 16538 at *3. The court remanded the case to the trial court for a determination on whether Green Hills had requested a hearing with the DNR within 30 days of the denial of Green Hill's permit as required by Mo. REV. STAT. § 260.235 (1986); see *City of St. Peters v. Department of Natural Resources*, 797 S.W.2d 514 (Mo. Ct. App. 1990), discussed below.

²⁰ 1994 WL 16538 at *1. The municipalities formed the Green Hills Solid Waste Management District to provide solid waste management services pursuant to Mo. REV. STAT. § 260.305 (Supp. 1993), which was upheld as constitutional in *City of Jefferson v. Missouri Dep't of Natural Resources*, 863 S.W.2d 844 (Mo. 1993).

²¹ 1994 WL 16538 at *1.

²² *Id.* See *State ex rel. Missouri Mining, Inc. v. Tallman*, Nos. CV92-28073, CV92-28074, CV92-28075, slip op. at 3 (Schuyler County Cir. Ct. June 2, 1993), where the circuit court found many provisions of the county's solid waste landfill zoning regulations to be unconstitutional.

²³ *Id.*

²⁴ 1994 WL 16538 at *2. Mo. REV. STAT. § 65.665 allows a "public board or other public entity" to overrule the disapproval of a planning and zoning commission's decision to approve the creation of a public improvement with a vote of that body. The overruling provision in § 65.665 is very similar to those set forth in §§ 64.050, 64.235, 64.570, and 64.820, for county and city zoning, but none have been litigated.

²⁵ 1994 WL 16538 at *2.

²⁶ Mo. REV. STAT. § 65.690 would normally requires appeals to either the township Board of Zoning Adjustment or to a circuit court (petition for review) in certain circumstances.

²⁷ Appeals of contested cases from an administrative agency are to be raised by a petition for review to the applicable circuit court. Mo. REV. STAT. § 536.100-140 (1986). The petition for review must be filed within 30 days after the BZA's action upon a landfill permit for the circuit court to have jurisdiction over the matter. *State ex rel. Laidlaw Waste Systems, Inc. v. City of Kansas City*, 858 S.W.2d 753, 756 (Mo. Ct. App. 1993); Mo. REV. STAT. § 89.110 (1986).

²⁸ 1994 WL 16538 at *2.

²⁹ *Id.* While appeals to a circuit court require exhaustion of administrative remedies, declaratory judgment actions are typically not similarly limited. *Salameh v. County of Franklin*, 767 S.W.2d 66 (Mo. Ct. App. 1989); *State ex rel. Koewing v. Franklin County Bd. of Zoning Adjustment*, 809 S.W.2d 874, 877 (Mo. Ct. App. 1991).

The Court of Appeals reversed the circuit court's ruling and remanded the case to the circuit court based on the conclusion that Green Hills was not required to exhaust their administrative remedies when the planning and zoning commission did not refer the matter to the BZA, and that a declaratory judgment action was not subject to the requirement of exhaustion of administrative remedies that an appeal (petition for review) would be.³⁰

Green Hills does clarify when exhaustion of administrative remedies is required, but the court did not address the plaintiffs' claims that section 65.665 confers upon Green Hills the power to overrule the planning and zoning commission's denial of a special use permit. The court did not reach that substantive issue given their ruling for remand to the circuit court.

The *Green Hills* decision does bring the Western District in line with prior Eastern District holdings³¹ on the issue of whether an appeal is required to the BZA following a decision by the planning and zoning commission before the aggrieved person can bring an action in state court, where the commission does not refer the person to the BZA.³² Under Mo. REV. STAT. § 65.690 and similar statutes, the BZA is given the power to hear disputes from "administrative officials" and when others refer the matter to the BZA.³³

The *Green Hills* court did not hold that Green Hills had exhausted their remedies

with the DNR, as insufficient evidence was available at the time, and thus remand was appropriate.³⁴ In light of *Green Hills* and other authority, while exhaustion of administrative remedies is not required in all instances, failure to "overexhaust" the available remedies with a zoning board before turning to courts can lead to long delays and litigation costs. Thus, the prudent advisor for landfill proponents should ensure that all possible steps are taken under the zoning regulations and the Missouri APA to succeed in the struggle to overcome zoning opposition.

B) Resolution of Intergovernmental Authority Disputes

Missouri courts have developed several methods to determine which political subdivision should prevail when two governmental bodies assert their right to create or oppose a landfill. Three frequently used tests which guide the courts in resolving disputes of the authority of one body within the boundaries of another body are: eminent domain, balancing of interests, and superior sovereign.

Once it has been established that the zoning power of the host has been supplanted by the authority of the sponsoring body, the host site no longer has jurisdiction over the landfill site.³⁵ This consequence presents a dilemma for the host government to resolve, as one would assume that the body would prefer some control over the

landfill as opposed to none. This factor should encourage host governments to negotiate their zoning regulations with the sponsoring body to avoid a court ruling that the host government lacks jurisdiction to regulate the landfill.³⁶

Eminent Domain Power

Perhaps one of the strongest weapons that governmental landfill sponsors may wield is that their landfill is immune from another government's regulation. If the body creating the landfill possesses the power of eminent domain, they are usually exempt from zoning controls of the governmental authority where the landfill is located.³⁷ The corporate body seeking to use this rule must have the power of eminent domain to acquire land outside its boundaries for use as a solid waste landfill.³⁸

The Missouri Supreme Court in *Appelbaum v. St. Louis County*³⁹ found that a body with the power of eminent domain is not subject to the zoning regulations of another body, especially when the body attempting to restrict a project lacks the power of eminent domain.⁴⁰ This argument has been slowly eroded in recent decisions, as courts have limited this power in regional boundaries, scope, and strength.⁴¹

The City of St. Peters' five-year struggle to create a landfill has been especially intense, as the City has been to the state appeals courts on three occasions so far, losing in every instance. In 1989, the city thought

³⁰ 1994 WL 16538 at *3.

³¹ See *Citizens for Safe Waste Management v. St. Louis County*, 810 S.W.2d 635, 641 (Mo. Ct. App. 1991); *Life Medical System v. Franklin County*, 810 S.W.2d 554 (Mo. Ct. App. 1991).

³² See *Miller v. Browning-Ferris Indus.*, 674 S.W.2d 150 (Mo. Ct. App. 1984); Mo. REV. STAT. § 65.690 (Supp. 1993).

³³ See also Mo. REV. STAT. § 89.090 (1986).

³⁴ 1994 WL 16538 at *4.

³⁵ *State ex rel. Askew v. Kopp*, 330 S.W.2d 882, 887, 888 (Mo. 1960).

³⁶ Note that any negotiation must avoid the "spot zoning" allegation which prohibits special regulation for certain parties under zoning orders. See *Eves v. Zoning Board of Adjustment Lower Gwynedd Twp.*, 164 A.2d 7 (Penn. 1960).

³⁷ See *State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960); *City of Kirkwood v. City of Sunset Hills*, 589 S.W.2d 31, 37 (Mo. Ct. App. 1979) has an excellent discussion of this and the other Missouri tests on intergovernmental immunity. Some courts and commentators have indicated that Missouri is moving away from use of the eminent domain test, see Note, *Intergovernmental Zoning Immunity: Time For A New Test?*, 46 Mo. L. Rev. 460 (1981).

³⁸ See *State ex rel. County of St. Charles v. Mehan*, 854 S.W.2d 531, 536 (Mo. Ct. App. 1993). For relevant statutes, see Mo. REV. STAT. §§ 64.320, 64.325, 64.490, 71.680, 79.380, 82.240, and 82.790 (1986). Many Missouri statutes confer on municipalities the power to use eminent domain for other purposes, see Mo. REV. STAT. §§ 88.010 and 82.240 (1986).

³⁹ 451 S.W.2d 107 (Mo. 1970).

⁴⁰ *Id.* at 113.

⁴¹ See *State ex rel. County of St. Charles v. Mehan*, 854 S.W.2d 531 (Mo. Ct. App. 1993)

they had found a great location for a solid waste landfill, buying a former quarry for \$1.00.⁴² Unfortunately, the quarry was outside the St. Peters city limits and within St. Charles County, a county with zoning controls.⁴³ The City of St. Peters applied to the DNR for an operating permit for the landfill, but the DNR "returned as incomplete" the application for failure to comply with local zoning and permitting requirements.⁴⁴ Based upon opinions of outside counsel that the landfill proposed by St. Peters was not subject to the zoning regulations of St. Charles County due to the power of eminent domain held by St. Peters, St. Peters sought a declaratory judgment action that its landfill was exempt from the St. Charles County zoning regulations, and a technical review of its application by the DNR.⁴⁵ Following an intervention by St. Charles County, the Western District held that St. Peters failed to exhaust its administrative remedies within the DNR by declining to seek a hearing with a DNR hearing officer within thirty days of the denial of its permit.⁴⁶

Later, when St. Peters returned to the DNR with their application, the DNR accepted St. Peters' argument that it was exempt from the zoning regulations of St. Charles. St. Charles appealed the DNR's decision to the Cole County Circuit Court.⁴⁷ The Western District held that St. Peters had no right to acquire by condemnation land outside its corporate boundaries for use as a landfill, under Mo. REV. STAT. § 71.680.⁴⁸

Mo. REV. STAT. § 71.680 allows fourth

class cities such as St. Peters to acquire property up to five miles outside its boundaries for use as incinerators, purification plants and sewage disposal plants. The court held that this section does not expressly nor by necessary implication grant the power of eminent domain to St. Peters to acquire land outside its boundaries for use as a landfill.⁴⁹ Thus, the court did not reach the question of whether the power of eminent domain held by St. Peters rendered it immune from the zoning regulations of St. Charles.

When the St. Charles County Commission eventually granted the necessary zoning change, neighbors of the quarry sought judicial review of the decision.⁵⁰ While the circuit court found that St. Peters was not subject to the St. Charles County Zoning and Regulatory Orders due to its power of eminent domain, the Eastern District Court of Appeals held that the *State ex rel. County of St. Charles v. Mehan* decision was controlling and superseded the trial court's judgment.⁵¹ The court further held that St. Peters was not a lawful owner for the purpose of operating the landfill, and thus reversed the circuit court ruling.⁵²

BALANCING OF INTERESTS TEST

Often when the rights of two governmental entities collide, the courts have used a "balancing of interests" test to determine which body should prevail. Missouri courts now support the use of this test, especially where the body seeking to create a public

improvement lacks the power of eminent domain. The test, while not precise in its language, is as follows: courts should weigh the public benefit derived from the proposed public improvement against the deprivation of rights of those affected. The case of *City of St. Louis v. City of Bridgeton* is particularly enlightening concerning the "balancing of interests" test.⁵³ When the City of St. Louis proposed to enlarge the parking lot for the Lambert-St. Louis Airport into the nearby City of Bridgeton, Bridgeton objected on the basis that their zoning ordinance prohibited the parking lot expansion.⁵⁴ St. Louis brought a declaratory judgment action and request for injunctive relief on the basis that the project was immune from the zoning regulations of Bridgeton which was granted by the Circuit Court of St. Louis County.⁵⁵ Upon an appeal by the City of Bridgeton, the Eastern District Court of Appeals held that the parking lot was immune from the zoning ordinances of Bridgeton since the 'balance of interests' in connection with the power of eminent domain favored St. Louis.⁵⁶ The court found that due to the regional impact of the Lambert Airport, the interests of Bridgeton must succumb to the needs of the public.⁵⁷

Similarly, in *City of Kirkwood v. City of Sunset Hills*, the Eastern District had held that the balance of interests test favors the City of Kirkwood in their plans to create a swimming pool within the city limits of the City of Sunset Hills.⁵⁸

⁴² See *Aldermen OK Sale of Quarry for Use as a Trash Dump; Ownership Case Pending in Appeals Court in Kansas City May Pose Some Problems*, ST. LOUIS POST-DISPATCH, March 14, 1994 at 1.

⁴³ See *City of St. Peters v. Department of Natural Resources*, 797 S.W.2d 514 (Mo. Ct. App. 1990).

⁴⁴ *Id.* at 515.

⁴⁵ *Id.*

⁴⁶ *Id.* at 517. The court construed a "return as incomplete" action by the DNR as equivalent to a denial under § 260.235, which triggers the hearing requirement prior to judicial review.

⁴⁷ *State ex rel. County of St. Charles v. Mehan*, 854 S.W.2d 531, 533 (Mo. Ct. App. 1993).

⁴⁸ *Id.* at 536. See *City Lacks Authority for Quarry Landfill, Court Rules*, ST. LOUIS POST-DISPATCH, March 9, 1994 at 1.

⁴⁹ *Id.* at 536.

⁵⁰ *State ex rel. Rosenfield v. St. Charles County*, 871 S.W.2d 614 (Mo. Ct. App. 1994).

⁵¹ *Id.* at 617.

⁵² *Id.* The court's opinion fails to outline why this requirement was not met by St. Peters. The City of St. Peters may not be finished with its litigation though, see *Aldermen OK Sale of Quarry for Use as a Trash Dump; Ownership Case Pending in Appeals Court in Kansas City May Pose Some Problems*, ST. LOUIS POST-DISPATCH, March 14, 1994 at 1.

⁵³ 705 S.W.2d 524 (Mo. Ct. App. 1985).

⁵⁴ *Id.* at 525.

⁵⁵ *Id.* at 525.

⁵⁶ *Id.* at 531.

⁵⁷ *Id.* at 531.

⁵⁸ 589 S.W.2d 31, 43 (Mo.Ct.App. 1979).

SUPERIOR SOVEREIGN

The courts often use a "superior sovereign" test to settle landfill disputes between two competing political subdivisions. As Missouri classifies all cities and counties as being: constitutional charter, first, second, or third, courts have recognized that an entity with a higher classification should prevail over another 'lesser' governmental body.⁵⁹ Under the "superior sovereign" test the easiest case would be a "constitutional charter," where the city or county is expressly mentioned in the Missouri Constitution (such as St. Louis and St. Louis County) and thus would be deemed superior to one that was created by the legislature.

C) Overcoming Zoning Restrictions

In addition to challenging the application of zoning regulations to a city-sponsored landfill, landfill sponsors can challenge zoning regulations on many fronts using the provisions of the Missouri APA.⁶⁰ The Missouri APA allows appeals and "petitions for review" to state circuit courts for parties aggrieved by the decisions of administrative bodies. These actions can be used to obtain judicial review of administrative decisions.

Ultra Vires

A party contesting the validity of zoning regulations may be able to assert that the zoning authority's jurisdiction does not extend to the proposed landfill. While a claim of complete preemption based on Subtitle D or the DNR's regulations is unlikely, landfill sponsors can challenge the means and ex-

tent of the zoning body's regulation of landfills or contend that certain zoning measures have been preempted by state or federal law.

While virtually all governmental zoning bodies follow the Standard Zoning Enabling Act ("SZE A"), authority for the method of regulations must be granted in the enabling legislation.⁶¹ The goals for zoning under the SZE A are:

"to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes."⁶²

As all of the Missouri zoning statutes are based upon the SZE A and have this broad language incorporated therein, a claim that the enabling statutes do not allow the regulation of solid waste landfills will likely fail.⁶³ Attacks on the zoning powers of municipalities or other bodies have to focus on the extent of regulation allowed by the enabling act and assume that some regulation is permissible.

Attempts by the zoning authority to regulate processes, materials used, and internal controls of the landfill are likely beyond the reach of the regulatory body. Missouri limits the powers of local units of government to those powers expressly delegated by the state legislature.⁶⁴

In regard to township powers, the Missouri Statutes codify "Dillon's Rule", a rule of strict construction of public authority:

No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted.⁶⁵

Under Dillon's Rule, "any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied."⁶⁶ Therefore, the reach of zoning authorities in Missouri is somewhat limited.

Constitutional Claims

The backer of a landfill can challenge the zoning regulations as being unconstitutional under the state or federal constitution.⁶⁷ The regulations can be challenged as arbitrary, unreasonable, and impractical in general and as applied to the plaintiff's land.⁶⁸ The regulations would most likely be invalid per se if an attempt were made to completely exclude solid waste landfills from the region covered by the zoning regulations as "exclusionary zoning."⁶⁹

In *State ex rel. Missouri Mining, Inc. v. Tallman*,⁷⁰ the Schuyler County Circuit Court found that the decision of the County Commission to deny a conditional use permit for a non-hazardous waste landfill was arbitrary and unreasonable and that there existed an "undue hardship" warranting the issuance

⁵⁹ See *City of Kirkwood*, 589 S.W.2d at 37. The court lays out the various tests for deciding the extent to which the use of land by governmental entities is subject to zoning regulations, however it does not adopt the "superior sovereign" test. *Id.*

⁶⁰ See Mo. REV. STAT. §§ 536.010-150 (1986).

⁶¹ Missouri may attempt to use "limited purpose zoning" which directly targets certain undesired activities, see House Bill 55, 87th Leg. Ass'y, 1st Sess. (1993).

⁶² See Neil R. Shortlidge and S. Mark White, *The Use of Zoning and Other Local Controls for Siting Solid and Hazardous Waste Facilities*, 7 NAT. RES. & ENV'T. 3, 5 (1993).

⁶³ See, e.g., Mo. REV. STAT. §§ 65.010 and 89.020 (1986 & Supp. 1993).

⁶⁴ The local units of government are considered to be mere creatures of the state. *Shortlidge and White*, *supra* note 62, at 4.

⁶⁵ Mo. REV. STAT. § 65.270 (Supp. 1992).

⁶⁶ *Browning-Ferris Indus. of Kansas City v. Dance*, 671 S.W.2d 801, 808 (Mo. Ct. App. 1984).

⁶⁷ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), where the Supreme Court held that zoning controls must have a rational relation to the protection of the health, safety, or welfare of the population. See § 536.010-150 of the Missouri APA where constitutional grounds can be the basis for court review of administrative decisions.

⁶⁸ See, e.g., *West Lake Quarry and Material Co. v. City of Bridgeton*, 761 S.W.2d 749 (Mo. Ct. App. 1988), but see *State ex rel. City of Creve Coeur v. St. Louis County*, 369 S.W.2d 184 (Mo. 1963).

⁶⁹ See, e.g., *City of Vinita Park v. Girls Sheltercare, Inc.*, 664 S.W.2d 256 (Mo.App. 1984) (discussing exclusionary zoning); and *Coots v. J.A. Tobin Construction Co.*, 634 S.W.2d 249 (Mo.App. 1982) (also discussing exclusionary zoning).

⁷⁰ Nos. CV92-28073, CV92-28074, and CV92-28075, slip op. (Schuyler County Cir. Ct. June 2, 1993).

of the variance sought by Missouri Mining.⁷¹ In so holding the court invalidated many provisions of the county's solid waste landfill zoning regulations as being unconstitutional, including the one mile setback from a farm dwelling and recycling requirements.⁷²

As indicated by the court's decision in *Dallen v. City of Kansas City*,⁷³ if constitutional challenges are raised before an administrative body, exhaustion of administrative remedies may not be required.⁷⁴ Although this opinion may be limited to instances where there is a claim that civil rights are being violated, the holding of the *Dallen* court is broad in scope: "[f]urthermore, respondents challenged the entire ordinance as unconstitutional. In such an action respondents are not required to file for a building permit before making their challenge."⁷⁵

Takings Claim

The Fifth Amendment of the United States Constitution requires the payment of just compensation for a "taking" of private property for public use. As the Supreme Court held in *Lucas v. South Carolina Coastal Council*,⁷⁶ the zoning regulations of states or their political subdivisions can constitute a taking of property when all economically viable uses of the property are destroyed.⁷⁷ A takings claim with regard to landfill restrictions is likely where the zoning authority

seeks to severely limit the use of the developer's property and "does not substantially advance legitimate state interests".⁷⁸

In the wake of the Supreme Court's decision in *Lucas*, commentators and courts have struggled to determine whether *Lucas* is limited to the facts presented to the Court or whether the holding has general application.⁷⁹ It is reasonable to assume that *Lucas* did not overrule prior guidelines on when a taking has occurred, as the court implicitly upheld those decisions which required compensation where less than 100% of the property's value had been appropriated.

Non-Conforming Use

Another property rights-based claim that a landfill is exempt from zoning restrictions is that of "non-conforming use" status. This exemption is illustrated by the decision in *McDowell v. Lafayette County Comm'n*,⁸⁰ where the court held that when a lawful activity is in existence prior to the enactment of zoning controls that attempt to prohibit or severely limit that activity, the operation has vested property rights in its continued operation, notwithstanding the enactment of zoning.⁸¹

The *McDowell* court held that a lawful use must be in existence before zoning regulations are passed for a person to have vested property rights in a landfill.⁸² In *McDowell* a proposed landfill had attempted to create a

non-conforming use in their property prior to the adoption of restrictive zoning regulations, but the court found that without a valid DNR permit for the landfill, a vested property right or non-conforming use status did not exist.⁸³

As many rural communities do not enact zoning regulations applicable to landfills until news of their formation is announced, a landfill could establish non-conforming use status if the landfill sponsors can beat the community to the punch. Given the tedious landfill design and application process, many communities are able to adopt sufficient zoning regulations before the DNR approves the permit.⁸⁴

One approach that communities with limited zoning utilize to stop the creation of a landfill in their jurisdiction is the issuance of interim development ordinances ("IDOs").⁸⁵ These temporary controls restrict the establishment of landfills by denying rezoning and permit requests while the zoning board enacts or revises comprehensive regulations to govern landfills.⁸⁶

II. SUBTITLE D REGULATIONS

With the promulgation of the Subtitle D regulations under RCRA, space in approved landfills has become scarce as the operational costs of landfills increase and many outdated landfills close.⁸⁷ The regulations apply to new or expanded landfills and

⁷¹ Slip op. at 30, 31. "Undue hardship" is the common required showing to obtain a zoning variance.

⁷² *Id.*

⁷³ 822 S.W.2d 429 (Mo. Ct. App. 1991).

⁷⁴ *Id.*

⁷⁵ *Id.* at 434.

⁷⁶ *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

⁷⁷ *Id.*

⁷⁸ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). If the statute unduly interferes with investment backed expectations, it can also constitute a taking. *Id.* at 262.

⁷⁹ See Robert M. Washburn, *Land Use Control, The Individual, and Society: Lucas v. South Carolina Coastal Council*, 52 Mo. L. Rev. 162, 180 (1993); J. Patrick Sullivan, Comment, *Regulatory Takings - The Weak and the Strong*, 1 Mo. ENVTL. L. & POL'Y REV. 66, 72 (1993).

⁸⁰ 802 S.W.2d 162 (Mo. Ct. App. 1990).

⁸¹ *Id.* See also *State ex rel. Columbus Park Community Council v. Board of Zoning Adjustment of Kansas City*, 864 S.W.2d 437 (Mo. Ct. App. 1993).

⁸² 802 S.W.2d 162.

⁸³ *Id.*

⁸⁴ This situation was experienced in the *Green Hills* case discussed above.

⁸⁵ See *Shortlidge and White*, *supra* note 62, at 44.

⁸⁶ *Id.*

⁸⁷ See *Landfills Shutting Down Statewide*, UPI, October 3, 1993. For more information on the Subtitle D landfill rule call the EPA's RCRA/Superfund Hotline, (800) 424-9346. The Subtitle D regulations are codified at 40 C.F.R. §§ 257-258 (1993). For a comprehensive treatment and history of the Subtitle D regulations, see Kathleen Farrelly, *The New Federal Standards for Municipal Solid Waste Landfills: Adding Fuel to the Regulatory Fire*, 3 VILL. ENVTL. L.J. 383 (1992).

require states to submit implementation plans to the EPA.⁸⁸ The Subtitle D regulations took effect on October 9, 1993, except in nine Midwestern flood-affected states (including Missouri) and for municipal landfills that accept an average 100 tons per day or less of solid waste, which were granted a six-month extension to April 9, 1994.⁸⁹ After October 1993, operators of non-exempt landfills must stop receiving waste or else meet most of the minimum requirements of Subtitle D.⁹⁰

The new regulations contain landfill liner design criteria and require leachate collection basins,⁹¹ satisfaction of rigid financial assurance (through bonding) and closure requirements, groundwater monitoring, new corrective action requirements, and the implementation of a solid waste landfill permit program.⁹² While no state had an approved RCRA Subtitle D permit program as of April 9, 1993, most states have finally gotten their act together.⁹³

The financial responsibility requirements for after the landfill has been closed are crucial to ensure that sufficient funds are available if the landfill requires cleanup at a later date. The operator must produce adequate financial assurance for 1) closure costs, 2) thirty years post-closure costs, and 3) any corrective action needed.⁹⁴

In addition to the new Subtitle D regulations under RCRA, operators must react

quickly to control and remediate any releases of hazardous wastes from landfills. Under the "corrective action" provisions of RCRA, known as "little CERCLA,"⁹⁵ owners and operators of facilities must notify the DNR and the EPA within 24 hours of a release and take response action to control the release and protect groundwater supplies.

The effects of the implementation of the Subtitle D regulations will be widespread and vary according to the specific circumstances of the community. While many smaller landfills will close, other landfills must raise their disposal fees considerably or enlarge to spread the cost.⁹⁶ The trend toward "regional landfills" will continue, as smaller communities unite to afford the higher costs of implementing the regulations.

III. LEGAL CONCERNS

The choice by a community to use a landfill for disposal of their wastes must address a variety of environmental problems that are consonant with landfills.

Out-of-State Waste

Under the commerce clause, the United States Supreme Court has limited the ability of publicly owned landfills to decline the use of their landfill to all producers, including those from out-of-state.⁹⁷ In *Fort Gratiot Sanitary Landfill, Inc.*, the court ruled that a

ban on solid waste produced outside of the county where the landfill is located is an impermissible burden upon interstate commerce.⁹⁸ "Thus, if the statute is discriminatory on its face or in practical effect, 'the state bears the burden of justifying the discrimination by showing the following: (1) the statute has a legitimate local purpose; (2) the statute serves this interest; and (3) nondiscriminatory alternatives, adequate to preserve the legitimate local purpose, are not available.'"⁹⁹

Furthermore, fees imposed only upon out-of-state waste also violates the Commerce Clause, according to the Supreme Court's decision in *Chemical Waste Management v. Hunt*.¹⁰⁰ Apparently, fees that do not overtly discriminate against interstate waste would be permissible. Congress has considered legislation to reverse *Fort Gratiot* and the related cases on interstate waste by shifting the authority to control the solid waste flow to local governments.¹⁰¹

The commerce clause limitation frightens local communities who do not want their "local" landfill to become a dumping ground for New York garbage and landfill operators attempting to preserve their capacity for local customers. Many attempts to circumvent this obstacle have been proposed, including turning landfill operations over to private companies (no "state action"), limiting access to those communities within a

⁸⁸ 40 C.F.R. § 258 (1993).

⁸⁹ EPA Finalizes Deadline Extension for Landfills, Gives Flood States Relief, 1993 DER (BNA) 188, September 30, 1993 at d8.

⁹⁰ 40 C.F.R. § 258.1 (1993). See *Cost of Compliance with RCRA Subtitle D Will Lead to 'Mega-Landfills,' Consultant Says*, 23 ENV'T REP. (BNA) 1204, August 14, 1992.

⁹¹ Note that leachate collection basins are a "point source" under the Clean Water Act, 33 U.S.C. § 1362.

⁹² 40 C.F.R. § 258 (1993).

⁹³ See *RCRA Reauthorization Unlikely This Year, CRS Environmental Policy Specialist Says*, 23 ENV'T REP. (BNA) 3108, April 9, 1993, *Municipal Landfill Permit Plans Expected from 15 States by Year's End, Official Says*, 23 ENV'T REP. (BNA) 1411, September 18, 1992.

⁹⁴ The implementation of this requirement has been delayed until April 9, 1995. *Supra* note 21.

⁹⁵ 42 U.S.C. § 6924(u) (1988). "Little CERCLA" reference is to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), codified at 42 U.S.C. §§ 9601-9625 (1988).

⁹⁶ See *Cost of Compliance with RCRA Subtitle D Will Lead to 'Mega-Landfills,' Consultant Says*, 23 ENV'T REP. (BNA) 1204, August 14, 1992.

⁹⁷ *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S.Ct. 2019 (1992); *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009 (1992). See Paul R. Harper, *Solid Waste Transport: Commerce Clause Restrictions and Free Market Incentives*, 24 AKRON L. REV. 681 (1991).

⁹⁸ *Fort Gratiot* at 2019; see Neil R. Shortidge and S. Mark White, *The Use of Zoning and Other Local Controls for Siting Solid and Hazardous Waste Facilities*, 7 NAT. RES. & ENV'T. 3 (1993), compare Barbara E. Glover Moore, *Ordinance Banning Out-of-county Waste is Constitutional Even When Based on County Residence*, 15 STETSON L. REV. 1085 (1986).

⁹⁹ *Northeast Sanitary Landfill, Inc. v. South Carolina Dep't of Health and Envtl. Control*, 843 F. Supp. 100 (D. S.C. 1994) (modified), citing *Government Suppliers Consolidating Serv. v. Bayh*, 753 F. Supp. 739, 763 (S.D. Ind. 1990); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Supp. 1566 (M.D. Ala. 1993).

¹⁰⁰ *Chemical Waste Management, Inc.*, 112 S.Ct. at 2017.

¹⁰¹ See *Solid Waste: Dingell, Swift Push Interstate Transport, Recycling Bill, May Exclude Flow Control*, Nat'l Env't Daily (BNA), Mar. 28, 1994.

certain radius of the landfill, or by imposing strict inspection requirements.¹⁰²

While the "garbage barge" of Islip, New York highlighted the problem of metropolitan areas disposing their garbage, several Eastern cities regularly ship their garbage to financially-strapped Midwestern towns who often get more than they bargained for. This practice unduly burdens the receiving areas, while the sending states avoid their responsibilities on recycling and disposing waste.

One possibility for local landfills to avoid infringing upon interstate commerce is for the operators to limit the quantity of waste generated to that which is normally produced within their service area.¹⁰³ This capacity limitation does not expressly discriminate against "out-of-state" waste, has a rational, non-discriminatory basis, and should allow landfill operators to limit the use of their landfill to the intended local customers.

CERCLA Liability

The owners and operators of landfills can be held liable for response costs and damages to natural resources arising from the disposal of hazardous substances at the landfills.¹⁰⁴ The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") imposes strict, retroactive, joint and several liability on owners, operators of facilities, and those who "arrange for the disposal" of hazardous sub-

stances.

Municipalities are not currently exempt from CERCLA liability.¹⁰⁵ Landfill operators must be careful to screen their sources for hazardous wastes which would expose them to unlimited liability for their cleanup.

While RCRA excludes household hazardous wastes,¹⁰⁶ very few landfill operators have the time or ability to check the wastes they accept for hazardous wastes which are slipped into the mix. Thus, unless purely "solid wastes" are accepted, the RCRA exemption does not protect the municipal operators from potential liability under CERCLA.¹⁰⁷

Nuisance Actions

Beyond the use of zoning restrictions, landfill operators must contend with the possibility of nuisance actions based upon air, soil, or water pollution of neighboring lands. Nuisance is the unreasonable, unusual, or unnatural use of one's property so that it substantially impairs the right of another to peacefully enjoy his property.¹⁰⁸

Damages and injunctions may typically be recovered in nuisance actions, thus threatening the viability of a continued landfill operation.¹⁰⁹ Nuisance actions may be brought independent of the violations of any DNR regulations by private citizens with standing.¹¹⁰ Nuisance actions seeking injunctions prior to the operation of landfills

must prove "'clearly and conclusively' that the alleged future injury would be 'inevitable and undoubted.'"¹¹¹ This heightened burden of proof can be difficult for plaintiffs to meet before a single load of garbage is dumped at the landfill.

IV. OTHER ACTIONS

Besides the legal and technical problems to be overcome, the proponent of a solid waste landfill must address other concerns as well. Even though these problems may be abstruse in comparison to Subtitle D or zoning, they can just as easily become a headache for the creators of landfills.

Banana Syndrome

Lately, what had been known as the NIMBY syndrome ("Not In My Backyard") has become the BANANA epidemic ("Build Absolutely Nothing Anywhere Near Anybody").¹¹² This shift in attitude is partly due to the greater awareness of the problems associated with the siting of solid or hazardous waste facilities and with the growing considerations given to environmental issues.¹¹³ As people have become more aware of how wastes are handled, they have become very active in opposing the siting of waste handling facilities in their area. At the same time, the EPA and the states have been more diligent in enforcing waste disposal criteria, causing many of the former sites to be

¹⁰² See Paul S. Kline, *Publicly-Owned Landfills and Local Preferences: A Study of the Market Participant Doctrine*, 96 DICK. L. REV. 331 (1992).

¹⁰³ An interesting twist would be Senate Bill 319, 87th Leg. Ass'y, 1st Sess. (1993), which would have prohibited the export of waste generated in a county, if the majority of registered voters in that county voted against the permitting of a solid waste facility, which is apparently oriented toward requiring counties to take responsibility for their own garbage.

¹⁰⁴ 42 U.S.C. § 9607 (1988).

¹⁰⁵ *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2d Cir. 1992), where the court held a municipality liable as an arranger for the disposal of hazardous substances; *The Reading Co. v. City of Philadelphia*, 155 B.R. 890 (E.D. Pa. 1993). See Norman A. Dupont, *Municipal Solid Waste: The Endless Disposal of American Municipalities Meets the CERCLA Strict Liability Dragon*, 24 LOY. L.A. L. REV. 1103 (1991).

¹⁰⁶ 40 C.F.R. § 261.4(b)(1) (1993). See also 42 U.S.C. § 6921(i) (Supp. 1993), where Congress clarified the exemption for resource recovery facilities, apparently agreeing with EPA's interpretation of hazardous wastes.

¹⁰⁷ See *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1201 (2d Cir. 1992), where the court rejected that claim in holding a municipality liable for CERCLA response costs as an "arranger for disposal," the RCRA exemptions for "hazardous waste" are not incorporated into CERCLA's definition of "hazardous substances."

¹⁰⁸ *Stevinson v. Deffenbaugh Indus., Inc.*, 870 S.W.2d 851, 854 (Mo. Ct. App. 1993), citing *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876, 880 (Mo. 1985).

¹⁰⁹ 1993 WL 498722, at *1. See also *State ex rel. Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916 (Mo. Ct. App. 1992).

¹¹⁰ See *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876, 880 (Mo. 1985).

¹¹¹ *Nothaus v. City of Salem*, 585 S.W.2d 244, 246 (Mo. Ct. App. 1979). This doctrine originated in *Aulderheide v. Polar Wave Ice & Fuel Co.*, 4 S.W.2d 776, 785 (Mo. 1928).

¹¹² See Orlando C. Deloqui, "NIMBY is a National Environmental Problem," 35 S.D. L. REV. 198 (1990), John Pendergrass, *Not In My Landfill*, 8 ENVTL. FORUM 7 (1991), William L. Andreen, *Defusing the "Not In My Backyard" Syndrome: An Approach to Federal Preemption of State and Local Impediments to the Siting of PCB Disposal Facilities*, 63 N.C. L. REV. 811 (1985).

¹¹³ The problem with siting has influenced federal legislation, see, e.g., *Hazardous Waste: Siting*, TOPICAL HIGHLIGHTS, ENVIRONMENTAL LAW, WESTLAW, WTH-ENV Database, March 4, 1993. Missouri House Bill 568 and Senate Bills 267 and 319, 87th Leg. Ass'y, 1st Sess. (1993) would have required the voters of a county to approve a hazardous waste facility before a permit can be granted.

abandoned.

The public's BANANA mentality, coupled with zoning controls and the diminishing space in landfills, has prompted many states to enact solid waste siting laws. One such state, Wisconsin, has delegated the authority (and the responsibility) to a central state board to designate the sites for solid waste landfills, preempting any local controls, including zoning.¹¹⁴

Several Missouri legislators have proposed creating a state committee for the siting of solid waste landfills, but have not met with much success.¹¹⁵ In the 1993 session, House Bill 919 introduced by Representative Hosmer would have created a "Missouri Solid Waste Facility Siting Commission" with the authority to supersede local zoning ordinances and approve landfill permit applications following recommendations by the DNR.¹¹⁶

The establishment of a solid waste siting commission could alleviate some of the hurdles inherent with BANANA-based zoning restrictions. When presented with a landfill proposal, the commission should assess the need, location, feasibility, and impacts of the landfill upon the local community. The commission should consider the legitimate health, safety, and property value concerns of the residents and balance those factors with the state's demand for landfill capacity.

During the commission's consideration of the proposal, adequate opportunity for public and adversarial hearings should be afforded to neighbors of the landfill and residents of the communities served by the landfill. To avoid costly litigation, mediation or arbitration alternatives can be supplied,

allowing local communities an option to retain some control over the landfill. Communities would certainly prefer this to a scenario in which the landfill sponsor successfully asserts their immunity from host zoning under the eminent domain, balancing of interests, or superior sovereign doctrines.

Recycling

Many states, such as Missouri, have either mandated recycling in certain areas or have required reductions in the amount of wastes placed in landfills.¹¹⁷ Congress has considered legislation on recycling and source reduction requirements, but has yet to solidify support for the proposal.¹¹⁸ To further encourage this practice, landfill operators should begin charging fees for waste by the pound, instead of a flat fee per household which encourages overuse of the "commons" landfill resources.

Given the limited and precious space in landfills, recycling should be encouraged at all levels - packaging, household recycling, and site separation.¹¹⁹ The catch-phrase "reduce, reuse, and recycle" has become familiar to the public, but it has yet to become a common household practice.¹²⁰ The precise makeup of the customer base served by the landfill will determine which option would be the most efficient.

In addition, federal law will soon require biodegradable beverage ring holders.¹²¹ This restriction is "technology forcing," as truly biodegradable plastics made from corn starch are mostly still in the design stage.

Alternatives to Landfills

While solid waste once was seen as "yesterday's garbage," many people view it as a resource.¹²² Many communities have utilized or have considered utilizing "resource recovery" facilities which use garbage for fuel in the furnaces to produce heat or electricity directly.¹²³

Methane gas is produced during the decomposition of organic wastes in landfills. If this gas is properly controlled, it can be gathered as sold as fuel. Also, many resource recovery facilities now use solid wastes as a direct fuel with some success.

Incinerators

Many communities have turned to incinerators to address the problem of diminishing landfill space, though this choice is not without its own problems. The emissions from the incinerator are governed by the Clean Air Act, while the ash leftover may be regulated as a hazardous waste under Subtitle C of RCRA.¹²⁴ This additional level of regulation reduces the appeal of incineration and may increase the potential liability for the disposal of what may be highly concentrated hazardous ash. While the waste has been reduced in volume, its relative toxicity has increased to the point where the ash is considered a hazardous waste. Once identified as a hazardous waste, the ash must be properly disposed of through a RCRA-licensed treatment, storage, and disposal facility.

V. SOLUTIONS

There are many options for Missouri to consider in the creation of the needed landfill capacity for the future. As well as continuing efforts in requiring recycling and reduced

¹¹⁴ See Peter J. Ruud and Dean M. Werner, *Wisconsin's Landfill Negotiation - Arbitration Statute*, 58 WIS. BAR BULL. 17 (1985), Mary Beth Arnett, *Down in the Dumps and Wasted: The Need Determination in the Wisconsin Landfill Siting Process*, 1987 WIS. L. REV. 543 (1987). Other states such as New York have only proposed such legislation, see *New York: Legislature to Look at Three Bills in 1988 Aimed at Solving Municipal Waste Problems*, 18 ENV'T REP. (BNA) 2087, January 29, 1988.

¹¹⁵ See, e.g., House Bills 669 and 919, 87th Leg. Ass'y, 1st Sess. (1993). House Bill 669 would create County Solid Waste Siting Commissions, while House Bill 919 is statewide.

¹¹⁶ Mo. Legis. H.B. 919 (1993).

¹¹⁷ Missouri House Bill 360 of 1990 requires a 40% reduction in waste volume within five years, codified at Mo. REV. STAT. § 260. In addition, composting has become more popular. See Linda B. Totten, *Stores Sell Compost As Use Heats Up; Demand Exceeds Supply As Gardeners Rush to Improve Their Plots*, ST. LOUIS POST-DISPATCH, Nov. 25, 1993, at 4.

¹¹⁸ See *RCRA Reauthorization Unlikely This Year, CRS Environmental Policy Specialist Says*, 23 ENV'T REP. (BNA) 3108, Apr. 9, 1993. See also Alice D. Keane, *Federal Regulation of Solid Waste Reduction and Recycling*, 29 HARV. J. ON LEGIS. 251 (1992).

¹¹⁹ Many recycling grants are available, see *Come and Get It: Recycling Grants*, ST. LOUIS POST-DISPATCH, Jan. 14, 1994, at 8B.

¹²⁰ The City of Columbia has taken many steps to reduce waste and encourage recycling, including the bottle deposit law and working with Civic Recycling to ease the handling of recyclables. See Leslie Wright, *'Super Sorting' Center Heralds New Landfill Rules*, COLUMBIA DAILY TRIB., Oct. 1, 1993, at 1A.

¹²¹ 42 U.S.C. §§ 6914b and 6914b-1 (1988); 40 C.F.R. § 234 (1993).

¹²² See Charlene Prost, *Trash Plant Proposed for Riverfront*, ST. LOUIS POST-DISPATCH, Dec. 21, 1993, at 4A.

¹²³ *Id.*

¹²⁴ *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588 (1994).

packaging, Missouri should find ways to not only overcome, but lessen the impact of local groups and the BANANA attitude.

To understand Missouri's problems, one must appreciate the topography of the southern half of our state. The geological makeup of the lower portion of Missouri is known as Karst geology, which is characterized by sinkholes and a high water table. These features are not conducive to creating landfills that must essentially be leakproof to avoid contamination of the water table.

The creation of a state solid waste siting commission approach should be thoroughly studied for use in Missouri as landfill space becomes scarce. To be successful, a solid waste siting law should include numerous opportunities for local input, including notice requirements and mediation or negotiation sessions for neighboring landowners.¹²⁵ To be effective, the state siting board must be able to preempt local zoning controls while ensuring that the landfill will fully comply with enhanced state requirements.

Another option would be to strengthen the landfill guidelines of the DNR so that many of the concerns of zoning boards would be addressed by state laws and regulations. For instance, the DNR has no setback requirements for residences or businesses, but if a one mile standard was created, most zoning controls would not be needed. Also important to the local governments is payment of a "host fee" which would pay for road maintenance, inspections, and other local township or county activities. In addition, the expertise and frequency of DNR inspections must be augmented so that local communities are satisfied that the statewide landfill requirements are met.

As stringent DNR and Subtitle D regulations are enacted, there is less need for local controls over landfills which only serve to delay and restrict safe landfills. Facing strong local opposition, landfill developers must be given the ability to create landfills once the

technical requirements are met, while local interests may then intervene in DNR proceedings and at public hearings.

Litigation over zoning controls would be greatly lessened if the zoning was based on a model issued by the DNR. While many authorities did use the Standard Zoning Enabling Act ("SZE") when their zoning was first enacted, landfills were not extensively covered until later. As a result, the zoning requirements for many cities, counties, and townships vary considerably. If the DNR or another statewide committee would promulgate standard zoning controls for landfills, the local governments could use them as a pattern. As zoning regulations become uniform, litigation would decrease as a body of precedent evolves from legal challenges to these uniform zoning regulations.

As many communities run out of space within their borders to dispose of their waste, more will attempt to locate solid waste landfills within the jurisdiction of another governmental body. Given the frequent and bitter disputes over intergovernmental immunity, it is clear that only a state strategy can provide the necessary landfill space while addressing the concerns of the local residents. As the Subtitle D regulations are implemented and landfills become more "sanitary" and better managed, local opposition should be satisfied that their livelihoods will not be unduly affected. Perhaps a one mile "buffer zone" (extra land purchased by the landfill sponsor) is needed around landfills so that effects on neighbors are mitigated.

Municipal hazardous waste problems must be addressed to minimize future liability concerns for the operators of landfills. This can largely be accomplished by requiring communities to operate hazardous waste collection facilities and develop more effective public education about the proper disposal of hazardous wastes.

Individual states must take responsibility

for the waste created within their borders. If states such as New York and New Jersey cannot afford to dispose their own wastes within the state, the communities generating the waste should have to pay fees and other expenses which fully compensate the receiving landfills.¹²⁶ In addition, disposing states should have more control over the waste that is imported to their states. The EPA should set national standards for the transportation of interstate waste to avoid violating the commerce clause while still protecting residents of the receiving state.

Congress can help alleviate the situation by addressing the commerce clause challenge to interstate waste shipments and consider exempting that waste from the clause's breadth.¹²⁷ Once states can limit the garbage disposed in their landfills, the communities producing extra garbage will realize the full price of its disposal. Further, interstate compacts on solid waste disposal would assist landfill operators in planning the use of their disposal capacity.

VI. CONCLUSION

The future of solid waste landfills in Missouri is clear in that more space is needed, but it is unclear how that space can be acquired with the current obstacles facing landfill sponsors. Regional landfills need to be created for the enterprise to be profitable after Subtitle D and volume reduction requirements.¹²⁸ To overcome local opposition and address those concerns, the public needs to be involved in the siting of landfills either through a state siting board, or through more public participation in the current siting process. House Bills 669 and 919 of the 1993 session need to be reconsidered, as both offer a mix of the common siting provisions found in other states.

Without a responsible state strategy, Missouri will soon be awash in garbage which does not understand the environmental, political, and legal implications of its disposal.

¹²⁵ See James E. McGuire, *The Dilemma of Public Participation in Facility Siting Decisions and the Mediation Alternative*, 9 SETON HALL LEGS. J. 467 (1986).

¹²⁶ Some in New York are attempting to take control of the waste problem. See *New York: Legislature to Look at Three Bills in 1988 Aimed at Solving Municipal Waste Problems*, 18 ENV'T. REP. (BNA) 2087, Jan. 29, 1988.

¹²⁷ See Michael R. Harpring, *Out Like Yesterday's Garbage: Municipal Solid Waste and the Need for Congressional Action*, 40 CATH. U. L. REV. 851 (1991).

¹²⁸ Many communities already are using regional landfills, see *Landfills Shutting Down Statewide*, UPI, Oct. 3, 1993.