
IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 880312

RESOURCE CONSERVATION MANAGEMENT, INC.;
RAYMOND C. HAWKINS AND RCH LAND SALES, INC.,

Appellants,

v.

BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA,
and
CARROLL N. LATHAM, JOHN B. VANCE,
AND HOMEOWNERS AGAINST LANDFILL TRACT/DUMP, INC.,
A Virginia Non-Profit Corporation,

Appellees.

JOINT APPENDIX

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Robert H. J. Loftus
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Fairfax, Virginia 22030
(703) 273-2440

Counsel for Appellants

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Board of Supervisors of
Prince William County, Va.

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Counsel for Appellees -
Carroll N. Latham,
John B. Vance and
Halt Dump, Inc.

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V I R G I N I A

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT,
INC.,
Route 2, Box 985
Catlett, Virginia 22019,

and

RAYMOND C. HAWKINS,
Route 2, Box 985
Catlett, Virginia 22019,

and

RCH LAND SALES, INC.,
Route 2, Box 985
Catlett, Virginia 22019,

Petitioners,

v.

CHANCERY NO. _____

THE BOARD OF SUPERVISORS OF
PRINCE WILLIAM COUNTY,

SERVE: John Foote, Esquire
County Attorney
Prince William County
1 County Complex Court
Prince William, Virginia 22192,

Defendant.

PETITION FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF

COME NOW Complainants, Resource Conservation Management, Inc. ("RCM"), Raymond C. Hawkins ("Hawkins") and RCH Land Sales, Inc. ("RCH"), (sometimes herein collectively called "Petitioners") and move this court to grant a declaratory judgment and injunctive relief on the grounds and in the manner set forth below:

1. RCH, a corporation organized under the laws of the Commonwealth of Virginia, is the owner of approximately 368 acres of land located in Prince William County, Virginia

2. Hawkins is the owner of approximately ten acres of land located in Prince William County, Virginia which land is adjacent to the land owned by RCH. (The aforesaid 378 acres of land owned by RCH and Hawkins is hereinafter referred to as the "Subject Property").

3. RCM is a corporation organized under the laws of the Commonwealth of Virginia and is the lessee of the aforementioned Subject Property.

4. At all times material and relevant hereto, the Subject Property has been zoned pursuant to the provisions of the A-1 zoning district, as the same is more particularly described in the Prince William County Zoning Ordinance.

5. The Board of Supervisors of Prince William County, Virginia (hereinafter "Board of Supervisors") is a body corporate and a body politic and is charged with the responsibility of adopting, amending and implementing the Prince William County Ordinances pursuant to authority expressly delegated to it from the General Assembly of the Commonwealth of Virginia, and authority necessarily implied from the said express delegation.

6. RCM caused to be submitted to the proper Virginia State Authorities an application, in proper form, for site suitability analysis to operate a debris solid waste disposal

facility in Prince William County, within the boundaries of the Subject Property.

7. RCM caused to be submitted to the appropriate officials of Prince William County, in proper form, along with all required documentation and fees, an application for special use permit to allow the establishment, maintenance and operation of a Debris Landfill on the Subject Property, and on or about April 13, 1986 RCM received notification of the proper filing of same from Prince William County.

8. At the time of submission, a Debris Landfill was a permitted use, subject to issuance of a Special Use Permit, in an A-1 Zoning District in Prince William County Virginia.

9. Prince William County had heretofore and prior to the filing of the aforesaid application, identified and independently verified the appropriateness of the Subject Property as one of two preferred sites for establishment and operation of a Debris Landfill in Prince William County.

10. In response to RCM's application for a Special Use Permit, and thereafter at all times material hereto, the Defendant Board of Supervisors embarked on a course of action which was calculated to, and in fact culminated in, the proscription, elimination and prohibition of the legitimate lawful and necessary activity of establishing, maintaining and operating a Debris Landfill in Prince William County.

11. The Defendant Board of Supervisors made request for, and received advices from agencies and departments of the Prince William County Government, that the wholesale

proscription and prohibition of the legitimate, lawful and necessary activity of establishing, maintaining and operating a Debris Landfill would be an extraordinary measure and would constitute an improper, impermissible and illegal action by the Board of Supervisors, devoid of the requisited express, or necessarily implied, legislative authority, and therefore violative of these petitioner's rights.

12. Notwithstanding the recognition by Prince William County that Debris Landfills are necessary to the health, safety and welfare of the current and future inhabitants of Prince William County, the Board of Supervisors, on October 7, 1986, acted upon a demonstrated and articulated bias and pre-disposition by voting unanimously to adopt certain amendments to the text of the Prince William County Zoning Ordinance which eliminated from all zoning districts in Prince William County the establishment, maintenance and operation of Debris Landfills (hereinafter referred to as "PWC Zoning Amendments").

13. The Defendant Board of Supervisors, acting beyond the requisite delegated authority conferred expressly by the General Assembly or necessarily implied therefrom, did on October 7, 1986 adopt the PWC Zoning Amendments notwithstanding advice from the Defendant Board's professional staff that a Debris Landfill facility when designed, constructed and maintained in an appropriate fashion can be operated consistent with the public health, safety and welfare.

14. The aforesaid actions of the Defendant Board were arbitrary and capricious and violative of Petitioner's rights.

15. The October 7, 1986 action of the Board of Supervisors in adopting the PWC Zoning Amendments was based upon a legislatively created and fabricated presumption that privately owned landfills pose a significant and imminent danger to the health, safety and welfare of Prince William County inhabitants although there exists no basis in law or fact to support the presumption.

16. The premise that a legitimate business improperly run, operated and maintained, poses a threat to the public health, safety and welfare, is an improper legislative rationale to abolish a legitimate business use.

17. The establishment and operation of Debris Landfills in Prince William County is necessary and essential to ensure and promote and improve the public health, safety, convenience and welfare of its citizens, consistent with the obligations imposed upon the Defendant Board by Code of Virginia 1950, as amended Section 15.1-427 et seq.

18. The only present operational Debris Landfill located in Prince William County has a short and determinable life.

19. The Defendant Board has failed to adopt a Solid Waste Management Plan meeting the requirements of Code of Virginia 1950, as amended, Section 10-263 et seq. to meet the recognized need for Debris Landfills located in Prince William County to ensure the public health, safety and welfare of its inhabitants.

20. The maintenance and operation of a Debris Landfill is a legitimate private business against which the PWC Zoning Amendments operate to illegally and unconstitutionally eliminate by wholesale prohibition without reasonable and valid justification. By excluding this legitimate private business from Prince William County, the Defendant Board of Supervisors has violated these Petitioners' protected rights secured under the United States Constitution and the Virginia Constitution, as well as federal and state law.

21. At all times material and relevant hereto, the Commonwealth of Virginia had, and continues to have, a complete, full pervasive, comprehensive and plenary system of regulation of the disposal of solid waste in Virginia, to ensure the protection of the health, safety and welfare of the citizens of Virginia.

22. Prince William County is preempted by state legislation from prohibiting the establishment of Debris Landfills within its boundaries.

23. Although counties may regulate certain aspects of Solid Waste Disposal facilities established within the counties borders, regulation is permitted only insofar as it is not inconsistent with state action evidencing a preemption.

24. The PWC Zoning Amendments portend to, and in fact constitute regulation of competition with reference to the establishment of Debris Landfills to be maintained and operated in Prince William County without the requisite express statutory authority to do so, and therefore the PWC

Zoning Amendments are directly violative of Federal and State Statutory and Constitutional Law.

25. The PWC Zoning Amendments are a patent attempt to monopolize, and in fact create a monopoly, in violation of the Virginia Constitution, the Sherman Antitrust Act (15 U.S.C. Sections 1 and 2), and the Virginia Antitrust Act (Code of Virginia 1950, as amended Sections 59.1-9.1 through 59.1-9.18).

26. The decision of Defendant Board in enacting the PWC Zoning Amendment was plainly wrong, was contrary to both law and fact, was an unconstitutional taking of property contrary to the rights afforded by the Constitution of the United States and the Constitution of Virginia, was an arbitrary and capricious restriction on the lawful use of property, and was in violation of the purpose and intent of the PWC Zoning Ordinance, which both facially and as interpreted unreasonably, unlawfully, and unconstitutionally discriminates against the use sought.

27. An actual antagonistic assertion and denial of right exists between the Petitioners and the Defendant Board of Supervisors, and this action is therefore properly brought under the provisions of Code of Virginia 1950, as amended Section 8.01-184 et seq.

28. The Defendant Board of Supervisor's above-described actions have no reasonable relation to the public health, safety, welfare or morals, have no public benefit and no public use, thereby depriving the Petitioner of its property

in violation of civil rights guaranteed by the Constitutions and statutes of the United States and the Commonwealth of Virginia and are in direct violation and derogation of Petitioner's protected rights pursuant to 42 U.S.C. Section 1983.

WHEREFORE, Petitioners move this honorable court for relief as follows:

a) A declaratory judgment finding that the aforesaid action of Prince William County Board of Supervisors in adopting the PWC Zoning Amendments, which operate to prohibit Debris Landfills within its boundaries, are in excess of state delegated power, are in excess of delegated police power, are in conflict with Virginia law and are in violation of the United States Constitution and the Virginia Constitution, and are therefore void and invalid.

b) A declaratory judgment that the PWC Zoning Amendments prohibiting Debris Landfills are in violation of the Sherman Antitrust Act (15 U.S.C. Sections 1 and 2) and the Virginia Antitrust Act (Code of Virginia 1950, as amended Sections 59.1-9.1 through 59.1-9.18) and are illegal and therefore null and void.

c) Decree that Defendant Board of Supervisors has by its actions elected to cede any regulatory control over the establishment, maintenance and operation of Debris Landfills, within its boundaries, to the proper State Authorities, and that Prince William County be restrained from participating in, or interfering with, the State permitting authority as to

the debris landfill which Petitioners seek to establish in Prince William County, Virginia.

d) Decree that when and if proper approval by state authorities is given to Petitioners to allow the establishment and maintenance of a Debris Landfill on the subject property, Prince William County shall be enjoined from interfering with the use thereof.

e) This court grant such other and further relief as this court determines just and proper.

f) Award Petitioners attorney's fees pursuant to the provisions of 42 U.S.C. Section 1983 et seq.

RESOURCE CONSERVATION
MANAGEMENT, INC.
RAYMOND C. HAWKINS, and
RCH LAND SALES, INC.
By Counsel

Marc E. Bettius
John B. Connor
MILES & STOCKBRIDGE
11350 Random Hills Road
Suite 500
Fairfax, Virginia 22030
(703) 273-2440

By: 

John B. Connor
Counsel for Resource Conservation
Management, Inc., Raymond C. Hawkins,
and RCH Land Sales, Inc.

V I R G I N I A :

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION
MANAGEMENT, INC., et al.

Petitioners

v.

BOARD OF SUPERVISORS OF
PRINCE WILLIAM COUNTY

Defendant

CHANCERY NO. 23341

ANSWER

The Board of County Supervisors of Prince William County, by counsel, files this Answer to the Petition for Declaratory Judgment and Injunctive Relief served against it.

1. The Defendant is without sufficient information to admit or deny the allegations of Paragraphs 1, 2, and 3 of the Petition, and they are therefore denied.

2. Paragraph 4 of the Petition is admitted.

3. The Defendant admits the allegations of Paragraph 5 to the effect that it is a body corporate and politic charged with the authority and obligation to adopt, amend and implement County ordinances consistently with State law. The Defendant affirmatively asserts that it has acted consistently with all applicable law, constitutional and statutory, in eliminating privately-owned debris landfills as a permitted use of land under the Prince William County Zoning Ordinance.

3. The Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 6, and they are therefore denied.

4. The allegations of Paragraphs 7 and 8 are admitted. It is further answered that private debris landfills were also formerly permitted in the M-1 and M/T districts with a special use permit.

5. Paragraphs 9 and 10 are denied.

6. Paragraph 11 of the Petition is denied. The Defendant further affirmatively asserts that the Board did in fact solicit and receive advice from its staff, but that the staff did not advise that eliminating privately-owned debris landfills in the County would be unlawful as is alleged. The staff recommended to the contrary, and advised the Board that, in its opinion, elimination of such a use was both reasonable, proper, and lawful given the profound public health and land use questions involved.

7. The Defendant admits in response to Paragraph 12, that on October 7, 1986, it amended the Prince William County Zoning Ordinance to eliminate privately-owned debris landfills from the A-1, M-1, and M/T zoning districts. All further allegations of Paragraph 12 of the Petition are denied, and it is particularly denied that the Board acted with any bias or predisposition contrary to the interests of any private party. The Board asserts that it fairly and properly exercised its considered legislative judgment that such action was best for the near- and long-term interests of the County citizens at large.

8. The Defendant repeats its answer to Paragraph 12, above, with respect to Paragraph 13, to the extent that it admits it did adopt the zoning amendments referred to therein, but all other allegations of Paragraph 13 of the Petition are denied.

9. Paragraphs 14, 15 and 16 of the Petition are denied.

10. Paragraph 17 of the Petition is denied. In further answer, the Defendant asserts that contrary to the Plaintiff's allegations, the proper and lawful accommodation of the public's need to dispose of debris, does not necessarily demand the present establishment of a publicly- or privately-owned debris landfill of any kind within the territorial limits of Prince William County. The construction of such a landfill is one alternative to the problems of waste disposal.

11. Paragraph 18 of the Petition is admitted, to the extent that all landfills have determinable active lives. The Defendant further asserts that the presently operational debris landfill located within the County, combined with other methods of disposal are wholly sufficient for the present needs of the County, until such time as one or more publicly-owned and -operated debris landfills or other alternatives shall have been deemed essential and shall have been placed in service.

12. Paragraph 19 is denied.

13. Paragraphs 20 through 28 of the Petition contain no allegations of fact requiring admission or denial, but to the extent they may do so, they are denied.

14. All other allegations of fact not heretofore expressly admitted are hereby denied.

WHEREFORE, the Board prays that the Petition be dismissed.

Respectfully submitted,

BOARD OF COUNTY SUPERVISORS
OF PRINCE WILLIAM COUNTY

BY: 

Counsel

JOHN H. FOOTE
County Attorney
One County Complex Court
Prince William, Virginia 22192-9201
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer was mailed, postage prepaid, to Marc E. Bettius, Esquire, and John B. Connor, Esquire, Miles & Stockbridge, 11350 Random Hills Road, Suite 500, Fairfax, Virginia 22030, this 26th day of December, 1986.
November,


JOHN H. FOOTE

B4:10

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT, INC.,)
et al.,)

Petitioners,)

v.)

THE BOARD OF SUPERVISORS OF)
PRINCE WILLIAM COUNTY)

Defendant.)

CHANCERY NO. 23341

PETITION IN INTERVENTION

Interveners, Carroll N. Latham, John B. Vance and Homeowners Against Landfill Tract/Dump, Inc. pursuant to Rule 2:15 of the Rules of the Supreme Court of Virginia, submit the following as their Petition in Intervention in response to the Petition for Declaratory Judgment and Injunctive Relief filed by Resource Conservation Management, Inc., Raymond C. Hawkins and RCH Land Sales, Inc.:

FIRST AFFIRMATIVE DEFENSE

Petitioners fail to allege facts which provide a basis for relief under the federal Civil Rights Act, 42 U.S.C. §1983.

SECOND AFFIRMATIVE DEFENSE

Petitioners fail to allege facts which provide a basis for relief under the federal Sherman Act, 15 U.S.C. §§1 and 2.

THIRD AFFIRMATIVE DEFENSE

Petitioners fail to allege facts which provide a basis for relief under the Virginia Antitrust Act, Code of Virginia §§59.1-9.1 et seq.

FOURTH AFFIRMATIVE DEFENSE

Petitioners fail to allege facts which provide a basis for relief under the Virginia Waste Management Act, Code of Virginia §§10-263 et seq.

FIFTH AFFIRMATIVE DEFENSE

Petitioners fail to state a basis for relief under the Constitution of the United States.

SIX AFFIRMATIVE DEFENSE

Petitioners fail to state a basis for relief under the Constitution of Virginia.

SEVENTH AFFIRMATIVE DEFENSE

Petitioners fail to state a claim of illegal action on the part of the defendant Board in enacting the challenged text amendment to the County Zoning Ordinance.

FURTHER RESPONSE

In further response to the Petition and by way of their answer to each and every allegation contained therein, interveners state the following:

1. Intervenors are without sufficient information either to admit or to deny the allegations contained in paragraphs 1, 2, 3, 6 and 7 of the Petition; therefore, they deny such allegations.

2. Intervenors admit the allegations contained in paragraphs 4 and 8 of the Petition.

3. Intervenors deny the allegations contained in paragraphs 9, 10, 11, 15, 16, 18 and 19.

4. The allegations contained in paragraph 5 of the Petition are admitted insofar as they state that the defendant Board is a body corporate and politic responsible for adopting, amending and implementing all local ordinances within Prince William County consistent with state law. To the extent paragraph 5 states more, either such statements constitute conclusions of law requiring no admission or denial or they are denied.

5. Intervenors deny the allegations contained in paragraph 12, 13 and 14, except as those paragraphs allege that the Board acted on the challenged zoning amendment on October 7, 1986.

6. Intervenors deny the allegation contained in paragraph 17 and state that whether a landfill is necessary and essential is a legislative determination to be made by defendant Board.

7. The statements contained in paragraphs 20 through 28 constitute conclusions of law requiring no admission or denial. To the extent they may be construed as allegations of fact, they are denied.

8. Any other allegations not specifically addressed in the foregoing paragraphs are denied.

WHEREFORE, interveners pray that the Petition be dismissed and that they recover their costs and attorney's fees expended herein.

Respectfully submitted,

CARROLL N. LATHAM
JOHN B. VANCE
HOMEOWNERS AGAINST
LANDFILL TRACT/DUMP,
INC.

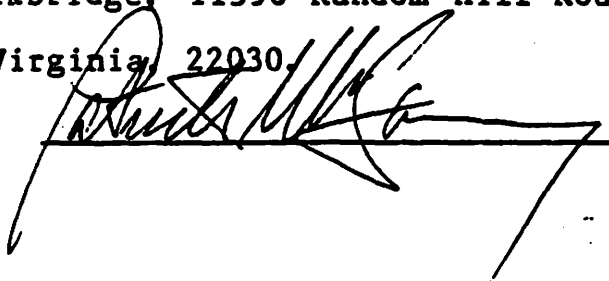
By


Of Counsel

Patrick M. McSweeney
Brian L. Buniva
McSWEENEY, BURTCH & CRUMP
A Professional Corporation
Post Office Box 1463
9 South 12th Street
Richmond, Virginia 23212
(804) 643-5192

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of December, 1986, mailed first class mail, postage prepaid, a true and correct copy of the foregoing Petition in Intervention to John Foote, Esquire, County Attorney, Prince William County, One County Complex Court, Prince William, Virginia, 22192 and John B. Connor, Esquire, Miles and Stockbridge, 11350 Random Hill Road, 3500 Fair Oaks Plaza, Fairfax, Virginia, 22030.

A handwritten signature in black ink, appearing to read "Robert M. G.", is written over a horizontal line. The signature is stylized with a large, sweeping initial 'R' and a long horizontal stroke extending to the right.

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT, INC.,)
et al.,)

Petitioners,)

v.)

CHANCERY NO. 23341

THE BOARD OF SUPERVISORS OF)
PRINCE WILLIAM COUNTY)

Defendant.)

ORDER

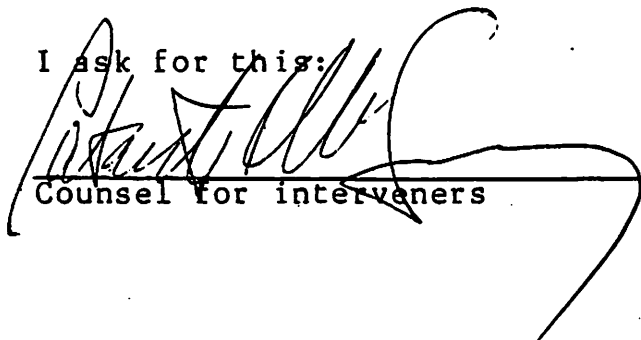
On the motion of Carroll N. Latham, John B. Vance and Homeowners Against Landfill Tract/ Dump, Inc. for leave to file their Petition in Intervention, and deeming it proper to do so,

IT IS ORDERED that said motion is granted and the Petition in Intervention be filed.

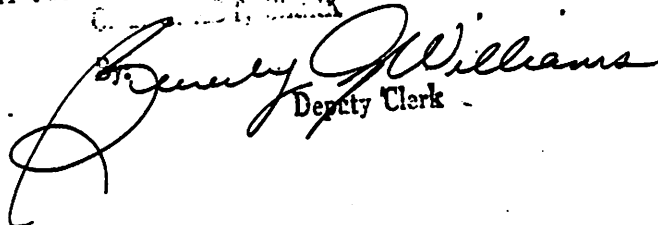
ENTER: 2 / 13 / 87


Judge

I ask for this:


Counsel for interveners

A COPY OF THIS
ORDER, CLERK


Deputy Clerk

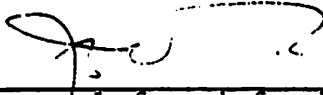
Seen



Counsel for ~~petitioners~~

defendant

Seen and objects noted



Counsel for ~~defendant~~

Amicus

V I R G I N I A

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT,)
INC., et al.,)

Petitioners,)

v.)

CHANCERY NO. 23341

BOARD OF SUPERVISORS OF PRINCE)
WILLIAM COUNTY,)

Defendant.)


NOTICE AND MOTION FOR SUMMARY JUDGMENT

Please take notice that on Thursday, September 10, 1987, at 10:00 a.m., or as soon thereafter as counsel may be heard, petitioners Resource Conservation Management, Inc., Raymond C. Hawkins, and RCH Land Sales, Inc., by counsel, will move the court for entry of summary judgment against defendant Board of Supervisors of Prince William County on the grounds that there is no genuine issue of material fact and the petitioners are entitled to judgment as a matter of law.

RESOURCE CONSERVATION
MANAGEMENT, INC., RAYMOND C.
HAWKINS, and RCH LAND SALES,
INC.

By Counsel

MILES & STOCKBRIDGE
11350 Random Hills Road
Suite 500
Fairfax, Virginia 22030
(703) 273-2440

By: 
Randolph D. Frostick
Counsel for Petitioners

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of July, 1987, a true copy of the foregoing brief in support of petitioners' motion for summary judgment was mailed, postage prepaid, to John H. Foote, Esquire, County Attorney, 1 County Complex Court, Prince William, Virginia 22192-9201, counsel for defendant and to Patrick M. McSweeney, Esquire and Brian L. Buniva, Esquire, McSweeney, Burtch & Crump, P.O. Box 1463, 9 South 12th Street, Richmond, Virginia 23212, counsel for intervenors Carroll N. Latham, John B. Vance and Homeowners Against Landfill Tract/Dump, Inc.


Randolph D. Frostick

V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION)	
MANAGEMENT, INC., et al.)	
)	
Petitioners)	
v.)	Chancery 23341
)	
BOARD OF COUNTY SUPERVISORS)	
OF PRINCE WILLIAM COUNTY,)	
VIRGINIA)	
)	
Defendant)	

NOTICE AND MOTION FOR SUMMARY JUDGMENT

Please take notice that the Defendant shall make the following Motion for Summary Judgment upon hearing of the Petitioners' Motion therefor, now scheduled to be heard Thursday September 10, 1987, at 10:00 a.m. or as soon thereafter as counsel may be heard.

The Board of County Supervisors of Prince William County does hereby move this Court for summary judgment in this cause as to those certain issues more fully set out below, on the grounds that there are no contested issues of material fact with respect thereto, and that the Defendant is entitled to judgment on these issues as a matter of law.

The Defendant more particularly asserts that it is entitled to judgment that:

1. There was sufficient and proper enabling legislation with respect to its adoption of Zoning Ordinance

amendments banning all privately-owned debris landfills as a use permitted in Prince William County.

2. The County's power to enact such ordinances has not been pre-empted by the Commonwealth of Virginia.

3. The amendments do not violate either state or federal antitrust laws.

4. The amendments do not constitute a taking of property under either state or federal constitutions.

5. There are disputed issues of material fact with respect to the reasonableness of the Board's adoption of these amendments, and therefore with respect to whether the action was a fairly debatable exercise of its legislative authority, which cannot be resolved on summary judgment.

Respectfully submitted.

BOARD OF COUNTY SUPERVISORS
OF PRINCE WILLIAM COUNTY

By



John H. Foote

JOHN H. FOOTE
County Attorney
One County Complex Court
Prince William, Virginia 22192
Counsel for the Defendant
(703) 335-6620

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum in Support of the Defendant's and in Opposition to the Petitioners' Motion for Summary Judgment was mailed, postage

prepaid, to Marc E. Bettius, Miles and Stockbridge, 11350
Random Hills Road, Suite 500, Fairfax, Virginia 22030, to
Patrick M. McSweeney, McSweeney, Burtch and Crump, P. O. Box
1463, 9 South 12th Street, Richmond, Virginia, 23212,
Counsel to Intervenors Latham, et al., and to Barbara J.
Gaden, Hazel, Thomas, Fiske, Beckhorn and Hanes, 310 South
Boulevard, P. O. Box 14515, Richmond, Virginia, 23221,
Counsel to Intervenors VWIA this 3rd day of September,
1987.



Counsel

D7: SJmotion

V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT,)
INC., et al.,)

Petitioners)

v.)

Chancery 23341

BOARD OF COUNTY SUPERVISORS)
OF PRINCE WILLIAM COUNTY,)
VIRGINIA)

Defendant)

AFFIDAVIT OF ROGER W. SNYDER

COMMONWEALTH OF VIRGINIA;

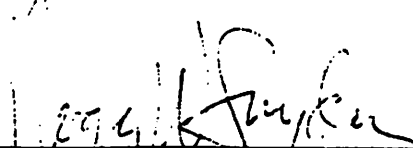
COUNTY OF PRINCE WILLIAM, to-wit:

ROGER W. SNYDER, Planning Director for Prince William County, after being duly sworn, made oath that the following statements are true and correct to the best of his knowledge and belief:

1. My name is Roger W. Snyder and I am the Planning Director for Prince William County. On April 13, 1986, Petitioners in the above-captioned cause applied to the Board of Supervisors for a special use permit for the operation of a debris landfill in the A-1 (agricultural) zone that is applicable to properties they purport to own. That application was regularly reviewed and processed by the Planning staff.

2. On October 7, 1986, however, the Board of Supervisors passed amendments to the Zoning Ordinance of Prince William County which had the effect of removing privately-owned debris

landfills as a use either by right or by special use permit in any zone in Prince William County. Shortly thereafter my staff returned the application fee to the Petitioners in this cause and closed the file on the application. No further action has been taken with respect to it.



ROGER W. SNYDER
Planning Director

Subscribed and sworn to before me, the undersigned Notary Public, this 31st day of August, 1987.



NOTARY PUBLIC

My Commission expires: October 14, 1989

A8:SnyderAf

V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT,)
INC., et al.,)

Petitioners)

v.)

Chancery 23341

BOARD OF COUNTY SUPERVISORS)
OF PRINCE WILLIAM COUNTY,)
VIRGINIA)

Defendant)
)

AFFIDAVIT OF ROBERT S. NOE, JR.

COMMONWEALTH OF VIRGINIA;

COUNTY OF PRINCE WILLIAM, to-wit:

ROBERT S. NOE, JR., County Executive of Prince William County, after being duly sworn, made oath that the following statements are true and correct to the best of his knowledge and belief:

1. My name is Robert S. Noe, Jr., and I am the County Executive and chief administrative officer of Prince William County, Virginia.

2. I was present on October 7, 1986, and personally observed the Board of Supervisors proceedings with respect to the adoption of Ordinance 86-147, a copy of which is attached to the Affidavit of Catherine Clemen Rollins, Clerk to the Board of Supervisors.

3. I believe, based on my personal familiarity with the staff reports, and the Board's discussions then and prior, that

it was the Board's intention to prohibit all privately operated debris landfills in Prince William County, in part because of its concerns for the near and long-term safety of the public. I also know of my own knowledge that after adopting these amendments the Board of Supervisors initiated consideration of construction a publicly-owned debris landfill, as a proper and viable alternative to privately-owned facilities.

4. In order to pursue consideration of this alternative, the Board of Supervisors created a Citizens Advisory Committee, by Resolution 86-941, charged with the evaluation of potential sites for an appropriate public debris landfill.

5. The Board of Supervisors has also, by Resolution 87-222, employed SCS Consulting Engineers as expert consultants with respect to the location of a public debris landfill, and with respect to the costs of such a project.

6. The Board of Supervisors, by Resolution 87-540, adopted its Capital Improvements Plan for the years 1987-92, in which are identified funds sufficient to initiate the construction of a debris landfill, as may be seen in Exhibit 3 to Ms. Rollins' Affidavit, and to construct such a landfill at a presently estimated cost of some \$10,000,000.

7. Based on all the information known to me as County Executive, it is my understanding that the Board of Supervisors is proceeding along a course which, if approved, will lead to the initiation of construction of one or more publicly owned debris landfills in Fiscal Year 1990, but no public debris landfill is presently in operation in the County. All debris

ROBERT S. NOE, JR.
County Executive

Subscribed and sworn to before me, the undersigned Notary Public, this 31st day of August, 1987.

Shelagh J. Lender
NOTARY PUBLIC

My Commission expires: October 14, 1989

30

V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT,)	
INC., et al.,)	
)	
Petitioners)	
)	
v.)	Chancery 23341
)	
BOARD OF COUNTY SUPERVISORS)	
OF PRINCE WILLIAM COUNTY,)	
VIRGINIA)	
)	
Defendant)	
)	

AFFIDAVIT OF DR. THOMAS J. GRIZZARD

COMMONWEALTH OF VIRGINIA;

COUNTY OF PRINCE WILLIAM, to-wit:

I, THOMAS J. GRIZZARD, having been duly sworn, do depose and state as follows:

1. My name is Dr. Thomas Grizzard, and I possess a Ph.D. from Virginia Polytechnic Institute in Blacksburg, Virginia, in the field of civil engineering.

2. I am the Director of the Occoquan Monitoring Lab and one of my principal tasks is to evaluate the environmental consequences of various human activities with respect to waters, both surface and ground.

3. I am familiar with the Board of Supervisors' prohibition of private debris landfills in the County by its action October 7, 1986.

4. I am of the general opinion, based upon my experience and study in the field of water quality protection, that solid

waste landfilling is potentially hazardous to the public health, safety and welfare, because of the difficulty in controlling the deposit of potentially hazardous materials in any fill. The manifestations of adverse environmental effects may not occur for many years, but the risk of pollutants entering our limited supplies of potable water remains significant.

5. I am also of the general opinion that landfilling is preferably done by public authority, since, among other reasons, it can select the best geological sites, generate the funds necessary to properly design, construct and monitor the facility, and will be present in perpetuity to correct any deficiencies or control any environmental degradation.



 THOMAS J. GRIZZARD, Ph.D.

Subscribed and sworn to before me, the undersigned Notary Public, this 1st day of September, 1987.



 NOTARY PUBLIC

My Commission expires: October 14, 1991.

A9:GrizzAff

V I R G I N I A:

- IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT,)	
INC., et al.,)	
)	
Petitioners)	
)	
v.)	Chancery 23341
)	
BOARD OF COUNTY SUPERVISORS)	
OF PRINCE WILLIAM COUNTY,)	
VIRGINIA)	
)	
Defendant)	
)	

AFFIDAVIT OF WILLIAM HEWETT

COMMONWEALTH OF VIRGINIA;

COUNTY OF PRINCE WILLIAM, to-wit:

WILLIAM HEWETT, Real Estate Appraiser in the Office of Assessments for Prince William County, after being duly sworn, made oath that the following statements are true and correct to the best of his knowledge and belief:

1. My name is William Hewett and I have been an appraiser in the Office of Assessments for Prince William County for many years.

2. At the request of the County Attorney, I conducted an evaluation of the properties owned by the Petitioners in the above-captioned cause, identified to me by Tax Map Numbers 158-01-10, -11, -13, -15, -15A and -15B, containing some 379 acres of land, to determine their approximate worth zoned in their present A-1 classification.

3. It is my opinion, based on standard information and methodology used by appraisers to determine the valuation of property, that the above-mentioned land was worth approximately \$1,700,000, as of March, 1987.

William H. Hewett
WILLIAM HEWETT

Subscribed and sworn to before me, the undersigned Notary Public, this 1st day of September, 1987.

Shirley J. Renda
NOTARY PUBLIC

My Commission expires: October 14, 1989.

A9:HewettAf

V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT,
INC., et al.,

Petitioners

v.

Chancery 23341

BOARD OF COUNTY SUPERVISORS
OF PRINCE WILLIAM COUNTY,
VIRGINIA

Defendant

AFFIDAVIT OF CATHERINE CLEMEN ROLLINS

STATE OF VIRGINIA;

COUNTY OF PRINCE WILLIAM, to-wit:

CATHERINE CLEMEN ROLLINS, Clerk to the Board of Supervisors, after being duly sworn, made oath that the following statements are true and correct to the best of her knowledge and belief:

1. My name is Catherine Clemen Rollins and I am the Clerk to the Board of County Supervisors, custodian of all official records.

2. Attached as Exhibit 1 is a true copy of Ordinance 86-147, adopted October 7, 1986, in a regular meeting of the Board of County Supervisors, amending portions of the Prince William County Zoning Ordinance to delete privately owned debris landfills as a use in the County. Also attached as Exhibit 1A is the Staff Report submitted to the Board for its consideration.

3. Attached as Exhibit 2 is a true copy of Resolution 87-222, of April 7, 1987, passed by the Board for the purpose of employing consulting engineers to assist in selection of debris landfill sites and for other purposes.

4. Attached as Exhibit 3 is a true copy of Resolution 87-540, adopting the FY 1988-92 County Capital Improvements Plan on July 14, 1987, together with Page 3 of that Plan showing capital planning for debris landfill purposes.

5. Attached as Exhibit 4 is a true copy of Resolution 86-941, of November 25, 1986, whereby the Board created a Citizen Advisory Committee to assist in the selection of potential debris landfill sites. I certify that further appointments beyond those shown were made subsequently, but that it was by this document that the Committee was established.

Catherine Clemen Rollins
CATHERINE CLEMEN ROLLINS
Clerk to the Board

Subscribed and sworn to before me, the undersigned Notary Public, this 31st day of August, 1987.

Annora J. Renda
NOTARY PUBLIC

My Commission expires: October 14, 1989

A8:CCRAffid

MOTION: Guiffre

October 7, 1986

SECOND: Pfitzner

Regular Meeting

ORD. No. 36-147

RE: ZONING TEXT AMENDMENT - PROHIBITION OF PRIVATELY OWNED
DEBRIS LANDFILLS

WHEREAS, on July 8, 1986, the Prince William Board of County Supervisors initiated a zoning text amendment which would prohibit the operation of privately owned and operated debris landfills; and

WHEREAS, the Prince William County Planning Commission held a public hearing, duly advertised in accordance with law, on September 3, 1986; and

WHEREAS, the Planning Commission adopted a resolution on September 3, 1986 recommending adoption of the zoning text amendment; and

WHEREAS, the Prince William Board of County Supervisors held a public hearing on October 7, 1986, duly advertised in accordance with law, on the text amendment as recommended by the Planning Commission, and interested citizens were heard;

NOW, THEREFORE, BE IT ORDAINED that the Prince William Board of County Supervisors does hereby adopt the zoning text amendments which amends Sections 32-301.12(17), 32-403.12(3) and 32-403.32(3) of the Prince William County Zoning Ordinance.

VOTE:

AYES: Guiffre, Jenkins, Kidwell, King, Pfitzner, Reading, Seefeldt

NAYS: None

ABSENT FROM VOTE: None

ABSENT FROM MEETING: None

FOR INFORMATION:

Planning Director

CERTIFIED COPY:

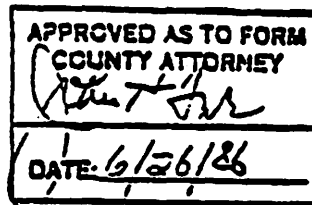
Catherine Clement-Rollins
CLERK TO THE BOARD

Amend Section 32-403.12 by deleting in its entirety §(3)

~~---(3)---Debris-landfills, subject to the standards set forth in Section 301-15(17) of this Chapter~~

Amend Section 32-403.32 by deleting in its entirety §(3)

~~---(3)---Debris-landfills, subject to the standards set forth in Section 301-15(17) of this Chapter~~





COUNTY OF PRINCE WILLIAM

1 County Complex Court, Prince William, Virginia 22192-9201
(703) 335-6600 Metro 611-1703

COUNTY EXECUTIVE
Robert S. Noe, Jr.

BOARD OF COUNTY SUPERVISORS
Edwin C. King, Chairman
Joseph D. Reading, Vice Chairman
Guy A. Guiffre
John D. Jenkins
Donald E. Kidwell
G. Richard Pfitzner
Kathleen K. Seefeldt

July 3, 1986

To: County Executive
From: Deputy County Executive-CB
Re: Debris Landfills

Purpose

To provide information requested by the Board of County Supervisors on debris landfills and on-site debris disposal.

Action Requested

Review and forward to the Board of County Supervisors.

Timing

The Board requested information for its July 8 meeting.

Potential Board Actions

1. Initiate zoning text amendment to prohibit operation of privately-owned debris landfills. (Appendix B, Yellow)
2. Adopt resolution authorizing RFP for consultant assistance to identify specific sites for a publicly owned and operated landfill(s) and to develop a financial plan for implementation of the landfill. (Appendix C, Pink)
3. Initiate amendment to the Zoning Ordinance and the Design and Construction Standards Manual to provide for individual on-site debris disposal areas. (Appendix D, Green)
4. Initiate amendment to the Zoning Ordinance and the Design and Construction Standards Manual to provide for "mini-regional" debris disposal areas. (Appendix E, White)
5. Adopt the solid waste management plan currently in effect for the sanitary landfill and expand its scope to include debris disposal as well. (Staff will prepare appropriate agenda item)
6. Staff will provide additional legal and financial information on the possibility of a mobile incinerator system, owned and operated by the County.

July 3, 1986

Page Two

Fiscal Implications

See discussion section.

Discussion

At its May 13 meeting, the Board of County Supervisors asked staff to investigate alternatives for on-site debris disposal and to continue investigation of debris landfills. In addition, the Board asked several legal and technical questions about various alternatives. Supervisor Guiffre directed staff to prepare an amendment to the Zoning Ordinance prohibiting private debris landfills in all zoning districts.

1. Debris Landfills

a. Legal Issues

Appendix A (Blue) is an executive summary and detailed memorandum from the County Attorney on legal issues concerning regulation of and potential liability with respect to debris landfills. In summary, the County Attorney concluded the following:

- o The potential long-term County costs of a landfill are marginally greater if it is privately rather than publicly owned and operated. The County could presumably exercise greater control over what is deposited in a public landfill, thereby reducing the likelihood of pollution. Presumably the County would feel a moral and political, but not a legal, obligation to correct any pollution caused at a private landfill.

- o The Board may treat a special use permit for a debris landfill in the same manner as any other special use permit application. Protection of the Occoquan Reservoir may be a factor in a determination to deny an application.

- o The County may prohibit all private landfills provided that an alternate means of disposing the debris is available, although not necessarily in Prince William County. However, the County probably cannot exclude debris landfills from all zoning districts, but may prohibit all private landfilling.

- o County cannot prohibit importation of solid waste from other states, but may be able to prohibit it from other Virginia jurisdictions.

- o County cannot exercise "flow control" over debris or preclude dumping in properly established private landfills.

July 3, 1986

Page Three

o Revenue bonds are an option to construct a debris landfill. The financial feasibility of revenue bonds would depend upon the specific project and may require flow control authority.

o The County can liberalize rules for on-site debris disposal unilaterally to the extent that such disposal is not regulated by State statute or regulations. It can modify open air burning rules only with concurrence of the State Air Pollution Control Board.

The County Attorney also recommended that the Board formally adopt the solid waste management plan currently in effect for the sanitary landfill prepared in 1982 and expand its scope to include debris disposal as well. (The Board received a summary of the 1982 plan but did not formally adopt it). The staff will prepare the appropriate plan amendment and resolution.

b. Zoning Text Amendment to Ban Private Landfills

Appendix B (Yellow) is the Zoning Text Amendment to ban private landfills, as requested by Supervisor Guiffre.

c. Publicly-Owned Landfills

The Board directed staff to continue investigation of debris landfills in the eastern and western portions of the County. To this end, Appendix C (Pink) provides a draft resolution to authorize an RFP for a consultant to assist in identifying potential sites. The resolution is structured to allow the Board to focus the investigation of potential landfill sites in the following ways:

- (1) Include the entire County.
- (2) Exclude the Occoquan watershed.
- (3) Include only the western portion of the County, on the assumption that the Potomac landfill will serve the eastern end.

In addition, the RFP would request the consultant to review the capital and operating cost projections prepared by the Department of Public Works and recommend financing alternatives.

At its work session, the Board indicated some interest in involving the Service Authority in debris landfilling. As indicated in the County Attorney's memorandum, Appendix A, Page 15, the Service Authority has been empowered by both the Code of Virginia and the Board of County Supervisors to operate a "garbage and refuse collection and disposal system," which would include a

July 3, 1986
Page Four

debris landfill. If the Service Authority may potentially be the owner/operator of a debris landfill, it should participate in this RFP process.

2. On-Site Debris Disposal-Burial

Appendix D (Green) provides appropriate language to amend the Zoning Ordinance and the Design and Construction Standards Manual to allow on-lot burial of debris generated by that site. The developer would be required to clearly mark the location of such site on the recorded plat to apprise future purchasers of its existence. Should the Board pursue this alternative, a fee should be charged for County inspectors to provide some monitoring of these on-lot burial sites.

As indicated in Appendix D, staff recommends that the Board not proceed with this alternative. The comments made by various agencies when this issue was raised last fall by the development community are also attached. The major reasons for not recommending on-site burial are as follows:

- o The potential number of on-site burial locations is large, and the County could not effectively inspect/monitor them to ensure that inappropriate debris is not buried and that the fills are adequately compacted.

- o On-site burial could result in settlement, sinkholes, and underground fires. Large scale, unsupervised burial could present significant future problems for County residents.

- o Once the developer has finished, any problems resulting from the on-site burial would be the responsibility of the homeowners and/or fall to the County when private assistance is unavailable.

- o On well and septic lots, the debris often encroaches into the established drainfield sites and wells.

- o The sites often emit organic ooze and/or anaerobic liquids and malodorous gases.

- o The debris sites limit the future owners' potential for development of the property, e.g. pools, garages, and outbuildings.

July 3, 1986
Page Five

While on-site disposal is now prohibited, in reality it still occurs. This practice has caused numerous problems for homeowners and the County. On-site disposal would be virtually impossible to monitor and control.

3. On-Site Disposal-Burning

The Board indicated an interest in encouraging the burning of debris. While a permit is required from the Fire Marshal's Office, the regulations generally reference regulations of the State Air Pollution Control Board (APCB) which also must issue a permit. The remainder of this section summarizes information Ms. Pandak obtained from Bill Miller, an engineer with the APCB, and Andy Gates, the Enforcement Officer for Prince William County.

The regulations applicable to open-air burning of land clearing debris are found in Rule 4-40 of Part IV of the Regulations for the Control and Abatement of Air Pollution, effective January 1, 1985. These standards govern open burning generally and burning using open pit incinerators, conical burners and special incineration devices, more commonly known as air curtain destructors (A.C.D.). This latter device is the preferred mechanism for large-scale burning of land clearing debris in development areas.

In addition to the State's requirements, which include minimization of the amount of material that is burned by removal of pulp wood, saw logs and firewood, restriction of material burned to that generated on-site, supervision of the burning at all times, and burning only when prevailing winds are away from a "build-up area," the regulations also require that all burning be accomplished at least 500 feet from any occupied building. The County ordinance requires a distance of 750 feet. With the permit is distributed a set of additional requirements which include a reminder that the Virginia Forest Fire Law limits hours of burning during certain times and reference the County ordinance.

Ms. Pandak was advised that air curtain destructors are favored because the intense heat diminishes the amount of smoke generated by such burning. Important to the efficient operation of such a device is a controlled flow of debris and cleaning of the pits before each burning operation occurs to avoid the disbursement of fly ash. The Air Pollution Control Board will not

July 3, 1986.

Page Six

permit such devices to be operated on single lots. The \$3,000-\$4,000 capital cost for installation of the device discourages use by small generators.

Mr. Miller and Mr. Gates were reluctant to have open burning encouraged, apparently because it would further stretch the resources of the office in supervising permits. Currently only one inspection of the completed facility is done in the absence of complaints. Mr. Miller indicated that if too many applications were received, they might be denied simply because of the inability of his office to monitor them. Mr. Gates estimated that generally five to six permits for new sites were issued per month during the heavy construction season, although he issued 12 in June. He estimates that those developers for whom the option to burn land-clearing debris on site with A.C.D.'s is economical are doing so. The smallest area for which he has issued a permit in recent memory is four acres.

A potential alternative needing further research is for the County to own and operate a mobile incinerator system for small scale debris disposal which can be hauled by truck from site to site. Due to the relatively high cost and smaller volume capacity, these units are not normally used for disposing land clearing debris.

The State Air Pollution Control Board has indicated that if the County were to own and operate such a system, a single permit would be required. However, all requirements governing open air burning, such as continuous monitoring, would still apply. The County Attorney's Office expressed some concern about County participation in such a program due to potential equal protection and anti-trust claims. The staff will supply the Board with additional legal and financial information about this alternative.

4. Mini-Regional Debris Landfills

As an alternative to individual on-lot disposal of debris, the staff has prepared a Zoning Text Amendment to allow mini-regional debris landfills (Appendix E, White). The concept is to locate a small debris landfill within large projects that would serve not only that development but smaller surrounding developments within close proximity. The advantages of these mini-regional landfills are:

- o Convenience to large areas being developed, thereby reducing truck traffic to the large debris landfills.

July 3, 1986 -
Page Seven

o The limited number of potential landfills would make County enforcement and inspection more feasible.

To effectively implement this alternative, staff recommends a requirement that bonds be posted indefinitely for the operation, closure and any potential pollution liability from these sites. Developers would also have to provide an acceptable arrangement for the permanent ownership and maintenance of these sites before they would be authorized in the development plans. The County should also charge a fee to fund additional County staff to inspect these landfills during operation and closure.

This alternative is essentially the same as permitting private regional debris landfills, only on a smaller scale. Therefore, the problems previously described with respect to private fills are not restated here.

Depending on their size, these mini-regional fills will be subject to the new permitting and regulatory processes the State is currently drafting. The existence of small privately operated landfills would significantly impact the financial viability of a publicly owned regional landfill. While these two courses of action are not mutually exclusive, the County may have difficulty successfully pursuing both.

5. Other Disposal Options

a. Use of Quarry as a Debris Landfill

Staff is not aware of any large scale abandoned quarries in the County which are suitable for a debris landfill site. Each potential site must be evaluated individually, however, the following potential problems can exist if a site of this nature is to be utilized for debris disposal:

(1) Since an abandoned quarry has been excavated into the rock layers, a significant liner and leachate collection system must be installed to protect the groundwater. Fractures in the rock would also create a potential for rapid groundwater contamination. If the depth of the excavation is significant, the water table may be too high to safely dispose of debris, even with a sufficient liner.

(2) Grading/site preparation of an abandoned rock quarry would probably require significant rock excavation. The amount would depend upon the existing shape, depth, slopes, etc. of the quarry. In addition, most quarries utilized off-road vehicles for hauling within the site which allows the use of steep grades. In order to provide access to the fill area for debris trucks major road building may be required. 46

July 3, 1986

Page Eight

(3) At most quarry sites, material required for daily cover and closure of the landfill would probably not be available on site, requiring hauling of fill material at a significant cost.

b. Use of Resource Recovery Facility to Process Debris

The resource recovery studies, currently being implemented by the County, are focusing primarily on the mass burn technology. The mass burn technology is the most widely used and successful technology for resource recovery facilities. The two limiting factors in accepting waste into a mass burn facility are size and combustibility.

The stumps and logs generated from land clearing are generally too large to process in a mass burn facility. Noncombustible dirt and stones mixed in with the stumps and logs can also greatly reduce the efficiency of the facility and could cause physical damage to the systems. Other noncombustible debris generated from construction sites such as brick, concrete, paint cans, shingles etc. would also be unacceptable at a mass burn facility.

Because of these factors, major pretreatment of the debris, such as sorting, cleaning and cutting, would be required before accepting this debris into a mass burn facility. The costs of pretreatment combined with the relatively high tipping fees of a facility of this type are prohibitive. Other methods such as recycling logs for firewood, chipping, etc., are more feasible methods both practically and economically.

Zoning Ordinance Text Amendment

Prince William County



Amendment to: prohibit the operation of any privately owned debris
 landfill in the County.

ORDINANCE

MOTION:

RES. NO.

SECOND:

REGULAR MEETING

DATE:

RE: ZONING TEXT AMENDMENT - PROHIBITION OF PRIVATELY OWNED
DEBRIS LANDFILLS

WHEREAS, on July 8, 1986, the Prince William Board of County Supervisors initiated a zoning text amendment which would prohibit the operation of privately owned and operated debris landfills; and

WHEREAS, the Prince William County Planning Commission held a public hearing, duly advertised in accordance with law, on September 3, 1986; and

WHEREAS, the Planning Commission adopted a resolution on September 3, 1986 recommending adoption of the zoning text amendment; and

WHEREAS, the Prince William Board of County Supervisors held a public hearing on October 7, 1986, duly advertised in accordance with law, on the text amendment as recommended by the Planning Commission, and interested citizens were heard;

NOW, THEREFORE, BE IT ORDAINED that the Prince William Board of County Supervisors does hereby adopt/does not adopt the zoning text amendments which amends Sections 32-301.12(17), 32-403.12(3) and 32-403.32(3) of the Prince William County Zoning Ordinance.

VOTE:

AYES:

NAYS:

ABSENT DURING VOTE:

ABSENT FROM MEETING:

**** Certified Copy ****

CLERK TO THE BOARD

/N8



COUNTY OF PRINCE WILLIAM

1 County Complex Court, Prince William, Virginia 22192-9201
(703) 335-6830 Metro 631-1703

PLANNING
OFFICE

Roger W. Snyder
Director

To: County Executive

Date: September 26, 1986

From: Planning Director *PWS*

Subject: Zoning Text
Amendment

Routing: Deputy County Executive - Bawcum *CI*

AGENDA

BOARD OF COUNTY SUPERVISORS

OCTOBER 7, 1986

TITLE: Prohibition of privately owned debris landfills.

ISSUE: Whether to amend the text of the Zoning Ordinance to prohibit the operation of privately owned debris landfills.

RECOMMENDATION: • Planning Office - ADOPTION
 • Planning Commission - ADOPTION

FISCAL IMPLICATION: Not applicable.

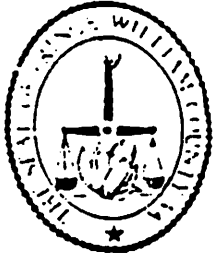
BACKGROUND: See attached Staff Report.

STAFF: Zoning Administrator

PRESENTATION TIME: 10 Minutes

DOCUMENTATION ATTACHED

- A. Proposed Ordinance
- B. Planning Commission Resolution
- C. Staff Report



COUNTY OF PRINCE WILLIAM

1 County Complex Court, Prince William, Virginia 22192-9201
(703) 335-6838 Metro 531-1703, Ext. 6100

PLANNING DIRECTOR
Roger W. Snyder

PLANNING COMMISSION

Terrence Spellane, Chairman
Frank R. Milligan, Vice Chairman
Benjamin F. Chavez
Harold H. Dutton, Jr.
George D. Gray, Jr.
Gilbert A. LeKander
Ella Shannon

MOTION: MILLIGAN

SECOND: DUTTON

RE: Zoning Text Amendment - Debris Landfills - (ADOPTED)

RES. NO. 86-212
Regular Meeting
September 3, 1986

WHEREAS, this is a proposal to amend the text of the zoning ordinance by amending the following sections: Section 32-301.12(17), Special Uses, Section 32-403.12(3), Special Uses, and Section 32-403.32(3), Special Uses, to prohibit privately owned debris landfills; and

WHEREAS, the Prince William County Planning Commission ordered, duly advertised and held a public hearing on September 3, 1986, at which time public comment was received and the draft amendment considered;

NOW, THEREFORE, BE IT RESOLVED that the Prince William County Planning Commission does hereby recommend adoption of the Debris Landfills zoning text amendment as written.

VOTE:

AYES: MILLIGAN, DUTTON, CHAVEZ, GRAY, LEKANDER, SHANNON, SPELLANE

A TRUE COPY

Sally J. Borman
Secretary to the
Planning Commission



COUNTY OF PRINCE WILLIAM

1 County Complex Court, Prince William, Virginia 22192-9291
(703) 335-6830 Metro 631-1703

PLANNING
OFFICE

September 26, 1986

Roger W. Snyder
Director

STAFF REPORT

Zoning Text Amendment - Prohibition of Privately Owned Debris Landfills

Board of County Supervisors Public Hearing Date: October 7, 1986

BACKGROUND

On July 8, 1986, the Board of County Supervisors adopted a resolution of intent to amend the Zoning Ordinance designed to delete provisions for privately owned debris landfills.

Under current County regulations, privately owned debris landfills are permitted in the A-1, M-1 and M/T zoning districts with a special use permit. Publicly owned landfills of any type, either sanitary or debris are permitted in all zoning districts upon a 456 Review by the Planning Commission and approval of a site plan.

The staff has drafted proposed language that would prohibit the private operation of debris landfills in the A-1, M-1 and M/T zoning districts. A copy of these amendments are contained in Appendix "A".

On September 3, 1986, the Planning Commission recommended adoption of the proposed amendments.

PROPOSAL OVERVIEW

The staff has reviewed this issue and has concluded that debris landfill facilities when maintained in accordance with applicable regulations concerning the design, construction and operation of such a facility can be safely operated. However, landfilling that is not properly regulated and monitored can produce on and off-site pollution problems such as leachate from the site into ground and surface waters and air pollution resulting from fires. The on-going control of any landfill site is the most crucial factor contributing to its safe operation. The staff, after examination of the issues involved and the experiences of other jurisdictions, is of the opinion that the degree of control that the County may exercise over its own facilities is sufficiently greater than that which is likely at a privately operated landfill, that the staff endorses the prohibition of privately owned debris landfills.

IMPACT

The adoption of the proposed amendment would have the following impact.

- Prohibit the operation of any privately owned debris landfill in the County.

RECOMMENDATION

Adoption.

Amended Section 11-701.12 by deleting in its entirety 4(17)

(17) - permits - landfills - subject to the following provisions:

(a) - The Director of Planning shall review each application for a landfill and shall furnish a report to the Planning Commission and Board of Supervisors.

(b) - No special-use permit for a landfill shall be approved unless the landfill has been approved by the Director of Public Works and the Bureau of Solid Waste and Vector Control with respect to the suitability of the site for such use.

(c) - Every permit for a landfill shall be deemed to incorporate as specific conditions all other provisions of law related to such use.

(d) - Upon completion of operations, the land shall be left in a safe condition and in such a state that it can be used for development of a use permitted in the district in which such land is located. Further, sufficient drainage improvements shall be provided so as to prevent water pockets or erosion, and such improvements shall be so designed that both natural and storm-water leaves the entire property at the original natural drainage pattern, and the area draining to any one point is not increased.

(e) - Except for improvements necessary for the operation of a landfill, no improvements shall be constructed in or upon any landfill for a period of twenty (20) years after the termination of the landfill operation without the prior approval of the Director of Public Works and the zoning Administrator. No such approval shall be granted unless the applicant demonstrates with sufficient technical evidence that:

(1) - Any residual post-construction settlement will not affect the appearance or structural integrity of the proposed improvement; and

(2) - The nature and extent of corrosion-producing properties, the generation and escape of combustible gases and potential fire hazards of the constituent material, considering its state of decomposition, have been provided for adequately, and will not create an unsafe or hazardous condition in or around any of said proposed improvements.

(f) - There shall be an annual inspection of each landfill by the Director of Public Works and said Director shall make a report of his findings to the Board of Supervisors.

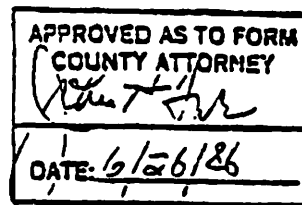
(g) - Every landfill shall be subject to such additional regulations as may be adopted by the Board of Supervisors. The Board may limit the type of debris and materials to be deposited and may require a degree of soil compaction adequate to support ultimate use of the property in accordance with the adopted comprehensive plan.

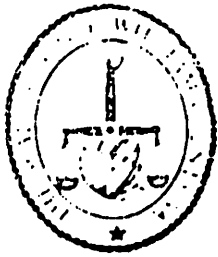
Amend Section 32-403.12 by deleting in its entirety # (3),

--(3)-Georgas-lands-which-are-subject-to-the-standards-set-forth-in-Section
361-22(17)-of-the-Chapter

Amend Section 32-403.32 by deleting in its entirety # (3)

--(3)-Georgas-lands-which-are-subject-to-the-standards-set-forth-in-Section
361-22(17)-of-the-Chapter





COUNTY OF PRINCE WILLIAM

County Offices - 10000 Lee Highway, Suite 100, Fairfax, VA 22031
(703) 691-6000

John H. Foote
County Attorney

June 27, 1986

TO: BOARD OF COUNTY SUPERVISORS

FROM: JOHN H. FOOTE *[Signature]*
County Attorney

RE: SUMMARY OF ATTACHED MEMORANDUM CONCERNING
POTENTIAL LIABILITY ASSOCIATED WITH DEBRIS
AND OTHER LANDFILLS

Attached to this is a lengthy memorandum which sets forth in some detail our analysis of several of the questions which have been posed with respect to the operation of public or private debris and sanitary landfills. This is a summary of the principal points of that memorandum.

1. We believe that the potential for public expenditure for pollution control and abatement is marginally greater to the County if a landfill is privately, rather than publicly, owned. I believe that the degree of control that the public may exercise over its own facilities is sufficiently greater than that which is likely at a private landfill to warrant such a judgment, and control over what is deposited in a landfill is absolutely crucial to the maintenance of a pollution-free environment.

2. A special use permit application for a debris landfill may be denied on the same bases that any special use permit may be denied, that is, where the factual grounds for denial render the Board's legislative determination "fairly debatable." This rests upon the thoroughness with which the factual underpinnings for denial are developed, both at the time of decision and in subsequent litigation. The location of a landfill in the Occoquan watershed is relevant to that determination. Denial of any special use permit is, in our judgment, always more difficult to defend than denials of rezonings, but not impossible where the facts warrant.

3. We believe that the County may lawfully prohibit all private landfills within the County, provided that

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other arrangement is made for local management of solid waste. In this regard, the County probably cannot exclude all debris landfills from all zoning districts but, assuming there is a debris landfill reasonably available, may prohibit all private landfilling.

4. We do not believe that a ban on privately owned landfills would constitute a violation of federal antitrust law. We believe that operation of a public debris landfill in all likelihood will not violate the antitrust law.

5. We do not believe that the County can prohibit the importation of solid waste produced in other states, but that it may be possible to ban such dumping from other Virginia localities.

6. The County does not have the power to exercise "flow control" over debris generated within the County and thus may not preclude dumping in private landfills that may be properly established.

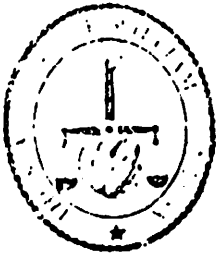
7. The County can use revenue bonds to pay the cost of constructing a public facility.

8. The County can liberalize its rules for on-site construction dumping and, assuming that the State Air Pollution Control Board concurs, may liberalize open air burning rules.

9. The Commonwealth is presently considering detailed regulations with respect to landfill construction and operation which may pre-empt local regulation overall but locational issues. These regulations have some deficiencies, but are, on the whole, good.

10. Finally, we believe the County should formally adopt a solid waste management plan, identified as such, which addresses the near-and long-term problems of solid waste management, as required by §10-274 of the Virginia Code as it will become effective July 1, 1986. While the County does have a detailed sanitary landfill plan, it does not presently address debris landfilling in any way.

cc: Robert S. Noe, Jr.
Connie Bawcum
Dan Lyeon
Nimet ElAlaily
Roger Snyder
Virginia Department of Health



COUNTY OF PRINCE WILLIAM

OFFICE OF THE COUNTY ATTORNEY
1000 COMMONWEALTH AVENUE, SUITE 100
FALLS CHURCH, VIRGINIA 22044

John H. Foote
County Attorney

June 27, 1986

TO: BOARD OF COUNTY SUPERVISORS

FROM: JOHN H. FOOTE *[Signature]*
County Attorney

RE: POTENTIAL LIABILITY ASSOCIATED WITH THE OPERATION
OF DEBRIS LANDFILLS AND OTHER QUESTIONS

I. THE SCOPE OF THE PROBLEM

The question what to do with waste, solid and otherwise, has occupied an increasing portion of the Board's attention for several years, with the construction of UOSA and the Mooney Plant, the recognition of the limited life of the sanitary landfill, and the possible construction of a resource recovery facility. There is a rising awareness on the federal, state, and local levels that disposal of solid wastes can create substantial risks of pollution if not done properly, and the Board has asked that the staff perform a comprehensive analysis of practical and legal issues which surround solid waste disposal. This memorandum addresses the legal issues which have been presented to the County Attorney to date.

II. IS THERE A GREATER POTENTIAL LIABILITY TO THE COUNTY IF A DEBRIS LANDFILL IS PUBLICLY OR PRIVATELY OWNED AND OPERATED?¹

In our view, there is a somewhat greater risk to the public that public monies will have to be spent if a landfill is privately owned, even though there are, indeed, serious risks inherent in public ownership as well. These

¹ There is actually a preliminary question whether state enabling legislation permits a county to operate a debris landfill, as opposed to a sanitary landfill, as we discuss later in this memorandum, it is our view that both the County, pursuant to §15.1-282, and the Service Authority, pursuant to §15.1-1241 of the Code, do have sufficient enabling authority to undertake the task if it is the Board's wish.

risks are, of course, in addition to the large capital costs of construction.

A. Sources of potential liability from public or private landfilling.

Sound operation of a landfill of any type, when done consistently with applicable regulations concerning the design, construction, and operation of such a facility, can be safe. Many such facilities operate without any significant danger to the environment, including the County's own sanitary landfill in Independent Hill. Such operation does not, by itself, create liability on the part of any person or agency. It is generally when illegal or otherwise unpermitted substances are deposited in a landfill and may or do pollute the land, air, or water, and generate a public health and safety risk, that liabilities become significant.

Landfilling that is not aggressively and properly regulated and monitored can produce intentional or unanticipated on- and off-site pollution problems. Pollution stemming from the operation of a landfill of any type can constitute a violation of any number of state and federal laws. It can violate:

- ° the Virginia Water Control Law, §62.1-44.2, et seq. of the Virginia Code;

- ° the new Virginia Waste Management Act, §10-263, et seq. of the Code, to be effective July 1, 1986;

- ° the federal Clean Water Act, 33 U.S.C. 1251 et seq.;

- ° the federal Clean Air Act, 42 U.S.C. 1857, et seq.;

- ° the federal Resource Conservation and Recovery Act, 42 U.S.C. 6901, et seq., (known as REC-ra);

- ° the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, et seq. (known as CERCLA, and more colloquially as "Superfund"), and

the Nuclear Waste Policy Act, 42 U.S.C.
10101 et seq.²

To say that there are numerous laws which govern landfilling practices, however, does not answer the question whether there is public risk from landfills. Much, if not all, depends on the rigor and thoroughness of regulation, and the efficacy of enforcement.

B. RCRA is the principal federal statute dealing with solid waste management practices.

Pollution of the air and water, from any number of sources and under the foregoing laws, may be prosecuted civilly and criminally. The principal statute among them with respect to landfilling operations, however, is the Resource Conservation and Recovery Act, and, to the extent that the State has proposed regulations to implement RCRA, Virginia's new Waste Management Act.

RCRA is designed primarily to regulate the disposal of hazardous, non-nuclear materials in safe and well run facilities subject to extensive federal regulation, and it is, therefore, not directed at the construction and operation of "ordinary" landfills. It does establish financial and technical assistance programs for localities, however, to aid them in dealing with solid waste management, and federal guidelines for landfill permitting have been adopted.

RCRA makes it a crime to dispose of hazardous materials in a landfill not authorized to receive them, and, together with the other laws mentioned, makes any resulting pollution a crime. For example, a landfill operator who permits unauthorized landfilling under the law may be assessed civil or criminal penalties of up to \$25,000 per day. The current operator of a landfill, even if not the "guilty" party, can be made to pay for the costs of cleanup at a RCRA-covered fill. These costs can be very high.

² There may be yet other statutes of some importance, such as the federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135, et seq., and the Safe Drinking Water Act, 42 U.S.C. 300f, et seq., but those cited in the text appear the most likely sources of potential liability.

Polluters may, of course, be long gone when pollutant are discovered. Therefore, among the most significant aspects of RCRA is a requirement that landfill operators subject to its provisions post substantial monetary guarantees available to public authorities in the event that pollution is discovered during or after operation of the landfill.

Previously, these guarantees were only required for RCRA-regulated landfills, and not for "ordinary" sanitary landfills. The General Assembly has, however, made substantial changes in this in order to implement local obligations under RCRA, for the Virginia Waste Management Act will provide for the promulgation of regulations to insure that any costs associated with protection of the public from the consequences of abandonment of a landfill by private entrepreneurs will be covered by bonds and other guarantees which must be posted as a condition of a landfill permit. §10-273. No such regulations are yet in effect, and the current draft regulations being circulated for review do not contain any such provisions.

C. It is our assessment that there is somewhat greater risk of operation of a landfill by private business than by public authority.

Rain and surface waters moving through landfills, and general degradation of filled materials, create leachate, solutions containing whatever it is that is in the landfill. When there are hazardous or noxious substances in the fill, the leachate carries the problem off-site, into ground and surface waters. Occasionally, a landfill fire will cause distribution of pollutants through the air.

Substances which may pollute leachate may be in virtually any landfill. Indeed, they may contain hazardous substances simply because they were placed there before anyone understood the hazards (and many common household products routinely landfilled today contain such hazardous substances). However, the most serious environmental problems apparently arise from unauthorized dumping of hazardous substances in large quantities, usually the 55 gallon drums in which the materials are generated, and which are either concealed in a larger load of permitted materials, or whose dumping is simply "bought."

The problem is control. Because it is relatively easy to spot major polluters, if the person hired to inspect a landfill does his or her job honestly it is possible to

secure the environment from significant pollution. It may prove equally difficult to insure the integrity of inspections and landfill operation at either public or private landfills. Notwithstanding the commonality of the control problem to landfills under any ownership, it is possible to draw some conclusions about the issues raised.

° First, unless the public has taken a substantial role with regard to daily operation, a locality is not obligated by any of the statutes above to undertake corrective action, nor is it liable civilly or criminally, for the improper operation of a purely private landfill.

Where pollution has occurred at privately operated landfills, efforts have been made to assign liability to public entities, but so far as we are aware, no case has been decided against the state and local actors. There may well be forces which drive voluntary intervention, however. To the extent that the locality assumes responsibility for operation or maintenance of a private landfill, including the extent to which it posts full time personnel for the purpose of insuring that only lawful wastes are deposited in the fill, its potential for liability increases apace. Merely monitoring landfill operation, and conducting frequent inspections, should not of itself generate direct local liability.

° If the locality itself operates the fill, of course, the potential for liability is commensurate with the skill and diligence of the people in charge.

° The potential for liability to someone from the operation of any landfill is reasonably high, since it is difficult to insure that only permitted substances are deposited in the fill. In our view, however, this risk is at least marginally greater when the landfill is privately owned and operated, even if there is diligent public inspection of all phases of the facility. While comprehensive inspection can reduce the risks, it cannot remove them as completely as can operation under wholly public auspices. This is so, we think, because the locality is better financed than most private operations, and under present law the maintenance of a landfill of any type is a very costly business. The up-front costs of proper design and construction, as well as subsequent operation, may be borne with less pain by public authority. We also believe that public and private operators have different motives: the private entrepreneur, of course, seeks return on his investment, while the public

has no obligation but the public trust. While there is no certainty that a private operator will fail to discharge his trust as well as the public, the general public confidence in a public operation is a factor not to be discounted.

° With respect to the public's assurance that pollution-causing practices will be avoided, or that abatement of actual pollution will in fact occur, we must note our experience that a public agency which is alleged to have caused pollution is a stationary target for federal and state regulatory authorities. These regulators are woefully slow to move against private violators but move with the swiftness of righteousness itself against local governments, because they know where to find them and because they know or assume that the governments will raise the funds necessary to comply with anti-pollution control orders. While the Health Department presently professes that this is not the case with landfills, we foresee a day, once comprehensive regulation is in place, when the general rule stated here will hold fast.

° The present lack of regulations providing fund guarantees for pollution control and abatement on the part of private entrepreneurs is troublesome. Should pollution occur it is possible that the operator would disappear, or, as is equally likely, turn out not to have the necessary resources to clean the mess up, or their resources are not adequate to the problems found. Even with the new provisions of the Waste Management Act for "abandonment" guarantees, there is no certain funding source for pollution abatement where a private polluter does not abandon the facility, but simply can't afford a proper clean up. Absent adequate resources on the part of the operator to remedy the pollution, state and local authorities faced with the reality of pollution in their environment, would be forced on either their own resources, or where the problem qualifies, on Superfund. The latter, while more generously funded than in past years, will not be readily available to pay for small to middling clean ups from new sources, since so many old and potentially more dangerous sites have already been identified.

° As we note, the risk of direct monetary liability on the part of the County is plainly greater if the Board owns and operates a landfill. However, the risk of actual pollution is surely as significant as money, and we view the risk of actual pollution to be greater when a fill is privately owned. When one adds to this the possibility

that the public would have to assume fiscal responsibilities from the failure of at least some landfill operations, the "benefit" of insulation from direct liability by private operation seems more ephemeral than real.

III. CAN THE COUNTY PROHIBIT ALL PRIVATELY OWNED LANDFILL OPERATIONS?

The Virginia Waste Management Act, cited above, requires each locality to have a local solid waste management plan, unless and until it is made part of a regional plan by the Governor. §10-274. Within the limits of this requirement for local solid waste management, we believe that the County can bar all privately owned landfills, if proper plan has been made for the disposal of solid wastes generated within the County.

Any legislative determination to forbid private fills would be subject to challenge on "customary" grounds, i.e., that the Board acted arbitrarily and capriciously (and that the decision was not "fairly debatable") and that the exclusion of private fills constitutes a violation of the equal protection, due process, and commerce clause of the state and federal constitutions. But we believe that a strong case can be made against any challenge.

VI. ARE THERE ANY ANTITRUST IMPLICATIONS TO A COUNTY BAN ON PRIVATE LANDFILLS?

A. Complete ban on landfills.

We see no antitrust risks in a complete ban. Refusal to permit debris landfills pursuant to a public purpose will not constitute an antitrust violation, because no monopoly is thus created.

B. Operation of a public landfill, with a ban on all private fills.

We do not think that there are antitrust problems with restriction to publicly owned fills.

Banning private landfills, and establishing a public debris landfill, would clearly result in a displacement of competition in the private sector by a publicly owned profit-generating operation, but where such limitation on competition

can be shown to be based on "state action," it will have antitrust immunity. Although there is no case law in Virginia on this precise point, federal courts have held that where state statutes comprehensively require counties to provide for waste disposal, operation of a public sanitary landfill is within the "state action" exemption to the antitrust laws. E.g., L&H Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 317 (8th Cir. 1985); Central Iowa Refuse System, Inc. v. Des Moines Metropolitan Area Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983).

Under §15.1-282 of the Code, this County is authorized to take certain actions necessary for itself to provide for waste management facilities including the lease or purchase of property, and, as noted, §10-274 requires all localities in Virginia to develop solid waste management plans. The enabling legislation for Arlington and Alexandria to control the disposal of waste clearly establishes state action protection from antitrust violations as to those two jurisdictions, expressly recognizing that "[i]t has been the continuing policy of the Commonwealth to authorize each county, city or town to displace or limit competition in the area of garbage, trash, or refuse collection" §15.1-28.01. We believe that this language, with other statutory law and administrative policies, supports the argument that landfill operation is properly "state action."

C. Can the County exclude all debris landfills from all zoning districts?

The County probably cannot forbid all debris landfills from all districts, if no reasonable plan for managing debris has been adopted. We emphasize, however, that a complete ban on private landfills is probably legal, under the circumstances described in this memorandum. While the County can generally exclude a variety of uses from all zoning districts and not run afoul of the zoning enabling legislation or the equal protection or due process clauses of state and federal constitutions, waste disposal facilities must be treated somewhat differently because of the Waste Management Act mentioned above. §10-274.

Virginia localities do not appear to have the power completely to exclude all solid waste disposal within their boundaries or by their citizens, for the State appears to have pre-empted the field at least as to the power to ban landfills entirely. (We note elsewhere that there is a strong argument that the Commonwealth has pre-empted the

entire area of landfill regulation, with the exception of issues of location governed by local land use laws). It has retained the power ultimately to determine whether a person operates a facility for the disposal of solid waste by requiring that a state permit be obtained, and more importantly, the Act specifically requires localities to "be responsible for implementation of a local solid waste management plan which meets such standards as may be prescribed by the Department [of Waste Management]", unless and until the Governor makes them subject to a regional solid waste management plan. This language is tracked in the current and proposed solid waste regulations.

It would appear then, that the County could exclude private debris landfills from all zoning districts only if a public debris landfill were operated in order to "implement[] a local solid waste management plan," or if another readily available debris fill (such as the one in Dumfries) can absorb the solid waste generated within Prince William. We recognize that some surrounding jurisdictions do not themselves provide for debris landfills in their Zoning Ordinances. We frankly do not believe that their failure to plan for debris waste disposal satisfies the mandate of §10-274, and that they might be ordered to make other arrangements, at least once the state has adopted proper landfill regulations.

D. Can the County require that all debris generated in the County be dumped in a public debris landfill?

No. In order to control a "waste stream", the County must be able to point to express legislation enabling it to exercise "flow control." This it does not have with respect to debris. The County can regulate businesses engaged in pickup and disposal of garbage, trash and refuse (§15.1-28.1), including delineation of service areas, limitation of persons engaged in such service in any such service area, and creation of one or more service areas, and regulation of rates. It may require most solid waste which would ordinarily go to a sanitary landfill to be deposited at a resource recovery facility. Section 15.1-28.03, however, specifically precludes the County from adopting an ordinance which requires delivery of all or any portion of "construction debris to be disposed of in a landfill" (emphasis supplied), to waste disposal facilities located within or without the County, or at any other place other than that provided for the purpose. While it can be argued that this exception was only intended to relate to delivery of refuse to resource recovery facilities,

the language appears to cover delivery to any solid waste disposal facility.

Without flow control, a County debris landfill may not be economically practical if it must compete with private landfills. The ability to obtain revenue bonds at a reasonable rate of interest may also be affected because of the anticipated lower level of revenues when there are competitors. Complete answer to this must be subject to other expert analysis.

V. THE SPECIAL USE PERMIT

A. Does the Board retain power under the zoning ordinance to regulate much of the landfilling process, without regard to state regulation?

The answer to this is in substantial doubt. There is a strong argument that the State has entirely pre-empted the field of landfill regulation, particularly in view of the recent amendments to the law not only adopting the Waste Management Act, but also creating a Department of Waste Management and assigning to it duties with respect to waste management generally (including hazardous waste facilities) formerly assigned to other agencies.

The present draft of proposed State regulations says that the localities have not been pre-empted, and that they may adopt more stringent regulation than that proposed by the Commonwealth. This, together with §15.1-28.01 of the Code, provides argument that the County retains substantial land use power to regulate solid waste management, unless and until the Governor establishes regional programs that transcend local boundaries. Whether this would prevail cannot be determined at this point.

If the state has pre-empted the regulatory arena, the County would be without power to regulate landfills which are subject to state permits, through the land use statutes. If not, then the County can do as much, or more, than the Commonwealth, through conditions attached to a special use permit. The County may, we would assert, continue to regulate those landfills which are not addressed by the State, such as small volume landfills. The pre-emption question, however, will once again raise its ugly head.

B. On what bases can the County deny a special exception permit for a debris landfill?

The Zoning Ordinance currently provides that debris landfills shall be permitted in the A-1, M-1 and R/T zoning districts with a special use permit. The purpose of such a permit, as the Board knows, is to subject this use to greater governmental scrutiny in order to insure compliance with suitable standards designed to protect neighboring properties and the public, so that special uses are no more onerous in their operation than are uses permitted by right in the district.

No specific criteria for evaluating location of a landfill are included in our current ordinance, however. While the Board has discretion in its determination to grant or deny a special use permit, courts will review such decision with reference to the reasonableness of the standards and the relationship of the standards to the protection of the public interest and the Board's case is made the stronger by advance analysis of the dangers of landfills generally, and of landfills in particular locations.

In all cases, denial of a special use permit must be grounded on legitimate factual bases which make the question whether the denial was properly "fairly debatable." It is impossible to articulate in advance all of the possible facts which might be ranged against a challenge, but preservation of the Occoquan is clearly among the strongest. There is evidence that landfills present a greater potential risk to the environment than other uses in those areas. I understand that Dr. Thomas Grizzard of the Occoquan Monitoring Lab has stated that a debris landfill can be an environmentally safe operation in the watershed but the Board could determine not to take the risks, and amend the ordinance requirements for a special use permit to provide that a permit may not be issued when the property is in The Occoquan Watershed. That decision would be entitled to the presumption of legislative validity. Board of Supervisors v. Southland Corporation, 297 S.E.2d 718 (1982), and subject to the "usual" court challenges as to its fairly debatable nature. In light of Dr. Grizzard's comments that, with appropriate safeguards there does not appear to be an environmental reason for denying a landfill in the watershed, an application for a permit which does not include appropriate safeguards could be denied with a substantial chance of successful defense. The matter is problematical if all expert testimony is to the effect that the proposal will meet all environmental

objections, and the State Department of Waste Management is willing to grant a permit for landfill operations. While aesthetic considerations are not in themselves dispositive, they can be argued in support. Impact of such an activity on nearby land uses will also be important.

VI. THE COMMERCE CLAUSE ISSUES

Can the County prohibit the dumping of solid waste from other jurisdictions?

A. Banning all waste from other states.

A ban on the import of debris from other states is likely to violate the Commerce Clause of the United States Constitution. There is no Virginia case law, but a Maryland court held in 1984 that the banning by Charles City County of disposal in public landfills under the commerce, equal protection and due process clauses was unlawful, since the county was acting as a market participant in a landfill service market and, therefore, a concept known as the "dormant commerce clause" did not apply. Its decision appears to turn on the fact that there were other private landfills in the county which could accept out-of-state garbage. County Commissioners of Charles County v. Stevens, 473 A.2d 12 (1984).

More significantly, the U.S. Supreme Court has struck down a New Jersey law which prohibited the import of waste from other states, as primarily protectionist and having more than an incidental effect on interstate commerce. The Court held that the New Jersey law improperly imposed on out-of-state commercial interests the full burden of conserving the state's remaining landfill space and isolated New Jersey from the problem common to many by erecting a barrier against the movement of interstate trade. City of Philadelphia v. State of New Jersey, 437 U.S. 617, 57 L.Ed.2d 475 (1978).

B. Banning waste from other Virginia localities.

Despite our sense that such a ban might fail, a ban on dumping from other counties and cities would probably not violate the "dormant character" of the Commerce Clause, since that clause only relates to the authority to regulate interstate not intrastate commerce. The New York Court of Appeals upheld a town regulation that prohibited acceptance of out-of-town refuse at facilities licensed by the town. The Court held that the Commerce Clause was not violated

where the plaintiff, a private operator, was not engaged in the importation of refuse from out-of-state, and there was no evidence that the regulation inhibited or discriminated against out-of-state garbage. Monroe-Livingston Sanitary Landfill v. Town of Caledonia, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980).

VII. WHAT IS THE PROPOSED STATE REGULATORY SCHEME?

As we have been at pains to note, the County is mandated to develop a local solid waste management plan, which may include public or private landfills, in or out of the jurisdiction, according to state regulatory guidelines. §10-274, Va. Code Ann. The state has moved with extraordinary slowness to respond to its duty to promulgate regulations under the predecessor statute to the foregoing, however, and despite the fact that they should have been in place perhaps five years ago, they remain in draft form.³ In May of last year, the Department of Health published a Notice of Intended Regulatory Action with regard to the adoption of detailed solid waste management regs. 1:16 Va. R. 1261-62, May 13, 1985. We assume that the Board of Waste Management and the Department will continue to march with these proposals. No final regulations have yet been adopted, and meetings among state officials, private landfill associations, VACO and VML continue even now. The preliminary regulations, although they have some shortcomings, are generally detailed and well done.

For all practical purposes, once these regulations go into effect (the proposed date of January 1, 1987, will almost certainly slip) no open dumping of any kind will be permitted in the Commonwealth, and virtually all landfills, past and future, will have to comply with detailed regulations.

³ EPA has developed guidelines for the development of state regulatory plans and the construction and operation of landfills. 40 C.F.R. Parts 255, 256, and 257, and it is from these guidelines that Virginia has moved to adopt adequate controls on solid waste disposal sufficient to meet the requirements of RCRA.

Almost all landfills will be covered by the regulations, and certainly all debris and sanitary landfills of any significant size.⁴ Applicants for permission to operate a fill must satisfy local land use requirements (§4.02.01(c)(4)), and must submit very detailed, two stage applications for site and design approval. There are operational and design controls which are designed to prevent off-site pollution of air and water, for example, an express prohibition on placing solid wastes in, or permitting them to infiltrate, streams and other surface and ground water supplies. §§5.01.03(f), 5.01.04(i). Open air burning is prohibited unless the operator possesses a proper permit from the Air Pollution Control Board. §5.01.04(h).

The proposed regulations identify four principal types of landfill: sanitary, construction and demolition (debris), industrial waste, and inert waste. All but inert fills (see note 4) must meet general requirements for landfills. Debris landfills must meet those general requirements, all of the requirements for sanitary fills, and certain additional requirements for debris fills alone. §5.03 et seq. These include provision of impermeable liners, (§5.02.03(h)), but unfortunately do not include venting systems or gas monitoring programs required for sanitary landfills. §5.03.03(b).

The State is very concerned with closure of fills, and so it regulates closure plans carefully. It also requires that, at the time of application, an applicant estimate closure costs, and establish binding financial guarantees to provide a certain fund with which the state or local authorities may pay for proper closure if the operator fails or is unable to do so. §3.17 et seq.

⁴ Some small volume landfills (generally those averaging 25 cubic yards of fill per day) will be exempt, as will be "inert waste landfills" which accept only rock, dirt, and broken asphaltic pavement. We disagree with this last exemption, on the grounds that any lawful hole in the earth will or can become a dumping area for substances other than those authorized, and because these fills will not be monitored or inspected, they could become prime targets for illegal dumping. We have no way of knowing how serious is the illegal dumping problem in the County now, but our visceral sense is that it is an increasingly significant problem.

There are requirements in the proposed regulations, which would provide a similar fund for the control or abatement of pollution which occurs during the useful life and operation of the facility, such as may be found in RCRA with respect to the operation of hazardous waste facilities. See 42 U.S.C. 6924(a)(6), -(t). There are, as noted, provisions for bonding and other guarantees for abandoned facilities in the new Waste Management Act, but no regulations effectuating those provisions have been proposed.⁵

VIII. CAN REVENUE BONDS BE USED TO PAY THE COST OF CONSTRUCTING A COUNTY-OWNED FACILITY?

Yes. As previously indicated, the County is authorized pursuant to §15.1-282 of the Code to operate "solid waste management facilities," which encompasses debris landfills. The definition of "sanitary landfill" in §10-264 of the Code, which empowers the Department of Waste Management to regulate solid waste, is broad enough to include debris landfills.

The Attorney General has frequently held that counties may issue revenue bonds without referendum, and they may be used for the foregoing purposes.

The Service Authority has been empowered by the Board pursuant to §15.1-1250 of the Code to construct and operate a "garbage and refuse collection and disposal system," which provision also includes debris landfill. Pursuant to §15.1-1250(g), the Service Authority may issue revenue bonds to pay all or a part of the cost of such system.

While revenue bonds may be legally possible, we do not know whether the market would purchase them, or at what rates.

⁵ We should add the important information that on June 3, 1986, the Circuit Court of King and Queen County invalidated a state-granted landfill permit, on the grounds that the Board of Health had failed to adopt regulations under the Solid Waste Management Act, despite having been instructed to do so by the General Assembly seven years earlier. This decision will likely be appealed, but it throws into question the status of all current permits, and all pending applications, including those in Prince William.

10

XI. CAN THE COUNTY LIBERALIZE RULES FOR ON-SITE
DUMPING AND OPEN AIR BURNING?

This question is best addressed by the Planning Office and Department of Public Works. We must note, however, that the County's ability to allow or regulate on-site dumping may be affected if the proposed solid waste regulations are adopted.

We note only that, as land use matters, the County can enlarge on-site dumping permission, and can encourage open-air burning within state law requirements. Any liberalization of open air burning rules would, of course, require the consent of the State Air Pollution Control Board, for the County is authorized to adopt only regulations which are more strict than state law, and even those require the express concurrence of the Air Pollution Control Board.

Currently, the most significant difference between the County's local ordinances and state air pollution regulations is that we mandate a distance of 750 feet between burning and an occupied dwelling, and the State would require but 500 feet, and permits some exceptions.

We add, too, that Air Pollution Control Board staff believes that all builders in Prince William who can use air curtain devices are doing so.

cc: Robert S. Noe, Jr.
Connie Bawcum
Dan Lycan
Roger Snyder
Virginia Department of Health

B16:18

PROPOSED RESOLUTION

**SUBJECT: Initiation of a Zoning Text Amendment to Prohibit
Privately Operated Debris Landfills**

WHEREAS, the Prince William Board of County Supervisors is dedicated to the protecting the health, safety and general welfare of the people while encouraging the development of a convenient and attractive community; and

WHEREAS, periodic changes to County Codes, ordinances and regulations are necessary to meet this goal; and

WHEREAS, the prohibition of privately operated debris landfills is in furtherance of this goal; and

WHEREAS, Section 700.10(1) of the Prince William County Zoning Ordinance provides for the Board of County Supervisors to initiate, by resolution, text amendments to the Zoning Ordinance;

NOW, THEREFORE, BE IT RESOLVED that the Prince William Board of County Supervisors does hereby initiate a zoning text amendment which would prohibit the operation of privately owned debris landfills; and

BE IT FURTHER RESOLVED that this proposed text amendment be considered by the Planning Office and Planning Commission in a timely fashion; and

BE IT FURTHER RESOLVED that initiation of this text amendment should not be construed as tentative approval.

/N7



COUNTY OF PRINCE WILLIAM

1 County Complex Court, Prince William, Virginia 22192-0201
(703) 435-6800 Metro (800) 470-3

EX-100
0001

Roger W. Snyder
Director

To: County Executive

Date: June 26, 1986

From: Planning Director *PWS*

Subject: Zoning Text
Amendment

Routing: Deputy County Executive - Bawcum

AGENDA

BOARD OF COUNTY SUPERVISORS

JULY 8, 1986

TITLE: Zoning Text Amendments.

ISSUE: Whether to amend the text of the Zoning Ordinance to prohibit privately operated debris landfills.

RECOMMENDATION: Adopt resolution of intent to amend the Zoning Ordinance.

FISCAL IMPLICATION: Not applicable.

BACKGROUND: See attached Staff Report.

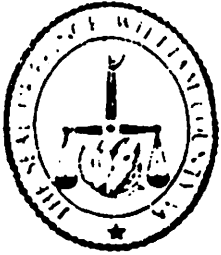
STAFF: Zoning Administrator

PRESENTATION TIME: 10 Minutes

DOCUMENTATION ATTACHED

- A. Proposed Resolution
- B. Staff Report

/N7



COUNTY OF PRINCE WILLIAM

1 County Complex Court Prince William, Virginia 22192-9201
(703) 315-6830 Mailing 631-1700

PLANNING
DIVISION

Roger W. Snyder
Director

June 25, 1986

STAFF REPORT

Zoning Text Amendment - Prohibition of Privately Owned Debris Landfills

BACKGROUND

In June of 1986, Supervisor Guiffre of the Gainesville District directed the staff as part of Directive #86-97 to prepare a draft zoning text amendment to delete provisions for privately owned debris landfills.

Under current County regulations, privately owned debris landfills are permitted in the A-1, M-1 and M/T zoning districts with a special use permit. Publicly owned landfills of any type, either sanitary or debris are permitted in all zoning districts upon a 456 Review by the Planning Commission and approval of a site plan.

Based on Supervisor Guiffre's directive, the staff has drafted proposed language that would prohibit the private operation of debris landfills in the A-1, M-1 and M/T zoning districts. A copy of these amendments are contained in Appendix "A".

PROPOSAL OVERVIEW

The staff has reviewed this issue and has concluded that debris landfill facilities when maintained in accordance with applicable regulations concerning the design, construction and operation of such a facility can be safely operated. However, landfilling that is not properly regulated and monitored can produce on and off-site pollution problems such as leachate from the site into ground and surface waters and air pollution resulting from fires. The on-going control of any landfill site is the most crucial factor contributing to its safe operation. The staff, after examination of the issues involved and the experiences of other jurisdictions, is of the opinion that the degree of control that the County may exercise over its own facilities is sufficiently greater than that which is likely at a privately operated landfill, that the staff endorses the prohibition of privately owned debris landfills.

IMPACT

The adoption of the proposed amendment would have the following impact.

- Prohibit the operation of any privately owned debris landfill in the County.

RECOMMENDATION

75

Adopt a resolution of intent to amend the Zoning Ordinance.

Amend Section 12.01.12 by deletion in its entirety (11/17)

(11) Debris landfills; subject to the following provisions:

(a) The Director of Planning shall review each application for a landfill and shall furnish a report to the Planning Commission and Board of Supervisors.

(b) No special-use permit for a landfill shall be approved unless the landfill has been approved by the Director of Public Works and the Bureau of Solid Waste and Vector Control with respect to the suitability of the site for such use.

(c) Every permit for a landfill shall be deemed to incorporate an specific conditions and other provisions of law related to such use.

(d) Upon completion of operations, the land shall be left in a safe condition and in such a state that it can be used for development of a use permitted in the district in which such land is located. Further, sufficient drainage improvements shall be provided so as to prevent water pockets or erosion, and such improvements shall be so designed that both natural and storm water leaves the entire property at the original natural drainage points, and the area draining to any one point is not increased.

(e) Except for improvements necessary for the operation of a landfill, no improvements shall be constructed in or upon any landfill for a period of twenty (20) years after the termination of the landfill operation without the prior approval of the Director of Public Works and the Zoning Administrator. No such approval shall be granted unless the applicant demonstrates with sufficient technical evidence that:

(1) Any residual post-construction settlement will not affect the appearance or structural integrity of the proposed improvement; and

(2) The nature and extent of corrosion-producing properties, the generation and escape of combustible gases and potential fire hazards of the constituent material, considering its state of decomposition, have been provided for adequately, and will not create an unsafe or hazardous condition in or around any of said proposed improvements.

(f) There shall be an annual inspection of each landfill by the Director of Public Works and said Director shall make a report of his findings to the Board of Supervisors.

(g) Every landfill shall be subject to such additional regulations as may be adopted by the Board of Supervisors. The Board may limit the type of debris and materials to be deposited and may require a degree of soil compaction adequate to support ultimate use of the property in accordance with the adopted comprehensive plan.

Amend Section 32-403.12 by deleting in its entirety #(1)

--(3)-Debris-landfills-subject-to-the-standards-set-forth-in-Section
301.12(17)-of-this-Chapter

Amend Section 32-403.32 by deleting in its entirety #(3)

--(3)-Debris-landfills-subject-to-the-standards-set-forth-in-Section
301.12(17)-of-this-Chapter

APPROVED AS TO FORM COUNTY ATTORNEY <i>[Signature]</i>
DATE: 6/26/86

MOTION:

July 8, 1986
Regular Meeting

SECOND:

Res. No. 86-

RE: RFP FOR PROFESSIONAL SERVICES TO IDENTIFY DEBRIS LANDFILL
SITES AND PREPARE FINANCIAL ANALYSIS

WHEREAS, debris is a by-product of the development and
construction process in Prince William County; and

WHEREAS, this debris must be properly disposed; and

WHEREAS, the Board of County Supervisors is interested in
pursuing a publicly owned and operated debris landfill(s); and

WHEREAS, a detailed investigation of specific sites and a
review of the projected capital and operating costs is needed to
develop an implementation schedule for a publicly owned debris
landfill;

WHEREAS, the person or firms performing such work must
possess a high degree of transportation, environmental, geological
and related expertise in order to perform the necessary analysis,
which expertise supercedes cost as a primary consideration in
contracting for such work, and, therefore, procurement by competitive
sealed bidding is neither practicable nor fiscally advantageous to
the public.

NOW, THEREFORE, BE IT RESOLVED that the Board of County
Supervisors does hereby authorize staff to prepare an RFP for
professional services with the following focus:

1. Identify specific parcels suitable for debris landfill
in the following location:

- a. All of Prince William County, or
- b. Prince William County, excluding the
Occoquan Reservoir, or
- c. Western Prince William County

2. Prepare a detailed financial analysis of the capital
and operating costs for a debris landfill and identify financing
alternatives for the capital expenditures.

BE IT FURTHER RESOLVED that the Board of County Supervisors does hereby appropriate \$40,000 from its Emergency Reserve for such procurement.

VOTE

Ayes:

Nays:

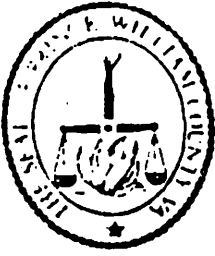
Absent from Vote:

Absent from Meeting:

For information:

CERTIFIED COPY: _____

Clerk to the Board



COUNTY OF PRINCE WILLIAM

1 County Complex Court, Prince William, Virginia 22192-9301
(703) 335-6980 Metro 621-1703

DEVELOPMENT
ADMINISTRATION

Martin E. Crahan
Director

November 25, 1985

TO: Michael R. Congleton
Zoning Administrator

FROM: Nimet R. El Alaily
Chief, Plan Review Branch

RE: Debris Disposal

In answer to your letter of October 29, 1985, in which you request our opinion whether the Zoning Ordinance should be amended to allow certain types of debris to be buried during development of sites, we have no objection to the burial of tree stumps, logs, and brush, as long as the burial location is well identified. It is, however, very common that paint, insulation material, and other debris are discarded during individual home construction. This type of material may be harmful and should not be approved. Thus when amending the Ordinance, items allowed to be buried must be well specified.

Should you have any further questions, please call.

NRE:maf/R-2

80

RECEIVED

NOV 25 1985

PROPOSED RESOLUTION

SUBJECT: Initiation of a Zoning Text Amendment and Design and Construction Standards Manual Amendment to Provide for On-site Debris Disposal Areas

WHEREAS, the Prince William Board of County Supervisors is dedicated to the protecting the health, safety and general welfare of the people while encouraging the development of a convenient and attractive community; and

WHEREAS, periodic changes to County Codes, ordinances and regulations are necessary to meet this goal; and

WHEREAS, the authorization of on-site debris disposal areas is in furtherance of this goal; and

WHEREAS, Section 700.10(1) of the Prince William County Zoning Ordinance provides for the Board of County Supervisors to initiate, by resolution, text amendments to the Zoning Ordinance;

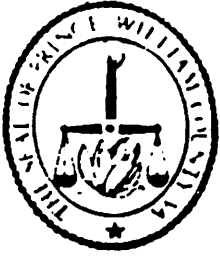
WHEREAS, Section 101.00 of the Design and Construction Standards Manual provides for the Board of County Supervisors to initiate, by resolution, text amendments to the Design and Construction Standards Manual;

NOW, THEREFORE, BE IT RESOLVED that the Prince William Board of County Supervisors does hereby initiate zoning text amendments and Design and Construction Standards Manual amendments which would provide for the use of on-site debris disposal areas in all zoning districts; and

BE IT FURTHER RESOLVED that these proposed text amendments be considered by the Planning Office and Planning Commission in a timely fashion; and

BE IT FURTHER RESOLVED that initiation of these text amendments should not be construed as tentative approval.

/N7



COUNTY OF PRINCE WILLIAM

1 County Complex Court Prince William, Virginia 22192-9261
(703) 335-6830 Mailing 611-1763

PLANNING
OFFICE

Roger W. Snyder
Director

To: County Executive

Date: June 26, 1986

From: Planning Director *PWS*

Subject: Zoning Text Amendments and
Design and Construction
Standards Manual Amendments

Routing: Deputy County Executive - Bawcum

AGENDA

BOARD OF COUNTY SUPERVISORS

JULY 8, 1986

TITLE:

Zoning Text Amendments and Design and Construction
Standards Manual Amendments.

ISSUE:

Whether to amend the text of the Zoning Ordinance and
Design and Construction Standards Manual to provide for
on-site debris disposal areas.

RECOMMENDATION:

Do not adopt resolutions of intent to amend the Zoning
Ordinance and Design and Construction Standards Manual.

FISCAL IMPLICATION: Not applicable.

BACKGROUND: See attached Staff Report.

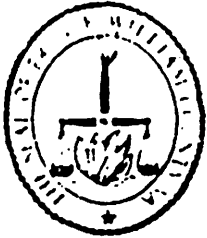
STAFF: Zoning Administrator

PRESENTATION TIME: 10 Minutes

DOCUMENTATION ATTACHED

- A. Proposed Resolution
- B. Staff Report

/N7



COMMONWEALTH OF VIRGINIA
COUNTY OF PRINCE WILLIAM

9252 Mosby Street, Manassas, Virginia 22110 (703) 797-9111

DEVELOPMENT
ADMINISTRATION

Martin E. Crahan
Director

November 4, 1985

TO: Michael R. Congleton
Zoning Administrator

FROM: John Elder *JE*
Soil Scientist

RE: Debris Disposal

As per your request the following comments are made regarding the disposal of organic debris by on-site burial.

Any organic material, including tree parts (limbs, roots, stumps, etc.), is subject to decomposition with time. Where stored in pits on-site, the decomposing materials cause an underground void and as the void grows larger, the cover material collapses tending to fill that void and leaving a sink hole in the lawn. This commonly happens after the lawn is well established and shrubs and trees planted. To repair such a condition is aggravating and expensive for the home owner and in some cases the neighboring properties. I have investigated about a dozen sink holes in lawns, all caused by disposal pits, in the past two years. These pits have ranged from about 2 to 8 years old, and are from about 6 to 10 feet deep.

Once permitted, the control of what goes into the pit is almost impossible. With some of today's chemicals it takes very small quantities to contaminate ground-water sources as well as surficial waters.

In seasonally wet soils, on which many home sites are placed in Prince William County, the organic ooze from decomposing materials can be most ugly and also may impart foul odors.

It is my opinion that burial of any waste products on home-site properties creates more problems for the home owner than it solves for the builders. I would further suggest that all possible recycling processes be investigated for the disposal of all such tree parts. In this area there is a constant need for woody mulch materials for basal plantings around home and lawn areas. There may be an economical means of processing these parts for such use or other similar uses.

JE:st

File: 500, 600.1

83

RECEIVED

NOV 5 1985



COUNTY OF PRINCE WILLIAM

1 County Complex Court, Prince William, Virginia 22192
(703) 335-6000 Metro 631-1763

November 19, 1985

TO: Zoning Administrator

FROM: Fire and Rescue Service Director

SUBJECT: Zoning Memorandum Dated 10/29/85 - Debris Disposal

Based on our review there are no specific concerns for the individual home builder. However, debris disposal activities associated with subdivision development may pose problems: number of disposal sites, quantity of debris, quality controls, and etc.

There have been numerous fires at debris disposal sites: Dale City, Yorkshire, and Woodbridge. These incidents can very quickly exceed the resources of this department as evidenced by the fire at Ray's Landfill in the spring of 1985.

The Fire and Rescue Service, therefore, would recommend no change to the Zoning text.

SELBY C. JACOBS

6800



COMMONWEALTH of VIRGINIA

In Cooperation with the
State Department of Health

Prince William Health District

9301 LEE AVENUE
MANASSAS, VIRGINIA 22110-5577

SERVING:
CITY OF MANASSAS
CITY OF MANASSAS PARK
PRINCE WILLIAM COUNTY

TELEPHONE: 335-6300
ENVIRONMENTAL HEALTH: 335-6

21 November 1985

MEMORANDUM

TO: Michael R. Congleton, Zoning Administrator
Planning Office
Prince William County

FROM: J. E. Florence, M. D., Health Director *F*
Prince William Health District

SUBJECT: Debris Disposal

The Health Department strongly recommends the Zoning Ordinance NOT be amended to allow for on-site burial of land clearing debris, e.g. stumps, logs, brush, limbs and root material.

REASONS

1. Once legalized, there is no way to control materials disposed of in the pit, extent of the pit, number of pits, location of pits or any other parameter of the practice. On wooded lots, which are the ones which generate such debris, there is a tremendous amount of competition for the cleared areas. Far, far too often the result is encroachment into established drainfield sites or other separation conflicts between burial pits and well and septic sites.
2. The pits are often aesthetically undesirable because of cave-ins, seepage of organic ooze and/or the emission of anaerobic liquids and malodorous gases. Numerous complaints are lodged which require investigation and consequently the needless expenditure of man power.
3. The use of burying pits by builders often limits future owners' ability to further develop the property, i.e. for pool, garage, outbuilding construction.

MEMORANDUM
Michael Congleton
Debris Disposal
21 November 1985

4. Once a burial site is created, it's too late. If it is in an inappropriate place, only considerable time and money can re-establish the area for some other use. No amount of reconstruction can generally re-establish it as a septic field site.
5. The State Health Department has jurisdiction in permitting the operation of sanitary landfills in the Commonwealth. The term Sanitary Landfill is defined under 32:1-177, Code of Virginia, which states in substance "Means a disposal facility for solid or hazardous waste. Solid waste is defined as garbage refuse, sludge, and other discarded material including solid, liquid, semi-solid and gaseous material which results from industrial commercial mining and agricultural operations-----.

The State Health Department thus permits inspects and regulates debris landfills regardless of location or size and they have not relinquished that duty to the locality except to agree that a locality may adopt more stringent regulations.

The builders would not save time by on-site burial of land clearing debris.

Attached for your information is a copy, Debris Landfill Permit Process Procedures of the State Health Department.

Even though the State Health Department may in some cases permit on-site burial of the subject debris, the local health department would still oppose the practice for reason listed above.

We recognize that the need for a relatively economical method of disposal of this type debris does exist. Individual on-site disposal of bulk debris is not the most desirable solution of this Department's perspective.

A recommendation might be a County sanctioned and/or operated central processing/reclamation center with only minimal subsurface disposal, of those debris parts which do not succumb to processing, at the plant site.

Debris Landfill Permit Process

Application submitted to Richmond (site location, type of waste to be accepted, name, address) under Section 32.1-180

Regional Consultant contacts applicant to arrange on-site meeting (discuss anticipated operation; note any potential problems)

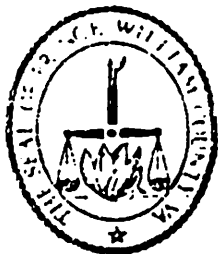
Applicant submits detailed description of landfill to Richmond in triplicate (parameters include operation, geology, groundwater protection)

1 copy sent to State Water Control
Geologist for comments

1 copy to Regional Solid &
Hazard Waste Consultant for
review

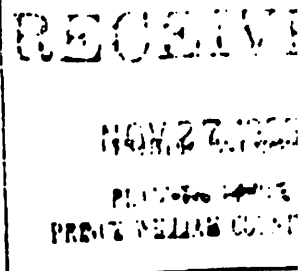
Returned to Richmond for review by Technical Services Chief (Engineer); then review by Ken Chestnut (Enforcement Chief) for legality; then to Division Chief (Gilley) for signature.

According to Ken Chestnut, locality may adopt local ordinance, but without local ordinance, Health Department involvement is limited to complaint investigation only. Follow-up handled by Richmond. State does not solicit local input during application processing, but sends copy of permit, when issued, to locality, State tries to monitor landfills every six (6) weeks. Loudoun is in process of adopting ordinance; Fairfax has one already



Daniel L. Lycan
Director

COMMONWEALTH of VIRGINIA
COUNTY OF PRINCE WILLIAM
9256 Lee Avenue, Manassas, Virginia 22110-5583 (703) 335-6820



November 26, 1985

TO: Mike Congleton
Zoning Administrator
Office of Planning

FROM: Thomas J. Smith, P.E.
Chief, Engineering and Technical
Services Division

RE: Debris Disposal: October 29, 1985 Memo

Your referenced memo requested comments on the current definition of "debris landfill", as defined in the Zoning Ordinance, in relation to section 611.02 - "Debris Disposal" of the current Design and Construction Standards Manual. Staff has reviewed this issue and offer the following comments:

1. Debris burial on-site within a site/subdivision is not the optimum solution for debris disposal. The optimum would be burial at an off-site, licensed and approved debris landfill or approved burning of the debris. Burial on-site leaves the possibility over a period of years for settlement, sink-holes and underground fires to occur. After the developer has completed the work and left the site, future problems with the debris burial is left with the homeowners and/or County.
2. Apparently, the building communities' concern is the high cost involved in hauling and disposing of land clearing debris and stumps to an approved debris landfill, and are requesting relief by allowing burial on site.

In order to resolve this conflict, the following is recommended:

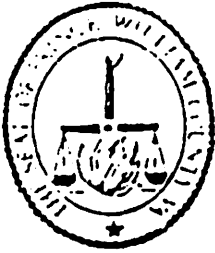
1. Revise the definition of "debris landfill" in the Zoning Ordinance to only include debris burial of areas and/or volumes over a specific amount. Limits on surface area, volume and depth should be considered as part of the definition. Disposal areas over a certain size, depth or volume would require a Special Use Permit as currently required in the Zoning Ordinance. The size limit should be coordinated with any State Health Department regulations for debris landfills.
2. Revise Section 611.02 of the Design and Construction Standards Manual to include stronger controls for burial of stumps and land clearing debris. The following controls/revisions are recommended:

- (a) Limits on the size of such areas in accordance with any revisions to the debris landfill definition of Zoning Ordinance.
- (b) Limit the number of such disposal areas in each development based upon the size of the development.
- (c) Include distance from a dwelling unit as part of the standards.
- (d) The disposal area should be shown on the site or subdivision plan and a temporary easement provided.
- (e) The closure of the disposal area should be included in the performance bond for the development.
- (f) An agreement or maintenance bond which will hold the developer responsible for maintenance of the disposal area (repair of settlement, sink holes, etc.) for a period of time after closure should be considered.

In a related, but separate matter, Section 301.12 (17) a-g of the Zoning Ordinance states that the Director of Public Works will approve and inspect all debris landfills. This section was apparently written when the Department of Public Works was responsible for approving development plans and providing inspections, and was never revised when the Department of Development Administration (DDA) was formed. Since DDA now approves and provides inspection of all development plans, the Director of Development Administration should be the approving and inspecting authority for these landfills. Public Works can review and provide guidance in these matters as requested.

cc: Director of Public Works

TJS:nlb



COUNTY OF PRINCE WILLIAM

1 County Complex Court Prince William, Virginia 22192
(703) 335-6600 Metro 631-1703

October 29, 1985

TO: Nimet El Alaily, Department of Development Administration
Daniel Lycan, Director of Public Works
John Elder, Soil Scientist
John Meehan, Health Department
Steve MacIsaac, County Attorney I
Selby Jacobs, Director, Fire & Rescue Service

FROM: Michael R. Congleton, Zoning Administrator *WAC*

RE: Debris Disposal

Currently, the Design and Construction Standards Manual, Section 611.02, Debris Disposal, permits the burial of land clearing debris or stumps on-site during time of construction, under specific guidelines. As you are aware, this section of the Design and Construction Standards Manual was negated upon the adoption of the 1982 Zoning Ordinance which classifies any burial of debris, tree stump, brush logs, limbs and root material, construction and/or demolition material as a "debris landfill." Debris landfills are only permitted upon the issuance of a special use permit in the A-1, Agricultural district, M-1, Heavy Industrial district, and M/T, Industrial/Transportation district.

This office has received numerous requests from individual home builders, as well as the Prince William County Builders Association to permit the on-site burial of tree stumps, logs and brush in connection with subdivision and/or individual home construction. The Builders Association has gone on record stating that this type of organic debris is the only type of material that its members need to dispose of on-site. All other materials would be sent to the appropriate landfill operation.

At this time, I would ask you to review this situation and provide this office with your opinion as to whether or not the definition of "debris landfill" as contained in the Zoning Ordinance, be amended to add language which exempts debris burial as specified under the terms of Section 611.02 of the Design and Construction Standards Manual.

It would be appreciated if you would forward your comments to this office by November 22, 1985. If you have any questions on this matter, please feel free to call me.

/ZA

Amend Section 32-100.00 by adding the following definition:

On-site disposal area: An area used for the burial of construction debris, stumps, root material, refuse and workman's litter generated by the development of a property, as regulated by Section 32-201.10 of this Ordinance and Section 611.02 of the Design and Construction Standards Manual. For the purposes of this definition, an on-site disposal area shall not include those debris or sanitary landfilling operations regulated by the Commonwealth of Virginia.

Amend Section 32-201.10 by adding the following language:

201.10 On-site disposal areas

On-site disposal areas, for the burial of construction debris, stumps, root material, refuse and workman's litter, generated by the development of any site may be located on-site, in all zoning districts, in accordance with the regulations of Section 611.02 of the Design and Construction Standards Manual.

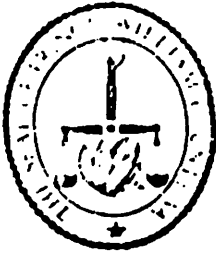
Amend Section 611.00 of the Design and Construction Standards Manual by deleting Section 611.02 in its entirety and substituting the following language:

611.02

Any site used or intended to be used for an On-Site Disposal Area, as defined and regulated by Sections 32-100.00 and 32-201.10 of the Zoning Ordinance, shall be located and shown on the preliminary and final site plan, subdivision plan or site grading plan for any development. Such debris shall not be buried within the right-of-way, parking areas, easements, identified swales draining more than (5) acres, floodplains, and building location. Furthermore, such disposal areas shall not be located within the distances shown below:

Drainfield Site - 50 feet
 Septic Tank - 20 feet
 Water Well - 50 feet

APPROVED AS TO FORM COUNTY ATTORNEY <i>(Signature)</i>
DATE: 6/26, 86



Roger W. Snyder
Director

COUNTY OF PRINCE WILLIAM

1 County Complex Court, Prince William, Virginia 22191-9701
(703) 335-6800 Metro 641-1700

RECEIVED
JUN 27 1986

June 26, 1986

STAFF REPORT

Zoning Ordinance and Design and Construction Standards Manual Amendments -

On-site Disposal

BACKGROUND

In May of 1986, the Board of County Supervisors directed the staff to prepare the necessary text amendments to permit the on-site disposal of construction debris associated with development. Under the terms of current County regulations, the on-site burial of debris of any land is prohibited in all zoning districts, except upon issuance of a special use permit for a debris landfill in the A-1, M-1 and M/T zoning districts.

To this end, the staff has drafted proposed language which would permit the on-site burial of debris as a use by right in all zoning districts, during time of development. A copy of that amendment is contained in Appendix "A". On-going development activity within the County has accentuated the need for a safe means of disposal for debris cleared from developing properties.

In October 1985, the Planning Office coordinated a review of the current debris landfill regulations between concerned County agencies. This review was prepared at the request of the development community due to an interpretation of zoning ordinance requirements that any burying of trees and/or construction scraps, regardless of quantity, constituted a debris landfill. The alternative offered for consideration proposed allowing the burying of debris generated with site development on the property where it originated without special use review. The in-house consensus was that this proposal would create numerous smaller debris landfills which may be even more difficult to regulate.

Adverse impacts cited by the County agencies included ground settlement, sinkholes, underground fires and groundwater contamination. Correspondence with the County agencies involved are included as Appendix B on this report.

PROPOSAL OVERVIEW

These amendments as proposed would permit the on-site burial of construction debris during time of development as a use by right, subject to certain standards.

ZTA and DCSM Amendments
On-site Disposal
STAFF REPORT, June 26, 1986

IMPACT

The adoption of the proposed amendment would have the following impact.

- Provide an on-site debris disposal area for development.
- Create the potential for adverse impacts to the site and adjacent properties in terms of ground settlement, sink holes, underground fires and groundwater contamination.
- Require the hiring of additional inspection personnel to monitor filling activities.

RECOMMENDATION

Do not adopt a resolution of intent to amend the Zoning Ordinance and Design and Construction Standard Manual.

PROPOSED RESOLUTION

SUBJECT: Initiation of a Zoning Text Amendment and Design and Construction Standards Manual Amendment to Provide for the Establishment of Construction Disposal Areas

WHEREAS, the Prince William Board of County Supervisors is dedicated to the protecting the health, safety and general welfare of the people while encouraging the development of a convenient and attractive community; and

WHEREAS, periodic changes to County Codes, ordinances and regulations are necessary to meet this goal; and

WHEREAS, the authorization of the operation of construction disposal areas, although not currently permitted, is in furtherance of this goal; and

WHEREAS, Section 700.10(1) of the Prince William County Zoning Ordinance provides for the Board of County Supervisors to initiate, by resolution, text amendments to the Zoning Ordinance;

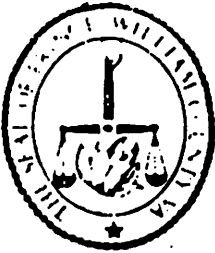
WHEREAS, Section 101.00 of the Design and Construction Standards Manual provides for the Board of County Supervisors to initiate, by resolution, text amendments to the Design and Construction Standards Manual;

NOW, THEREFORE, BE IT RESOLVED that the Prince William Board of County Supervisors does hereby initiate zoning text amendments and Design and Construction Standards Manual amendments which would provide for the use of on-site construction disposal areas in all zoning districts; and

BE IT FURTHER RESOLVED that these proposed text amendments be considered by the Planning Office and Planning Commission in a timely fashion; and

BE IT FURTHER RESOLVED that initiation of these text amendments should not be construed as tentative approval.

/N7



COUNTY OF PRINCE WILLIAM

1 County Center, Prince William, Virginia 22192-9001
(703) 361-5300 ext. 631-170

Roger W. Snyder
Director

To: County Executive

Date: June 26, 1986

From: Planning Director *PWS/mt*

Subject: Zoning Text Amendments and
Design and Construction
Standards Manual Amendments

Routing: Deputy County Executive - Bawcum

AGENDA

BOARD OF COUNTY SUPERVISORS

JULY 8, 1986

TITLE: Zoning Text Amendments and Design and Construction
Standards Manual Amendments.

ISSUE: Whether to amend the text of the Zoning Ordinance and
Design and Construction Standards Manual to provide for
construction disposal areas.

RECOMMENDATION: Adopt resolution of intent to amend the Zoning Ordinance
and Design and Construction Standards Manual.

FISCAL IMPLICATION: Not applicable.

BACKGROUND: See attached Staff Report.

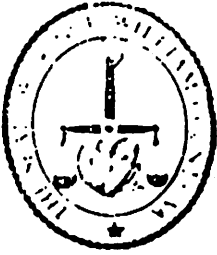
STAFF: Zoning Administrator

PRESENTATION TIME: 10 Minutes

DOCUMENTATION ATTACHED

- A. Proposed Resolution
- B. Staff Report

/N7



Roger W. Snyder
Director

COUNTY OF PRINCE WILLIAM

County of Prince William, Virginia 22191-9201
(703) 791-1700

10-10-10
10-10-10

June 26, 1986

STAFF REPORT

Zoning Ordinance and Design and Construction Standards Manual Amendments - Construction Disposal Areas

BACKGROUND

In May of 1986, the Board of County Supervisors directed the staff to prepare the necessary text amendments to permit the on-site disposal of construction debris associated with development. Draft amendments have been prepared and are currently under consideration by the Board of County Supervisors. As contained in the staff report prepared on these amendments, it was the recommendation of the staff that unregulated on-site debris disposal facilities would not be in the best interests of the County as their operation could produce a variety of adverse impacts.

However, the staff is also aware that due to on-going development activity within the County, an alternative method of construction debris disposal, other than unregulated on-site burial and full scale privately operated debris landfills should be considered. Due to revised State regulations, landfill activities of this type with a daily volume of less than 41 cubic yards of material may ultimately be entirely exempted from State control and may be solely regulated by the County, if at all. To this end, the staff has drafted proposed language which would permit the on-site burial of construction debris in small quantity as a special use permit in all zoning districts. A copy of these amendments is contained in Appendix "A."

PROPOSAL OVERVIEW

These amendments as proposed would permit the establishment of small scale on- and off-site construction disposal areas upon the issuance of a special use permit by the Board of County Supervisors, in all zoning districts. These amendments contain certain operational and locational standards which must be met, in addition to any conditions imposed on the operation by the Board of County Supervisors. These standard conditions have been in part carried over from current County regulations for debris and sanitary landfills. New conditions include provisions for the actual distance in miles from which debris may be transported, size of the area and amount of debris deposited daily, and the posting of a suitable bond with the County to guarantee closure, restoration and maintenance of the site.

ZTA and DCSM Amendments
Construction Disposal Areas
STAFF REPORT, June 26, 1986

IMPACT

The adoption of the proposed amendment would have the following impact.

- Provide for a method of on and near site disposal of construction debris.
- Provide for County approval and monitoring of debris disposal areas.
- Reduce the amount of cross-County truck traffic transporting construction debris.
- Extend the life of any existing debris landfill located in the area.
- Require the addition of inspection personnel to monitor disposal activities.

RECOMMENDATION

Adopt a resolution of intent to amend the Zoning Ordinance and Design and Construction Standard Manual.

Amend Section 32-201.01 by adding the following definition:

Construction Disposal Area: An area used for the burial of construction debris, stumps, root material, refuse and workman's litter generated by the development of a property, as regulated by Section 32-201.06 of this Ordinance and Section 611.02 of the Design and Construction Standards Manual. For the purposes of this definition, a construction disposal area shall not include those debris or sanitary landfilling operations regulated by the Commonwealth of Virginia.

Amend Section 32-201.10 by adding the following language:

201.10 Construction Disposal Areas

Construction disposal areas for the burial of construction debris, stumps, root material, refuse and workman's litter, generated by the development of any site, may be located in all zoning districts, upon approval of a special use permit, provided the following minimum standards are met. These conditions shall be deemed included in a special use permit whether specifically referenced therein or not:

(1) Only construction debris, stumps, root material, refuse and workman's litter generated on the site, or generated within a distance of three (3) road miles, shall be buried on the site.

(2) The construction disposal area shall be limited to such size and daily waste volume as may be exempted by the Commonwealth of Virginia from State regulation as a landfill of any kind. Until the Commonwealth shall have adopted such regulations, construction disposal areas shall be limited to the disposal of not more than 41 cubic yards of fill per day, as a calendar week average.

(3) No special use permit for a construction disposal area shall be approved unless the disposal area has been approved by the Director of Public Works with respect to the suitability of the site for such use.

(4) Every permit for a disposal area shall be deemed to incorporate as specific conditions all other provisions of law related to such use.

(5) Upon completion of operations, the land shall be closed and left in such a condition and in such a state that it can be used for development of any use permitted in the district in which such area is located in accordance with the requirements of paragraph (6) hereof. Sufficient drainage improvements shall be provided so as to prevent creation or occurrence of water pockets or erosion, and such improvements shall be so designed that both natural and storm water leaves the entire property at the original natural drainage points, and the area draining to any one point is not increased.

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(6) Except for improvements necessary for the operation of a disposal area, no improvements or structures of any kind shall be constructed in or upon any disposal area for a period of twenty (20) years after the date of termination of the disposal area operation as certified by the Director of the Department of Development Administration, without the prior approval of the Director of Public Works and the Zoning Administrator. No such approval shall be granted unless the applicant demonstrates with sufficient technical evidence that:

(a) Any residual post-construction settlement will not affect the appearance or structural integrity of the proposed improvement or structure, and

(b) The nature and extent of corrosion-producing properties, the generation and escape of combustible gases and potential fire hazards of the constituent material, considering its state of decomposition, have been provided for adequately, and will not create an unsafe or hazardous condition in or around any of said proposed improvements.

(7) There shall be an annual inspection of each disposal area by the Director of Public Works and said Director shall make a report of his findings to the Board of Supervisors.

(8) Every disposal area shall be subject to such additional regulations as may be adopted by the Board of Supervisors either as specific conditions of a special use permit, or as general requirements in the Design and Construction Standards Manual. The Board may limit the type of debris and materials to be deposited and may require a degree of soil compaction adequate to support ultimate use of the property in accordance with the adopted comprehensive plan.

(9) Prior to the establishment of any construction disposal area, the applicant shall provide to the County a bond in such an amount determined by the County to insure closure, restoration and maintenance of the site, according to regulations set forth in the Design and Construction Standards Manual.

Amend Section 611.00 of the Design and Construction Standards Manual by deleting Section 611.02 in its entirety and substituting the following language:

611.02

Any site used or intended to be used as a Construction Disposal Area, as defined and regulated by Sections 32-100.00 and 32-201.10 of the Zoning Ordinance shall be located and shown on the preliminary and final site plan, subdivision plan or site grading plan for any development. Such debris shall not be buried within the right-of-way, parking areas, easements, identified swales draining more than (5) acres, floodplains, and building location. Furthermore, such area shall not be located within the distances shown below.

Drainfield Site - 50 feet
 Septic Tank - 20 feet
 Water Well - 50 feet

APPROVED AS TO FORM COUNTY ATTORNEY
DATE 8/14/16

MOTION: PEITZNER

April 7, 1987
Regular Meeting
Res. No. 87-222

SECOND: JENKINS

RE: AWARD OF CONTRACT TO IDENTIFY DEBRIS LANDFILL SITES AND
PREPARE FINANCIAL ANALYSIS

WHEREAS, the Prince William Board of County Supervisors by Resolution No. 86-606 appropriated \$40,000 for professional services to identify debris landfill sites and prepare financial analysis; and

WHEREAS, a request for proposals was issued on November 17, 1986 by the Purchasing Agent for these services; and

WHEREAS, the following engineering firms, listed in alphabetical order, responded to the request for proposals:

1. Baker Engineers, Alexandria, VA
2. BCM Potomac, Vienna, VA
3. Hayden-Wegman Consulting Engineers, Atlanta, GA
4. Law Engineering Testing Company, McLean, VA
5. PSC Environmental Services, King of Prussia, PA
6. SCS Consulting Engineers, Reston, VA
7. Woodward-Clyde Consultants, Rockville, MD

WHEREAS, a Consultant Selection Committee was appointed by the County Executive and this committee reviewed the proposals, conducted interviews, and selected the most qualified candidate; and

WHEREAS, negotiations with the most qualified candidate, SCS Consulting Engineers, Inc. resulted in a fair and reasonable fee proposal of \$61,000 for Phase 1 of the analysis; and

WHEREAS, this is a phased contract and the cost of Phase 2 cannot be determined until Phase 1 is completed;

NOW, THEREFORE, BE IT RESOLVED that the Prince William Board of County Supervisors does hereby budget and appropriate \$30,000 from the Contingency Reserve to the Public Works professional services FY87 budget (Index Code 400036, Subobject 3201), to complete Phase 1 of the analysis;

April 7, 1987
Regular Meeting
Reg. No. 87-222
Page Two

BE IT FURTHER RESOLVED that the Prince William Board of County Supervisors does hereby award a contract to SCS Consulting Engineers, Inc., Reston, VA, for a phased study to identify debris landfill sites and prepare financial analysis;

BE IT FURTHER RESOLVED that the Prince William Board of County Supervisors does hereby authorize the Director of Public Works to sign the agreement between SCS Consulting Engineers, Inc. and Prince William County as provided in Section 100.11(e) of the Prince William County Purchasing Regulations.

VOTE:

Ayes: Guiffre, Jenkins, Kidwell, King, Pfitzner, Reading, Seefeldt

Nays: None

Absent from Vote: None

Absent from Meeting: None

For information:

County Attorney

Director of Public Works

CERTIFIED COPY

Catherine C. ...
Clerk to the Board

MOTION: JENKINS

July 14, 1987
Regular Meeting
Res. No. 87-540

SECOND: GUIFFRE

RE: FY 1988-92 CAPITAL IMPROVEMENTS PROGRAM (CIP)

WHEREAS, the thoughtful planning of expenditures for capital improvements over the course of the next five years will provide needed public facilities in a fiscally responsible manner; and

WHEREAS, the Planning Commission and the County Executive have referred their recommendations regarding the FY 88-92 Capital Improvements Program to the Board of County Supervisors; and

WHEREAS, the Board approved a Capital Improvements Program for FY 1988 on April 30, 1987, after holding properly advertised public hearings on April 20 and April 22, 1987;

NOW, THEREFORE, BE IT RESOLVED that the Prince William Board of County Supervisors does hereby adopt the FY 88-92 Capital Improvements Program for Prince William County.

ATTACHMENT

VOTE:

Ayes: Guiffre, Jenkins, Kidwell, King, Pfitzner, Reading, Seefeldt


Nays: None

Absent from Vote: None

Absent from Meeting: None

For Information: Planning Director

CERTIFIED COPY:


Clerk to the Board

PRINCE WILLIAM COUNTY
FY 1988-1992 CAPITAL IMPROVEMENTS PROGRAM
PROPOSED ADOPTED PROGRAM
PROJECT COST SCHEDULE (\$000)

AGENCY	FUNDING SOURCE	FY 88	FY 89	FY 90	FY 91	FY 92	TOTAL FY 83-92
POLICE							
1. ANIMAL SHELTER EXPANSION	GENERAL FUND	137					137
2. WESTERN STATION	FY 1991 BOND				2,550		2,550
subtotal		137	0	0	2,550	0	2,687
PUBLIC WORKS - DRAINAGE							
1. FLAT BRANCH	GENERAL FUND		545	545	440	400	1,930
2. HORNER ROAD	GENERAL FUND			410			410
3. NEABSCO CREEK	GENERAL FUND			10	35		45
4. NEABSCO TRIBUTARY	GENERAL FUND					100	100
5. MACE COURT	GENERAL FUND				50	460	510
6. NORFOLK STREET	GENERAL FUND					35	35
7. HOLLY ACRES	GENERAL FUND						0
subtotal		0	545	965	525	995	3,030
PUBLIC WORKS - REGIONAL IMPOUNDMENTS							
1. MARUMSCO CREEK	GENERAL FUND		580				580
2. POND #2 (j)	GENERAL FUND			75	600		675
3. POND #3 (j)	GENERAL FUND					75	75
subtotal		0	580	75	600	75	1,330
PUBLIC WORKS - SOLID WASTE DISPOSAL							
1. SANITARY LANDFILL CITIZEN AREA	GENERAL FUND (LOAN)			620			620
2. RESOURCE RECOVERY STUDY	LANDFILL FEE	250	250				500
3. RESOURCE RECOVERY CONSTRUCTION	G.O. OR REVENUE BONDS					* 100,000 * (k)	100,000
4. DEBRIS LANDFILL STUDY	GENERAL FUND (LOAN)	310					310
5. DEBRIS LANDFILL CONSTRUCTION	REVENUE BOND			10,000			10,000
subtotal		560	250	10,620	0	100,000	111,430
PUBLIC WORKS - ROADS							
1. STATE ROAD MATCH PROGRAM (l)	GENERAL FUND	1,260	1,260	1,260	1,260	1,260	6,300
2. ROAD IMPROVEMENTS	FY 1989 BOND		20,000				20,000
	FY 1991 BOND				30,000		30,000
subtotal		1,260	21,260	1,260	31,260	1,260	56,380

(j) The pond locations are to be determined by the Department of Development Administration.

(k) The costs and timing for the construction of the facility are preliminary and will be more descriptive when the study is completed.

(l) Of the \$1,260,000 annual allotment, \$630,000 will be matched by the state.

MOYTON: PFITZNER

November 25, 1986

SECOND: READING

Regular Meeting

Res. No. 86-941

RE: APPOINTMENT OF CITIZEN ADVISORY COMMITTEE FOR THE
DEBRIS LANDFILL STUDY

WHEREAS, the Prince William Board of County Supervisors, by Resolution No. 86-606 authorized staff to prepare a Request for Proposals (RFP) to identify debris landfill sites and prepare associated financial analyses; and

WHEREAS, a committee with representatives from Public Works, Planning, Health, Finance and Economic Development has prepared an RFP for this purpose; and

WHEREAS, in accordance with the Prince William County Purchasing Regulations, the County Executive has appointed a consultant selection committee and authorized the issuance of this RFP; and

WHEREAS, a Citizen Advisory Committee, comprising of a representative from each Magisterial District appointed by the Board, could provide valuable input into the analyses to determine potential debris landfill sites;

NOW, THEREFORE, BE IT RESOLVED that the Prince William Board of County Supervisors does hereby appoint the following citizens, identified by Magisterial District, to a Citizen Advisory Committee to participate in the review and analyses of debris landfills prepared by the consultant:

Brentsville: Mr. Richard King (Member)

Coles: R. Douglas Peet (Member)
Bernard A. Malo (Alternate)

Dumfries:

Gainesville:

Neabsco: Larry Gresham (Member)
Fred E. McKelvey (Alternate)

Occoquan:

Woodbridge:

VOTE:

Ayes: Guiffre, Jenkins, Kidwell, King, Pfitzner, Reading, Seefeldt

Nays: None

Absent from Vote: None

Absent from Meeting: None

For information

Director of Planning
Director of Public Works
Clerk to the Board

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CERTIFIED COPY

Catherine A. ...
Clerk to the Board

COPY

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

-----X
RESOURCE CONSERVATION MANAGEMENT, INC., X
and RAYMOND HAWKINS, X
and RCH LAND SALES, INC., X

Complainants,

v.

BOARD OF SUPERVISORS OF PRINCE WILLIAM X
COUNTY, X

Defendant. X
-----X

Chancery # 23341

Transcript of the hearing held in the above-styled
matter on the 10th day of September, 1987, beginning at
10:06 a.m., before the Honorable Frank A. Hoss, Jr., Judge
of the Circuit Court of Prince William County, Virginia, in
the Courthouse thereof.

Northern Virginia Reporting
105
STENOGRAPHIC COURT REPORTING

4453 MAJESTIC LANE
FAIRFAX, VIRGINIA 22033
703-378-6220

MANASSAS, VIRGINIA
703-361-2945

A-P-P-E-A-R-A-N-C-E-S

On Behalf of the Complainants:

MARC E. BETTIUS, ESQUIRE
Miles & Stockbridge

On Behalf of the Defendant:

JOHN H. FOOTE, ESQUIRE
County Attorney of Prince William County

On Behalf of the Intervenors:

PATRICK M. MCSWEENEY, ESQUIRE
McSweeney, Burtch & Crump

Reported by:

Christina A. Carter

Northern Virginia Reporting
STENOTYPE COURT REPORTING

106

4453 MAJESTIC LANE
FAIRFAX, VIRGINIA 22033
703-378-6220

MANASSAS, VIRGINIA
703-361-2945

P R O C E E D I N G S

THE COURT: The matter of Resource Conservation Management, Incorporated, and Raymond Hawkins, and RCH Land Sales, Incorporated, Plaintiff, versus the Board of Supervisors of Prince William County, Chancery Number 23341.

MR. BETTIUS: Plaintiffs are ready, Your Honor.

THE COURT: Would you identify yourselves for the record?

MR. BETTIUS: Yes, sir. Your Honor, my name is Marc E. Bettius, and I'm a partner in the firm of Miles & Stockbridge in Fairfax, sir.

MR. MAHAFFEY: Peyton Mahaffey, associate in the firm of Miles & Stockbridge.

MR. FOOTE: John Foote, Your Honor, County Attorney for Prince William.

MR. MCSWEENEY: Patrick McSweeney. I'm with the firm of McSweeney, Burtch & Crump in Richmond, and I represent the Intervenors, Your Honor.

THE COURT: All right. It comes on your motion. You may proceed.

MR. BETTIUS: It does, Your

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NORTHERN VIRGINIA REPORTING

Fairfax, VA
(703) 378-6228

1 Honor.

2 Your Honor, as a preliminary matter, we have
3 given to opposing counsel a copy of authorities that we will
4 use and have been cited in our brief. I'd like to give that
5 to the Court as well.

6 May it please the court, the matter comes on this
7 morning for, on our Motion for Summary Judgment. And what
8 we are doing here is to contest a purported exercise of
9 police power by the governing body of Prince William County.

10 The protection of the public health, safety, and
11 welfare sounds like a wonderful thing. In our system of
12 jurisprudence it has, however, been regarded as a
13 restriction on the rights -- or a synonym for the
14 restriction on the rights of others.

15 And in terms of our statutory and constitutional
16 scheme, exercises of the police power, especially by local
17 governments, we will show in the course of our memorandum,
18 are fundamentally questioned.

19 And one of the first things that I think we need
20 to do this morning is to look at where this case is as the
21 Court approaches a decision.

22 First of all, cross Motions for Summary Judgment
23 have been filed both by the County and by the Petitioner.

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NORTHERN VIRGINIA REPORTING
Fairfax, VA
(703) 378-6220

1 And it leaves the Court I guess somewhere like under Rule
2 56. The presumptions that normally apply have to be
3 somewhat questioned.

4 It is of material import that I communicate to
5 the Court early that the attack which we make upon the
6 ordinance is one as the ordinance is drafted.

7 Fundamentally there are two types of attack which
8 can be made against a legislative act. The as-applied
9 argument, which really attacks the reasonableness of the
10 ordinance as it affects individuals or groups in the
11 community, or the other one, which says it is so void, so
12 violative of either constitutional or statutory regulation,
13 that it just can't exist.

14 And that is the argument that we make to the
15 Court this morning. That as drafted, this ordinance is void
16 of statutory or legislative authority.

17 At the outset, Your Honor, it is important that I
18 think we tell the Court that it is our view of the law, and
19 we think the precedents firmly support, that Prince William
20 County has no police power, as such, which is inherent from
21 the fact that it governs.

22 In Virginia, all police power resides within the
23 General Assembly, and then is delegated through appropriate

1 means and statutes by local -- to local governing bodies by
2 the General Assembly.

3 And the best expression of that is, we think,
4 found in a case called Gordon v. Fairfax County, in which
5 the Supreme Court said in Virginia the powers of Boards of
6 Supervisors are fixed by statute, and are limited to those
7 conferred expressly or by necessary implication.

8 The Court, I think, may be somewhat aided -- and
9 I don't presume to intrude into areas of how the Court
10 should make its decision because the Court's going to do
11 that as it sees fit.

12 What is the standard of review that the Court is
13 concerned with in judging the legislative validity of a
14 county ordinance when it's challenged on an as-drafted
15 basis?

16 In effect, Your Honor, I could give the Court a
17 shorthand expression. We say that this case is on its face
18 -- that this ordinance is on its face a violation of
19 Dillon's rule.

20 And the shorthand statement of Dillon's Rule is
21 that which I have just given the Court for Gordon. That the
22 County itself, in and of its own right, is impotent. It has
23 no police power except that delegated.

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NORTHERN VIRGINIA REPORTING
Fairfax, VA
(703) 378-6220

1 Under such circumstances, if the fundamental
2 attack rests on the delegation of legislative authority,
3 there is no presumption of validity. We don't come to this
4 Court having to prove on this motion our view of the case,
5 even by a preponderance of the evidence.

6 The sanctity and even the existence of Dillon's
7 Rule is premised on the fact that the Court must look with a
8 jaundiced eye at any exercise of legislative authority;
9 otherwise, Dillon's Rule would cease to exist.

10 The best expression of this judicially, Your
11 Honor, is in a case which we cite in our brief, called
12 Commonwealth v. Arlington County. And it really sets forth
13 where the proper standard of review is in one of these
14 cases.

15 In Commonwealth v. Arlington County, Arlington as
16 a governing body elected to enter into collective bargaining
17 with its employees. The Supreme Court found the
18 possibility, or the presence of a Virginia state policy that
19 was inconsistent with collective bargaining with government
20 employees.

21 In terms of the decision which the court
22 rendered, the Supreme Court rendered, it said that the
23 county's position rested on the fact that it was an

1 employer, and by statute was recognized to be an employer,
2 and matters of contract between employee and government had
3 to fundamentally be outside the ambit of state policy. And
4 the Court said that's not true.

5 The Court said if indeed such a policy exists in
6 the state, if you can claim an inherent right that is
7 contradictory of state policy, you have fundamentally
8 abolished Dillon's Rule.

9 Now, what does that mean to this case? It means
10 that it as the Court looks at this ordinance, it must first
11 identify this ambit.

12 It's often said that God created the deer and
13 that the moose was a creation of a government committee.
14 And I think that that appropriately describes the situation
15 that we're going to be talking about this morning.

16 They have elected to call this animal a zoning
17 ordinance. And that, Your Honor, is not what it is at all.

18 Courts have been very judicious in looking in
19 Virginia, especially when something is called a zoning
20 ordinance, at what its real intent is.

21 And I would respectfully submit that the county
22 has furnished to the Court in support of its Motion for
23 Summary Judgment how the issues should be framed in a

1 document or exhibit which is attached. And it is a
2 memorandum to the county executive from the planning
3 director dated the 26th of September, 1986.

4 And frankly, it's all across the brief and the
5 legislation and itself. It says the issue that the Board was
6 considering when it adopted the questioned ordinance is
7 whether to amend the text of the zoning ordinance to
8 prohibit the operation of privately owned debris landfills.

9 Well, if the Court says landfills are a land use,
10 it's not a zoning ordinance. Indeed it's not, Your Honor.
11 It doesn't have a thing to do with whether Prince William
12 County will ever have a landfill or not. It doesn't
13 establish a landfill. It doesn't prohibit a landfill.

14 It assumes that a landfill is going to exist in
15 Prince William County, and then goes on to regulate what,
16 Your Honor? Ownership. And this is purely an ordinance
17 which seeks to regulate the ownership of land.

18 But more fundamentally, it does something much
19 more destructive than that. As I said earlier in the
20 argument, Your Honor, the police power when exercised is a
21 synonym for the restriction of my freedom, or your freedom,
22 or somebody else's freedom. That's what's at the heart of
23 it.

1 It is a sacrificing of private rights, either
2 liberties or property rights, for the common good of the
3 people.

4 And in terms of Virginia's view of how that's
5 done, the Court, I think, really needs to look at a zoning
6 case that was something else. That was called one thing,
7 and that was something else.

8 It was a case, Your Honor, that I had the
9 privilege of arguing both in the trial court and in the
10 Supreme Court. And it's the famous DeGroff case.

11 What was interesting about the case was, it had a
12 much greater spark of legislative validity attached to it
13 than the ordinance that we're dealing with here today.

14 It required developers to do two things. It
15 required developers to build homes in subdivisions which
16 they would sell to -- ownership, the first question,
17 ownership -- disadvantaged socioeconomic groups. It was low
18 and moderate income housing.

19 The ordinance then did two things, Your Honor.
20 It said you will direct ownership of property -- just like
21 this ordinance does; only the county could own a landfill.
22 In DeGroff the only owners of these houses that you can sell
23 to are a restricted socioeconomic group. And regulated the

1 compensation for the use of land. Just as this ordinance
2 squarely does.

3 It says if there is to be compensation for the
4 use of land that attributes to a landfill, it's going to go
5 into the coffers of the county.

6 The Court in ruling in that case -- and it was
7 interesting, Your Honor. As counsel were preparing for
8 argument, we got a letter from the Supreme Court.

9 And the Clerk asked us to focus special attention
10 -- and it's the first time it's ever happened to me in my
11 career -- on the issue of can a zoning ordinance direct
12 ownership and compensation of land. That was a question
13 that the Court wanted us to focus on.

14 The Court in ruling on the case issued, I think,
15 what is a noteworthy opinion, and one which I think frankly
16 controls in this case, as to what this ordinance is, as to
17 whether in fact it is a zoning ordinance or whether in fact
18 it regulates ownership of land.

19 And I'd like to find that, if I can, Your Honor,
20 and quote to the Court.

21 In that case, the Court said, "We conclude that
22 the legislative intent was to permit localities to enact
23 only traditional zoning ordinances, directed to the physical

1 characteristics and having the purpose neither to include
2 nor exclude any particular socioeconomic group."

3 In effect, the Court said, "You're not regulating
4 bulk, height, and mass. You're now getting into an issue of
5 who may own and what you may charge."

6 Your Honor, fundamentally, early on in the zoning
7 history of a growing Northern Virginia, the Supreme Court
8 struck a blow at that kind of ordinance. They said, "Don't
9 restrict freedom of ownership of land in that fashion."

10 In terms of where we are, the County itself in
11 its brief tells us what a zoning ordinance is in very clear
12 terms. And unfortunately, it's another Fairfax case. It's
13 Fairfax v. Parton.

14 Zoning ordinances are of two types and in effect
15 a hybrid of the two types. They either prohibit a land use,
16 or they include a land use, or they do a combination of
17 both.

18 Your Honor, as you consider this case, it becomes
19 apparent that this ordinance doesn't prohibit landfills.
20 And it doesn't allow landfills. It assumes their existence,
21 and then tells us who owns them.

22 Your Honor, that is absolutely violative of what
23 the concept of a zoning ordinance is.

1 Earlier on in the argument, I told the Court that
2 in effect the county is impotent and possesses no police
3 power unless specifically delegated.

4 The county has tried to wrap this ordinance in
5 the cloak of being a zoning ordinance in order to give it a
6 color of legislative authority. And that they can't do,
7 because it's not a zoning ordinance.

8 Is there any expressed authority then, outside of
9 the zoning ordinance? Because the Court should search to
10 try and find a valid basis to sustain the ordinance.

11 Where else is there a delegation that the county
12 can conceivably hold onto, in order to say that this
13 ordinance is valid? And the Court must either try and find
14 an expressed delegation, or an implied delegation, that
15 would allow that to happen.

16 The only other express delegation is in effect
17 the general police power delegation in 15.1-510 of the Code
18 of Virginia.

19 Interestingly enough, Your Honor, every time --
20 every time that a jurisdiction has called a moose a deer in
21 the form of a zoning ordinance, when they get into the four
22 walls of a courtroom, they start arguing general police
23 power delegation under 510.

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1 And in every single case -- and I'm going to get
2 into these -- where that has occurred, and the Court says
3 you're not dealing with traditional regulation of land, the
4 separation of prejudicial uses, height, bulk, and mass, it's
5 invalid. And it's an imperfect attempt to exercise the
6 police power in an inappropriate way.

7 One of the most wonderful things in having a
8 zoning career, I guess, such as I've had in land use
9 regulation, is you get to get up and argue the right of
10 property and the right of people to pursue their livelihood.

11 In effect, you get to rail at the exercises, or
12 inappropriate, what you conceive to be inappropriate
13 exercises of police power.

14 There is fundamentally in this case, Your Honor,
15 a very important principle. This is a case that is of
16 significant moment. Not because of the regulation of
17 landfills, but of what the government has said here.

18 The government has said, "We're not going to
19 regulate land use. We're going to tell you who can practice
20 a particular trade. And we're going to do that by first
21 saying that the trade or landfill use is affected with the
22 public interest.

23 "And once we make the finding that it's affected

1 with the public interest, we're going to make a very basic
2 policy decision. And that policy decision is, in Prince
3 William County today, government does it better than
4 business."

5 Your Honor, Jefferson is doing 360's in his
6 grave.

7 Prince William County has established as a matter
8 of governmental policy that government does it better than
9 private industry. And we say to Your Honor, this is the
10 Commonwealth of Virginia, and these are the United States of
11 America, and that presumption is not found anywhere.

12 But even if such a presumption were to be made,
13 Your Honor, within the statutory scheme of Virginia, with
14 this county being devoid of police power, those decisions
15 are universally made, sir, universally made by either the
16 federal government or by the state government.

17 They decide which industries and which businesses
18 can be regulated, unless they make a specific delegation to
19 local government.

20 We challenge the county to tell us under what
21 circumstance the county has ever been able to monopolize,
22 regulate, and issue to itself a certificate of need and
23 convenience, in the absence of an expressed delegated

1 authority.

2 They run a police department; provided for in the
3 Code. They run sewer systems; provided for in the Code.

4 Each one of these delegations that allow them to
5 monopolize or to practice in a specific area are
6 fundamentally delegated authorities.

7 Now, what's been said in terms of Virginia law
8 about the possibility of implied delegations? Is there a
9 possibility of implied delegation, and how does the Court
10 search through the issue of implied delegation in this case?

11 Your Honor, I would submit to the Court that
12 almost any business can be found to be affected by the
13 public interest.

14 If for instance the Court were to have before it
15 an ordinance that said that gasoline is an extra hazardous
16 substance, the Court would have to agree with that. If the
17 Supreme Court said gasoline in and of itself is a volatile
18 explosive. It's a terribly dangerous possibility that
19 irresponsible people are out there regulating and selling
20 gasoline.

21 If the county then decided it wanted to go into
22 the gasoline business under this ordinance, they would
23 merely prohibit all gas stations within Prince William

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1 County, and establish themselves as the ones who were going
2 to run the business, and call it a zoning ordinance. That's
3 precisely what happened here.

4 Now, with regard to debris landfills, there is a
5 very significant point that cannot be overlooked in this
6 case.

7 In the discovery, which the Court can consider on
8 summary judgment, the county concedes in Answer to
9 Interrogatories that landfills appropriately run by private
10 industry are perfectly safe. Well, that's an amazing
11 admission.

12 And they tell the Court that what they're
13 concerned about is that people may abandon them. Some
14 people may run them badly. That they may not close down
15 properly. And these are matters of concern to the county.

16 I'll ask Your Honor to focus on that and put that
17 issue aside for just a moment.

18 As the Court looks for an express delegation,
19 you're not going to find out. And the county will not refer
20 you to one, except perhaps under one section of the Waste
21 Management Act, which I'm going to discuss in detail with
22 the Court in the context of decided case law.

23 But if we will, Your Honor, you're not going to

1 find that expressed delegation to do this. So we're talking
2 about implied delegation.

3 And we've already seen that there can be no
4 implied delegation in the absence of some nexus for
5 asserting that it exists.

6 Your Honor, in Horn -- which was another case
7 that I had the privilege of appearing in the Supreme Court
8 in -- the Court said the General Assembly of Virginia has
9 undertaken to achieve -- and I think this is very important
10 -- in the enabling legislation, a delicate balance between
11 the individual property rights of the citizens and the
12 health, safety, and general welfare of the public as
13 promoted by reasonable restrictions on those property
14 rights.

15 We believe that it is peculiarly a function of
16 the General Assembly to determine, subject to constitutional
17 restraints, what revisions in the statute may be required to
18 maintain the appropriate balance between important but
19 frequently conflicting interests.

20 And again, Your Honor, it is perhaps one of the
21 best shorthand statements of private rights being sacrificed
22 to what the government conceives is good for us.

23 I once heard a liberal defined as an individual

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1 who does what's good for you, whether you like it or not.
2 And I perceive that -- while not choosing to couch the Board
3 of Prince William County as liberal or conservative -- they
4 are doing what's good for us, whether we like it or not.

5 And this they can't do. And Horn is a very
6 interesting case. Because it's going to take us some place
7 that I want to go, into the Virginia Waste Management Act.

8 THE COURT: You're saying, are
9 you not, that it's not that the government can't do it; it's
10 that the local government can't do it?

11 MR. BETTIUS: Exactly, Your
12 Honor. Exactly. And the other position is that government
13 --

14 THE COURT: Because they do do
15 it all the time. They do it in our profession. They say
16 who can practice law and who can be a dentist.

17 MR. BETTIUS: Exactly, Your
18 Honor. And that's the point I make.

19 It has always been recognized that if a business
20 is to be, by fiat, decided to be in the realm of the public
21 interest so that it can be regulated -- so that it can be
22 regulated -- these are decisions made by the federal
23 government, and they are decisions made by state government.

1 And they're subject to equal protection of the law. And
2 that's fundamentally so important to what we are doing here.

3 Yes, indeed -- and we're saying ultimately, Your
4 Honor, that the state has announced a policy, and they've
5 announced it strongly, that it is private landfills which
6 are to be encouraged.

7 And, Your Honor, before I sit down if I haven't
8 shown you directly in the statute where that's occurred, I
9 haven't done my job, and I hope somebody will remind me.

10 But I will tell you that there is in existence a
11 plenary, total regulation of landfills within the
12 Commonwealth of Virginia that contains a total statement of
13 state policy which is fundamentally contrary to that which
14 has been adopted by the Board of Supervisors.

15 At a state level, Your Honor, the state has said
16 with regard to hazardous landfill sites, where you put
17 atomic waste -- I'm talking about the glow-in-the-dark
18 garbage, Your Honor. If you picked it up and put it down,
19 you'd glow in the dark, that kind of garbage. The most
20 intense type of waste. The most intense type of waste.

21 That they have said private ownership is to be
22 encouraged, in those express words. And it ties right back
23 into this Horn case that I just cited. Horn was a very

1 interesting case.

2 Fairfax County, not unlike Prince William County,
3 was experiencing enormous growth. And what they did was,
4 they decided they were going to declare a moratorium on
5 zoning, site plans, and record plats. They just said there
6 aren't going to be any filed. And we're not going to permit
7 them to be filed.

8 The Supreme Court said, what in the world are you
9 doing? First of all, that's not a zoning ordinance. You're
10 regulating subdivision plats. And while that's delegated to
11 you, we don't find in there delegation to stop them. We
12 find it's a matter of a right in property. And if you're
13 going to curtail the very fundamental right like that,
14 where's your authority?

15 But what was interesting about the ordinance,
16 Your Honor, what was very interesting about the ordinance
17 was, it provided for the application of a new ordinance to a
18 newly adopted or newly annexed area. The County had gone in
19 a newly annexed area.

20 This ordinance said, you can temporarily extend
21 your subdivision plats and ordinances to it. And the Court
22 said what you're talking about is temporary suspensions of
23 private rights. The legislature spoke to temporary

1 permission and if they meant to speak to temporary stopping,
2 they would have said so.

3 And you're going to see, Your Honor, that exact
4 wisdom applies in this case.

5 Because as I've told the Court, the Waste
6 Management Act, which is a total and preemptive legislative
7 strike at waste management, says in Section 10-287 of the
8 Code of Virginia, it is further -- "It is the further intent
9 of the General Assembly that hazardous waste treatment,
10 storage, and disposal facilities should be privately owned
11 and operated to the extent feasible.

12 "And whenever privately or publicly owned and
13 operated should be subject to strict governmental
14 regulation. And the cost of long-term post-closure care and
15 maintenance of hazardous waste treatment, storage, and
16 disposal facilities should be borne by their owners and
17 operators."

18 And now, Your Honor, look at their Answers to
19 Interrogatories. It's dispositive. What do they say are
20 the reason for the adoption of this ordinance?

21 They're concerned about badly run landfills.
22 They're concerned that they will be abandoned.

23 This Waste Management Act, Your Honor, provides

1 for a comprehensive scheme of financial responsibility. And
2 in fact, Your Honor, we're going to ask you to take judicial
3 notice -- I'm going to pass them up -- the first set of
4 regulations of this newly created Waste Management Board has
5 come out.

6 And what do they regulate? Financial
7 responsibility. We're going to tender them to the Court.
8 Financial responsibility of privately owned debris
9 landfills.

10 There is, Your Honor, a statement of policy and
11 intent that these are viable and in fact desired uses within
12 the Commonwealth, and we find Prince William County, on a
13 lark of its own, making a legislative finding that's totally
14 inapposite, totally inappropriate in a scheme of statewide
15 regulation. And this they can't do.

16 There is a case -- and I'm surprised to see it in
17 the County's brief. They cite King, the case out of
18 Arlington County.

19 And, Your Honor, I think that the Court is going
20 to be well aware of the trial judge who sat in that case,
21 because he authored more intelligent opinions, I think, in
22 this county and every other county in Northern Virginia.
23 And it was Walter McCarthy. And he sat on that bench for

1 over 40 years and saw an awful lot happen. He rode all of
2 these circuits.

3 And what happened was that the Commonwealth of
4 Virginia had adopted a dog licensing and taxing statute.
5 And Arlington County came back and said -- and this is, I
6 think, one of the most important cases decided on the issue
7 of implied exercise of authority.

8 Everybody always looks for guidance. And if I
9 can digress for a moment, Your Honor, both counsel in this
10 case have taken the liberty of citing some out-of-state
11 cases. And they're about as useful to Your Honor as a map
12 of New York City in wandering around Manassas.

13 Because frankly, as you'll see in the DeGroff
14 opinion, which is cited in our brief, the Court came to a
15 very fundamental decision. And I think it's referenced in
16 the DeGroff case.

17 You have to look at each state's regulatory
18 scheme, and you have to see if it's a Dillon's Rule state in
19 the first place, or if it's not a Dillon's Rule state,
20 before you understand whether there is a positive home rule
21 in these counties to make decisions.

22 In almost every state the delegation of authority
23 is different. But Virginia has a well-developed body. And

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1 Your Honor, these cases will put you to sleep after the best
2 night's rest you've ever had. But as a lawyer who works
3 with them all the time, they get to be good friends.

4 But the King case really is the one that gives
5 you an insight into what a county can do, especially in the
6 area when the state legislature has stated to write on a
7 slate.

8 Judge McCarthy said, I've got to find whether
9 there is reserved to Arlington County, within a dog taxing
10 and licensing statute, the right to control vicious dogs,
11 and whether they can be put to death. A pressing issue
12 which we see with these pit bull type dogs.

13 Judge McCarthy, in looking at the statute, said
14 admittedly I must proceed with caution because there is a
15 state policy of regulation here. But he said, the ordinance
16 is totally silent on the issue of vicious dogs.

17 And then he made the corollary of judicial
18 reasoning that ties it all together. He said, does that
19 give me the authority to rule? He said, I think it does,
20 because of one reason.

21 People sitting in special or general sessions
22 don't understand Arlington county the way we do. The
23 concentrations of our population. How we're going to

1 interact with one another.

2 And he said, for that reason the state has talked
3 generally about dog registration and licensing. But it
4 hasn't preempted vicious dogs. And I find, because this
5 matter is of particular, within the particular breast of
6 knowledge of our local legislators, they can do it
7 notwithstanding a government policy.

8 But what was contrary -- what was very important
9 was, Walter McCarthy found, Judge McCarthy found, in sitting
10 on that case, that there was no contrary expression of state
11 intent.

12 Well, Your Honor, there is a contrary expression
13 of state intent. But Your Honor need go no further than to
14 make one intellectual connection in this case.

15 The County has said, private is not as good as
16 public, notwithstanding all things equal, that private
17 landfills can be run well. And I think we all know, just
18 from general knowledge, that some very badly run municipal
19 landfills exist. But they've made that regulatory decision.

20 Isn't it -- when -- we think, Your Honor, that
21 when you read the state Waste Management Act, and it is a
22 comprehensive scheme of regulation, that policy decisions so
23 fundamental as whether it's going to be public or private

1 should be made by the regulator and not the regulated?

2 Because these folks, if they operate a landfill,
3 are indeed the regulated. They are regulated as well. They
4 get to escape many of the requirements of bonding and so
5 forth.

6 But in this case we have the county who wants to
7 be the sole operator as the regulated party, getting up and
8 saying, we're going to make fundamental policy.

9 Your Honor, if I was sitting in Richmond and I
10 was on the Waste Management Board, I'd say, well, we got a
11 little unique situation in Prince William. I'm not going to
12 regulate a whole class of who? That's been taken away. And
13 I'm not an owl sitting in a tree, by saying who. I mean
14 who's going to operate these things?

15 They've taken that away from the regulator.
16 These are such fundamental decisions within the context of
17 regulation as to whether it's going to be public or private,
18 that they can't stand, in terms of a statewide comprehensive
19 regulation of landfills, Your Honor. It just doesn't make
20 sense.

21 And if the law is to have any respect in the
22 breast of the people, it's got to make sense. What's
23 happened here, Your Honor, is we have been assured that in

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1 Prince William County, the establishment of landfills is no
2 longer a legislative process.

3 There won't be any zoning hearings. There won't
4 be any private use. This ordinance will never be applied.
5 It won't have an applied status because nobody can apply.

6 It fundamentally is antithetical to the way we
7 live. And what we believe in. And our constitution and our
8 state method of regulation.

9 You can't even apply. You can be the best there
10 ever was. The state could say, well, you run landfills
11 outside of Charlottesville. And they're wonderful. But you
12 can't apply in Prince William County.

13 Not because we regulators have said so. But
14 because Prince William County, the regulated, has said so.
15 They have monopolized the business without any scintilla of
16 authority to do so.

17 Fundamentally offensive, Your Honor, and I'm
18 going to tell you what we think the case is. I have
19 recommended to my clients that we stand on the Motion for
20 Summary Judgment.

21 If this Court can't make a resolution of this
22 ordinance within its four corners -- because it's purely a
23 matter of law in the sense that is an as-drafted attack --

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1 then it can't be done.

2 The evidentiary questions come as to
3 reasonableness. And the county has attempted to say that
4 that's what this case is. And that's not right, Your Honor.
5 We're not going to talk about an as-applied ordinance that's
6 fairly debatable.

7 We're saying do these folks have the authority to
8 do this? And they got to convince you that they do. That's
9 fundamentally what this case is about.

10 I don't have to get up and convince Prince
11 William County that I'm qualified to practice law. That
12 decision has been made. It's been made by the Bar
13 Association. And it will be made by the local judges and
14 committees that oversee the discipline and continuing
15 practice of lawyers.

16 But could Prince William say that we've noted
17 within the Bar substantial abuses by local members of the
18 Bar or the public -- and I'll bet Your Honor knows of some.
19 I know of some. And the County Attorney certainly knows of
20 situations where lawyers have disabused the citizens of
21 Prince William County.

22 Can they now say that you can practice law in
23 Prince William County only if you have a place of business

1 to do so, and incidentally only the county can own the
2 places of business?

3 Because that's what they've just done with
4 landfills, in the face of a scheme that's ever bit as
5 comprehensive as the regulation of lawyers.

6 Who's next, Your Honor? Who's next to be
7 affected with the public interest in Fairfax (sic) County,
8 and legislated out of business in the context of a zoning
9 ordinance?

10 Because if the business which you practice is in
11 any way tied to a fixed place of business, they can put you
12 out of business and monopolize it for themselves, just by
13 saying you can't have that use in Prince William County.

14 And the joke of that is to do it by a zoning
15 ordinance when there will never be a zoning hearing. It's
16 the antithesis of logic. But it sounds good. And it looks
17 good.

18 Put it in the title that deals with zoning
19 ordinance. They amended the form of zoning ordinance which
20 said you could make an application. But today you can't
21 make an application.

22 Now, as we look at the state enabling legislation
23 -- and, Your Honor, there is a case, and it's called Tiny

1 House. And it really says it all. There are few cases that
2 really say it all. And the County cites this as support for
3 their position.

4 It really relates to a section of the Code. Does
5 the comprehensive Waste Management Act give to the County
6 input into the process of licensing management and operation
7 of landfills?

8 Your Honor, in Section 10-271, the County's
9 comments aren't solicited. They aren't solicited, in the
10 following language. "No such permit shall be issued until
11 the director has received notification from the governing
12 body of the county, city, or town in which the landfill or
13 other facility is to be located, that the facility is
14 consistent with all ordinances adopted pursuant to Chapter
15 11, Title 15-1.427 of the county."

16 That sounds good. You got to get comments from
17 the county.

18 Well, let's look at those in the context of a
19 comprehensive scheme of regulation. What is it they're
20 allowed to comment on? Location. Not whether they exist or
21 they don't exist -- and please, Your Honor, tie right back
22 to Horn.

23 Because if you read this in the same context of

1 Horn, if they said you have a right to comment on the
2 location, if they were going to say you have a right to veto
3 any location, they should have said so.

4 And, Your Honor, when you read Horn, and you put
5 it next to this, you say what in the world are these people
6 doing in this adoption?

7 But there's something more, even fundamentally,
8 wrong with an assertion that giving these comments is a
9 right to proscribe. Because that's not what's true at all.

10 Incidentally, these comments are of such
11 magnitude in the granting of a permit, if the county doesn't
12 respond in 30 days, they're waived. They're waived. That's
13 the import of that section.

14 But there is a case right on point, Your Honor.
15 And it's called Tiny House. And it really tells us what to
16 do in connection with ordinances where there is the
17 possibility of an existence of a local power in conflict
18 with state regulation, and when the two come right together.

19 The case, I think, is dispositive of the issues
20 here. First of all, in Tiny House, what they said was, if
21 two establishments serving alcoholic beverages could not be
22 closer than 1,000 feet to one another and special permits
23 were necessary.

1 And the city said, in denying an application,
2 we're not going to let you do that. The applicant then
3 attacked the ordinance, saying it was an impermissible
4 intrusion, an impermissible intrusion on the Virginia
5 Alcoholic Beverage Control law.

6 And the Court said, what are you talking about?
7 They're not regulating the serving of alcohol, except only
8 incidentally. It's a mere incidental intrusion. It is not
9 prohibition.

10 We recognize that the ABC has this right. What
11 they're trying to do is a legitimate zoning power in
12 separating prejudicial uses from other parts of the
13 community.

14 Your Honor, this is a prohibition. You can't
15 file. You can't be heard. You don't have an opportunity to
16 talk to anybody. It's an absolute prohibition. It is
17 regulation in the absolute sense.

18 And when you read the Tiny House case, cited in
19 both briefs, the logic is compelling. That had they, in
20 Tiny House, prohibited the sales of alcohol in the county,
21 it would have fallen right on its face, and it should have.
22 As this ordinance must as a matter of law and construction,
23 by this Honorable Court. It must fail.

1 Your Honor, I've covered so far a number of
2 subjects. And I've probably said enough. But there is a
3 lot more that needs to be said about the ordinance.

4 There is no attack or no question as to the
5 Board's motives. We will concede that bad laws are passed
6 for the best of reasons. And that good laws may be passed
7 for the worst of reasons. That's not the inquiry here.

8 There are two sections of the Virginia Code that
9 deal with what I think zoning can do. And they're found in
10 the jurisdiction and purposes of the Act. And in the
11 jurisdiction and purposes section, they're found in 15-1 --
12 well, they're cited in the brief, Your Honor, but I can't
13 find them. I should know them by heart. 15-1.489, I think
14 in one case, and 15-1486.

15 And it is in that context that you always come
16 back to the same thing. What's the county's right in a
17 zoning ordinance? And the best case construing that is
18 again Horn.

19 If you want to tell us how high a building can
20 be; want to tell us what the setback is; you want to tell us
21 that you can't have a use here, or you can't have it there;
22 that's fine. But don't go prohibiting ownership.

23 These are not -- this is not a traditional

1 ordinance. Your Honor, it absolutely runs contrary to state
2 expression, so we can't have implied authority. Where does
3 the County find express authority.

4 When they turn around and read the Waste
5 Management Act, if you've got atomic isotopes, if you've got
6 nuclear waste, you've got PCP, the legislature says we're
7 going to encourage private landfill use. We're going to see
8 to the financial requirements. We're going to see that
9 they're properly done. And we're going to license them.

10 And then they say, we encourage private
11 ownership. Prince William County finds itself dead at
12 variance.

13 And when you find that the county government
14 stands before the Court nude in terms of authority, it's not
15 cloaked in any authority to do these things, they better
16 find some pretty specific authority within the Waste
17 Management Act to do what they've done.

18 It's interesting, Your Honor, when you read Tiny
19 House, the word "location, location, location." They can
20 regulate location. And I don't think there is a doubt about
21 that. Because that's what Tiny House said.

22 But the regulation in terms of saying it's
23 prohibited, uh-uh. And the County will say that there have

1 been ordinances that prohibit land uses. Well, they try to
2 quote the Bore case in Virginia, and that's not what that
3 case says at all.

4 But I don't have to make that argument. I don't
5 have to sit here in esoteric argument of whether land use
6 ordinances can prohibit or include certain uses. Because
7 this ordinance doesn't prohibit the use, it assumes it. And
8 that's key, Your Honor.

9 When they're up here telling you about zoning
10 ordinances that say that we may be able to exclude it from
11 the whole county, that's not what they've done. In this
12 ordinance, they've said we're going to have them. But
13 you're not going to own them.

14 Let them show you that kind of law in this
15 Commonwealth. Because if they can, Your Honor, I'm going to
16 move. That's not what Virginia is about. And that's not
17 what Virginia has ever been about.

18 And this Court needs to shoot this thing
19 aborning. To kill it before it does more damage. Because,
20 Your Honor, the problem with this kind of regulation is that
21 it tends to insidiously spread, and to invidiously find
22 itself infecting many other areas.

23 The list of potential regulation on this scale is

1 infinite only to the extent that the legislators can
2 conceive that there is a public interest that they want to
3 serve with the predisposition that government does it
4 better.

5 And that, Your Honor, is not found in the
6 American system of regulation or judgment. And what Your
7 Honor needs, I think, to firmly understand about our
8 position is that we agree with the County that in the past
9 there has been ineffective regulation by state authority.

10 It is not for the county, for me, or for this
11 court to judge the adequacy of state regulation. We're not
12 the arbiter of the General Assembly's wisdom.

13 But what the General Assembly did was to
14 recognize that the previous bastion of power, State Health
15 Department, wasn't doing an appropriate job. And as Your
16 Honor reads Title 10, you're going to see that they
17 established a comprehensive scheme of regulation. And they
18 said, we're the regulators.

19 And inconsistent with that -- and incidentally,
20 Your Honor, it is important that the Court note that in that
21 Act, they speak to a statewide concern being addressed on a
22 regional basis. Regulation is to be addressed on a regional
23 basis.

1 Well, they can't have a regional basis now
2 because regulation in terms of Prince William County has
3 already been usurped by the Board. They said, we're going
4 to be the only ones in business.

5 Now, Your Honor, the thing that's made this
6 country work so well is if somebody is not doing something
7 right, generally somebody will come along and provide
8 another opportunity to do it better. And that's inherent in
9 this scheme of regulation.

10 If Prince William County decides not to establish
11 a landfill, or they decide to take only certain loads, or
12 they decide to run theirs a certain way, there won't be a
13 regional solution to the landfilling by regulative body at
14 the state level.

15 Key policy decisions have already been made. No
16 competition in Prince William County.

17 Your Honor, that's so antithetical in terms of
18 what's been done in this ordinance, that we respectfully
19 submit to this Court it cannot stand.

20 We have then established, Your Honor, several
21 things, I think, or we would ask the Court to consider that
22 it is our position that we have established -- you're going
23 to tell us what we've established -- that first of all, it

1 isn't a zoning ordinance. Because in order to be a zoning
2 ordinance, it's got to regulate land use. This one
3 regulates ownership.

4 Secondly, there is no express delegation; in
5 fact, there is a contrary expression of state intent as to
6 privately owned landfills.

7 And it is to me interesting that the county would
8 take the position that while you can store the most noxious
9 forms of waste in privately owned landfills, you can't take
10 the most inert kinds. And that's so inconsistent with Horn
11 and the other cases.

12 We must remember that it is described, Your
13 Honor, as a zoning ordinance. There is an interesting thing
14 about whether it's a zoning ordinance or not. Section 1,
15 those people that codified the laws of the Commonwealth of
16 Virginia elected to put this in the first chapter of the
17 Code in the 13th part.

18 It's Code Section 1-13.17 of the Code of Virginia
19 that says, "When the council or authorities of any city or
20 town, or any corporation board, or a number of persons are
21 authorized to make ordinances by laws, rules, regulations,
22 or orders, it shall be understood that the same must not be
23 inconsistent with the Constitution and the laws of the

1 United States of this state."

2 How do you square direct statement of public
3 policy found in Section 10-287 of Virginia, that facilities
4 should be privately owned and operated, with an ordinance
5 that says on its face and is described by the County to be
6 an abolition of privately owned landfills?

7 Your Honor, I hope that the folks out here don't
8 take a dislike to Greeks, because I could find myself
9 banned. I say that with some sense of humor.

10 But you have to remember, Your Honor -- and this
11 is not slight on the Prince William Board, because I think
12 they acted from the best of motivations -- in 1933, the
13 National Socialist government in Germany restricted the
14 rights of certain racial -- they conceived to be racial
15 groups to own businesses.

16 And that's just been so antithetical to the
17 constitutional system of government that we have, if a
18 decision is going to be made, in the context of private
19 liberties, we've seen that they're to be made with conscious
20 view toward equal protection of the law.

21 Even if Your Honor were to assume for a moment
22 that the power existed in Prince William County to do this,
23 the County has made a legislative finding that's

1 incorporated in their interrogatories here that private
2 business can do this as well. They're safe; if they're
3 properly run, they're safe.

4 The basis for classification has just disappeared
5 right before the Court's eyes. You have discrimination, and
6 patent discrimination, without any sense of classification
7 that justifies it.

8 It's so fundamentally void of constitutional
9 authority that it fails on this basis. But Judge Plummer in
10 deciding the DeGroff case said -- and that was the low-
11 moderate housing case -- he said, you're not going to get me
12 to make a ruling on constitutional grounds. I don't need
13 to. And this case is not going to get to the United States
14 Supreme Court that way. It's going to go down on the issue
15 of delegated authority.

16 And Your Honor, it was the Supreme Court of our
17 state who, under those circumstances, sua sponte said,
18 constitutionally this thing creates an aura in the courtroom
19 that we're not going to ride.

20 Hazel and I tried that case together, and we
21 pointedly attempted to keep the constitutional argument out
22 of it, because we saw it as a hot area for the Supreme Court
23 of the United States decision in the seventies.

1 But our Supreme Court felt it was necessary to
2 write on that slate. And they said, if you get to the point
3 where you're regulating ownership and you're getting to the
4 point where you're regulating who can do what, you better
5 have a constitutional nexus in it in local government.

6 Very similar to another case that was decided --
7 and a lot of this law has been made in Fairfax County. It
8 was the Davis case.

9 And Davis is an interesting case because it was
10 candidly admitted -- and a lot of people have said it's
11 poorly reasoned. Well, if it's poorly reasoned, the Supreme
12 Court hasn't said so, because it's never been overturned.

13 There was an airport that existed down on Route
14 1. And an application came up to convert that thing to a
15 shopping center. And, lord, the hearing went off on one
16 issue. The whole zoning decision -- that's an as-applied
17 case, I recognize that. But it really stands for the
18 proposition of what a board can and can't do.

19 The whole issue came down to were there enough
20 sites already present, and whether or not there was a
21 competitive disadvantage to existing merchants in the
22 operation of another center.

23 And the issue was so hot that they got a judge to

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1 come in from out of town to hear the case. And the judge
2 said, you're not going to make me close my eyes to that
3 which is plain to see. You are regulating competition. And
4 that is absolutely what you cannot do under the
5 circumstances and guides of the zoning ordinance.

6 And with the state in this case, Your Honor,
7 telling us -- and I mean in no uncertain terms: private
8 landfills are okay. In fact, they're to be actively
9 encouraged -- we find Prince William regulating competition.

10 Your Honor, I think what the Court ultimately
11 will see when you look at this ordinance is that the
12 establishment of landfills is no longer a legislative
13 decision in Prince William County. It's a political
14 decision.

15 Politicians will advertise a 456 hearing, and
16 establish a landfill. There will never be a public hearing.
17 The press -- and I know, Your Honor, this is a summary
18 judgment -- is making a laughingstock out of the committee
19 appointed to find landfill sites in Prince William County,
20 as we argue this case today. They call them windshield
21 surveys. These are hot, steaming, emotional issues in any
22 community.

23 And you know, I'm getting ready to be called a

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1 garbage lawyer or the trash lawyer. That doesn't bother me,
2 because I'm already getting some of that. I'm now the
3 Prince William trash lawyer. And that's fine.

4 My view of the most important thing about this is
5 that that is why waste management regulation has been in
6 essence removed in large part from local government.

7 We are more and more, Your Honor, coming to the
8 recognition that an unbridled use of the police power
9 creates the police state.

10 In terms of where we are on this issue, Prince
11 William County has still great voice in terms of landfill
12 regulation. There will be hearings. There will be
13 legislative hearings. They will be subject to due process.

14 There is no due process right -- Mr. Hawkins' due
15 process rights have been taken away from him. He has an
16 application in the name of his company pending for a
17 landfill. And they said, you don't get a hearing.

18 The great thing that distinguishes this system of
19 government is that you can sail into the safe harbor of the
20 courtroom and have that kind of thing overturned. You are,
21 Your Honor, the final arbiter, the final arbiter of the due
22 process rights of this man to operate a lawful business
23 encouraged by the legislature.

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1 And it's unfortunate -- and I'm sure Your Honor
2 doesn't like to have to make that weighty decision either.
3 I wouldn't want to be sitting in your position as a resident
4 of Prince William County, having to make the decision to
5 overturn a county ordinance. It's a frightful thing to have
6 to do.

7 But the tough decision has to be made here. The
8 only buffer that we really exists between the unbridled
9 legislative exercise of power to curtail legitimate rights
10 rests in a black robe.

11 And it's here, Your Honor, and we're here to
12 submit this case to you on the basis that we entreat you to
13 recognize that you can't do this; that if a decision is to
14 be made in the final essence as to whether or not this
15 lawful business shall operate in the county, its exclusion
16 should not be decided in this manner.

17 Your Honor, you've been very patient. Are there
18 any questions that I can answer for the Court? In Your
19 Honor's reading of this matter, if there is something that
20 the Court doesn't understand about our position, I'd be glad
21 to answer any questions which you have, sir.

22 THE COURT: I think not at this
23 time.

1 MR. BETTIUS: Thank you, Your
2 Honor.

3 THE COURT: Let's take a brief
4 recess.

5 (Brief recess.)

6 THE COURT: All right, Mr.
7 Foote.

8 MR. FOOTE: Good morning, Your
9 Honor. We, of course, have a number of points that we wish
10 to raise to the Court's attention today. However, I would
11 begin by mentioning simply what the Court already knows.

12 And that is that we have filed a detailed brief
13 in this matter, which addresses a number of the points which
14 Mr. Bettius has raised in his argument this morning, and
15 which we think go a long way toward resolving the questions
16 which might appear in the Court's mind with respect to the
17 position he has taken.

18 I will attempt to not duplicate in my oral
19 argument the points that we've made in our brief, because we
20 did try to be thorough and clear in that document.

21 Mr. Bettius -- and I refer to him as Mr. Bettius
22 because I have known him a great many years, and I have a
23 very great deal of regard for his skills -- Mr. Bettius

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1 unfortunately makes to this Court what I consider to be an
2 excellent emotional appeal.

3 He's got one or two legal arguments and a number
4 of political arguments for this Court. But what he suggests
5 to the Court simply isn't the law in Virginia.

6 The central issue in this proceeding on cross
7 Motions for Summary Judgment is whether Prince William
8 County may prohibit through its zoning ordinance the private
9 use of land for debris landfills.

10 I want to make that even more precise, because a
11 number of points that were raised in opposition to our
12 position are generally in the extreme.

13 The precise issue is not about the regulation of
14 a Tastee-Freeze. It's not about the regulation of doctors
15 and lawyers. It is not about the regulation of dentists.

16 The precise issue before the Court deals with the
17 County's regulation of an area that has traditionally been
18 reserved to local governments. It has only been in the very
19 recent past that the state has interposed in the area of
20 solid waste management at all.

21 This is an area in which we're talking about
22 situations in which private land owners claw the earth
23 permanently. They fill it with, we submit, God knows what.

1 They close it over, and then they go away.

2 Both public and private landfills in Virginia are
3 stringently regulated now. We don't dispute that. The
4 question is which is better for Prince William County, and
5 who decides that.

6 The question that's before the Court in this
7 particular proceeding is whether the ordinance by which the
8 Board has made that fundamental policy decision is facially
9 unconstitutional on the basis of a Bill of Complaint and an
10 Answer. That's it.

11 As this Court knows from reading Rule 2:21, you
12 can consider the pleadings, the admissions if any, pretrial
13 orders. That's it. The summary judgment can be based on
14 nothing else.

15 We submit that there is sufficient information of
16 record to decide some of the questions both sides are
17 mutually putting to the Court. But that's all that's before
18 you.

19 And you will find that -- you will find, sir,
20 that you will labor in vain to find courts in the United
21 States which have done what the petitioners in this case are
22 asking you to do, to rule that an ordinance such as this is
23 invalid on its face.

1 You will labor in vain to find cases that deal
2 with anything like the statutory structure which exists in
3 this state.

4 We have in fact cited a number of cases to the
5 Court from other jurisdictions. We do not wish to dismiss
6 them as simply surplusage.

7 The reason we do so is they're not submitted on
8 the points that Mr. Bettius suggested, but rather on the
9 question of the powers of localities to regulate uses to
10 permit, prohibit, and regulate uses.

11 The petitioners in this case effectively seek to
12 avoid a trial on the issues which we believe are central to
13 the cause. We seek to have one.

14 We are not submitting to you on the basis of the
15 materials before this Court that the issue as a whole
16 decided that we can successfully accomplish what the Board's
17 attempted to accomplish here.

18 Our point is that it is not facially
19 unconstitutional, but that what must be determined is the
20 fair debatability of this legislative enactment as any
21 legislative enactment must be tested.

22 Facial challenges are essentially difficult to
23 tone out. That is, I state no extraordinary principle of

1 law when I state that.

2 You start with the presumption of validity to any
3 ordinance. They assert that somehow when you're dealing on
4 cross Motions for Summary Judgment, that those presumptions
5 are modified in some way.

6 Well, I believe Your Honor is fully aware that
7 that's not true. The locality begins, whether it's a facial
8 challenge or otherwise, with the presumption that what it's
9 done is constitutional and valid.

10 And as I say, fundamental issues here turn on
11 evidence not of record. The record is scarce.

12 We say in brief that the power to prohibit uses
13 in Virginia is not an implied power, but is an expressed
14 power. We say also that there is no preemption because of
15 their misstatement of the character and scope of the
16 Virginia Waste Management Act.

17 Any equal protection and due process claims,
18 which we submit are at the true heart of this proceeding,
19 must be resolve on the basis of a full record, which is
20 simply not before you today.

21 Turning to the specific points, which have been
22 raised by my able colleague's argument to you today, and by
23 his fine brief, we would start with out fundamental

1 proposition that contrary to their assertions, there is
2 express power to do what has been done in this case.

3 If you look at the memorandum which we have
4 submitted, we have detailed a series of arguments which I
5 will not repeat this morning, to the effect that unlike
6 virtually every other state in the nation -- there are only
7 four that we can identify -- unlike virtually every other
8 state, Virginia expressly authorizes the prohibition of
9 uses.

10 Virginia state enabling legislation says that
11 localities may regulate, restrict, permit, prohibit -- and
12 it goes on to say -- uses of land.

13 And then, as Mr. Bettius properly notes, bulk,
14 height, size, that sort of question. A separate provision
15 of the statute.

16 We submit that you cannot avoid or escape the
17 clear meaning of the General Assembly when it said that the
18 locality may prohibit uses.

19 Consequently, it is not necessary for us to move
20 to the question of whether there is some kind of implied
21 power for the County to act.

22 Even -- as we say in our memorandum, even if the
23 ordinance were not deemed to specifically prohibit uses and

1 terms, which we say it does, or the enabling legislation, it
2 also is the case that the power to regulate and restrict in
3 the zoning ordinance necessarily included the power to
4 prohibit as well.

5 The question is not whether it may be done. The
6 question is on what bases it may be done.

7 The cases that we have cited to the Court,
8 particularly with respect to the due process issue -- but as
9 we indicate also applicable to the question of power -- you
10 labor in vain to find a court which simply says the power
11 doesn't exist.

12 There are perhaps one or two jurisdictions which
13 so hold. The vast bulk of American jurisdictions conclude
14 that the power to permit, prohibit, regulate, restrict --
15 however you phrase enabling legislation -- contemplates the
16 exclusion of uses in the proper case.

17 The question of when the proper case is or isn't
18 is the question which can only be addressed from the
19 development of a full record.

20 They assert at the outset that this is not a
21 zoning ordinance. Well, that's a very difficult question
22 for them to reach.

23 But they've got to do it, because if they can

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1 convince Your Honor that that's the case, then it's not a
2 zoning ordinance. We're forced to look for implied powers,
3 and that's a difficult case for the County.

4 But we submit that it's clearly a case of a
5 zoning ordinance.

6 They say it deals with the ownership of land and
7 not land regulations. But, Your Honor, it manifestly
8 regulates land.

9 In a moment I will address the inappositeness of
10 the DeGroff case. But we start from the proposition that
11 what we're talking about here is we tell a landowner what
12 you can and cannot do with your land.

13 And if that's not a zoning ordinance, I don't
14 know how to describe a zoning ordinance, unless you would --
15 as my opponents would ably argue -- unless you argue that
16 all we can do is regulate the height and width of buildings.
17 Well, that's not what zoning ordinances do. This is not the
18 DeGroff case.

19 We say we're not going to let you, a landowner,
20 claw your land up and put a hole in it, in which to bury
21 debris. Regulated or not.

22 The effort on the part of a locality to tell
23 someone what they can and can't do with their property is a

1 zoning ordinance.

2 It was adopted as a zoning ordinance. And I
3 recognize that if that were its character, that would not be
4 dispositive.

5 But the fact of the matter is, it was adopted as
6 a zoning ordinance, and not just this time. But guess what
7 we did here? We took out of the ordinance provisions
8 formally authorizing privately owned debris landfills by
9 special use permits in, I think it was three zoning
10 categories.

11 They come to the Board of Supervisors requesting
12 authorization to do their activity as a matter of zoning
13 law, and now when we tell them they can't as a matter of
14 zoning law, they say it's not a zoning law. It just doesn't
15 hold water, sir.

16 A zoning ordinance may have secondary effect. We
17 don't dispute that. A zoning ordinance, in fact, will
18 almost always have secondary effects on the character or
19 quality of an ownership.

20 But if that's not what its primary function is,
21 then that is not a basis on which it can be struck down.
22 You will again labor in vain to find a case in Virginia or
23 elsewhere in which a secondary effect on someone, directly

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1 related to a prohibition or a permission of a use of land,
2 has been found the basis for overturning the ordinance
3 itself. On that basis alone.

4 Moreover, Your Honor, every case of which we are
5 aware, and all the cases which we have cited to the Court --
6 and I would mention we've already determined this -- but
7 every state case that we cited is provided to you so that
8 you may refer to it.

9 Every case of which we are aware, all of which
10 they cite, treat the prohibition of uses in this manner as
11 an example of the use of the zoning power.

12 I specifically bring your attention to a case
13 called Cavanaugh v. Township of London Grove, because I
14 think it's extremely illuminating.

15 First of all, it specifically dealt with
16 prohibition of sanitary landfill, a landfill. In that case
17 -- and let me go back and say that Pennsylvania is probably
18 the jurisdiction most hostile to the exclusion of uses under
19 its zoning ordinance, under zoning powers.

20 There is a state statute in Pennsylvania similar
21 to that in Virginia which says, gee, you should use privates
22 to the extent feasible. The Township of London Grove had
23 banned a sanitary landfill on the grounds that it was going

1 to do a public landfill.

2 The Township of London Grove took that -- or that
3 was taken by Cavanaugh before the township court -- and I
4 forget what they call the lowest level of trial court in
5 Pennsylvania. But that exclusion was affirmed.

6 The Court of Common Pleas, the Commonwealth court
7 affirmed it. It went to the Supreme Court of Pennsylvania,
8 a court which has developed a thing called the Pennsylvania
9 Rule on exclusion of uses.

10 And that court by divided vote affirmed the
11 exclusion of the sanitary landfill in that case. It
12 affirmed the exercise -- and for my purposes right now, I
13 will emphasize this -- it affirmed the exercise of a zoning
14 power to exclude a sanitary landfill by private parties
15 where the public had expressed its intention to proceed.

16 That case is useful for any number of purposes in
17 this proceeding, Your Honor, and we have provided you a copy
18 of it.

19 It is especially useful with respect to whether
20 these kinds of ordinances are zoning ordinances. Only
21 recently, as I indicated, has the state found its way into
22 the regulation of solid waste management.

23 I reiterate that this has traditionally been a

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1 local concern. It's not, as I suggest, doctors, dentists,
2 and lawyers. That's not the case here today.

3 The case is landfills. Landfills and landfill
4 regulation has traditionally been local based. That infuses
5 both the powers that we assert the county has as a matter of
6 zoning law, and the preemption argument which I will turn to
7 in a moment.

8 They assert that somehow because we have said
9 only private debris landfills are excluded, and not public
10 debris landfills, that somehow it's clearly not a zoning
11 ordinance.

12 Well, I believe the Court knows that zoning
13 ordinances don't apply to localities anyway, unless they
14 expressly say so.

15 We are, as Mr. Bettius correctly observes,
16 subject to 456 review. 14.1-456 of the Code provides a
17 mechanism whereby public uses are authorized and located.
18 We're not subject to the zoning ordinance.

19 Every time we exercise a zoning power, be it in a
20 general manner such as this, or zone by zone, we have
21 clearly affected private rights. That alone does not change
22 its nature.

23 Moreover, as we will show later, the local power

1 to exercise zoning is clearly recognized by the Waste
2 Management Act.

3 My opponents argue the DeGroff case as if it were
4 dispositive with respect to the issues before the Court,
5 saying that the DeGroff case clearly proves this is not a
6 traditional zoning ordinance and therefore it must fall.

7 Your Honor I'm sure will either read or has read
8 the DeGroff case, and will know that that's simply not what
9 it says or does.

10 It's what it says and does with respect to the
11 question of socioeconomic zoning. But it does not say that
12 we cannot regulate how someone will put their land to use.

13 In that case, of course, the question was,
14 someone builds a townhouse complex. It looks like every
15 other townhouse complex. In that, as a matter of
16 socioeconomic zoning, with no other basis, you must set
17 aside 15 percent of the units in that property for lower and
18 middle income persons.

19 Well, I have no trouble saying that the Court
20 was probably correct in its interpretation of Virginia law
21 with respect to DeGroff. But that's not what's happening
22 here.

23 If he says that somehow we restrict or regulate

1 ownership and compensation for land, I submit that's what
2 every zoning ordinance does. It's not a matter of
3 antitrust. It's not a matter of any kind of socioeconomic
4 zoning. Every single restriction or regulation on the use
5 of property affects the value in the hands of the owner of
6 that property.

7 If it quacks like a duck and it walks like a
8 duck, it's a duck. And this is a duck. This is a zoning
9 duck we have here.

10 I repeat again, that the ability to prohibit uses
11 of land in Virginia, while not unique as a matter of
12 exercise of local power, is unique as a matter of state
13 zoning enabling legislation.

14 I no longer recall the four states that permit
15 it, but there is an appendix in the memorandum which
16 identifies -- I think of the 50 states, we were able to find
17 the zoning enabling legislation of 47 or 48 of them.

18 Most of them used the old standard state zoning
19 enabling formulation of regulate and restrict, which most
20 courts have addressed the issue and have concluded also
21 includes the power to prohibit.

22 No case in Virginia, none that you can find, none
23 that you can show to me, and we submit one or two to the

1 contrary, requires every locality to provide for every use
2 within its boundaries.

3 In fact, the law in Virginia seems quite clearly
4 to the contrary.

5 If we may adopt an inclusive zoning ordinance
6 which says that you can permit some uses and prohibit
7 others, or that you need not list everything in a zoning
8 category, it seems to me clearly to include the proposition
9 that you need not think of everything.

10 The question is not that we must one day think of
11 everything. Suppose we don't provide for Tastee-Freezes in
12 Prince William County, and they come before us requesting
13 permission to do so. We say no, because it's not provided
14 for in the ordinance.

15 Well, on what basis could that be sustained were
16 it challenged? And it could be challenged, if you sought
17 permission to go forth. That could -- it could be
18 challenged, there is no deprivation of due process with
19 respect to something like that.

20 Then we would have to justify it on the bases we
21 submit to have to justify any ordinance, and it couldn't
22 survive. I don't think anyone here would contend so.
23 Certainly the county does not contend so.

1 We repeat, this is a peculiar, traditional, local
2 function, encompassed within the zoning power of Prince
3 William.

4 They say because there is no zoning ordinance,
5 then the presumption of validity necessarily fails. Well,
6 that's the first time I've ever heard that argument made.

7 Presumption of validity attaches to any
8 legislative enactment. It doesn't have to be a zoning
9 ordinance for that to be the case.

10 It is not a taking case. It is not a
11 constitutional decision to be reached on the merits of the
12 case before us today.

13 For example, Mr. Bettius suggested that the
14 DeGroff case was somehow an equal protection case. He never
15 said as much, but would lead the Court to believe that the
16 court sua sponte found some kind of discriminatory taking
17 here. Discriminatory activity. That that was a taking case
18 question under the state just compensation clause.

19 In effect, what the arguments about ownership of
20 property are, ownership and regulation of ownership are, are
21 back-door attempts to argue antitrust to this Court.

22 In their Bill of Complaint, the petitioners
23 asserted that this, that the zoning ordinance amendments

1 were a violation of the antitrust laws.

2 Unfortunately requiring us to -- or perhaps
3 fortunately requiring us to do an extensive body of research
4 on a point which they now appear to drop except through
5 that.

6 Well, what they're suggesting is that somehow we
7 are without power, first as a matter of zoning law, and then
8 monopoly keeps coming up in the course of the argument --
9 that we somehow are not empowered to do it because we can't
10 monopolize and do this just for ourselves.

11 Well, I refer you to our memorandum on antitrust.
12 It simply isn't the case. In fact, the cases we cite there,
13 Racetrack Petroleum and Pendleton, both of those involve
14 exclusion of uses and certainly as a matter of antitrust.
15 They weren't zoning cases. Said we can do it. Said that's
16 not a violation of the antitrust law.

17 So an attempt to get back into the question of
18 antitrust, or monopolization and control of ownership
19 simply can be unavailing, because we have the power to do
20 what we do, if we have the power to enact the ordinance
21 we've enacted, which we submit we do.

22 It is perhaps consistent with the arguments that
23 have been raised to this Court today, which we think go way

1 too far in an attempt to persuade this Court that what has
2 happened here is some kind of egregious deprivation of
3 property rights in this country.

4 The brief goes on to suggest that somehow, if
5 we're permitted to do what we're doing, we will create a
6 system of economic anarchy.

7 We suggest that that asks a bit much of this
8 Court to believe. The courts retain ultimate control of the
9 validity of zoning actions, such as that which were taken,
10 as we submit on the development of a full record the fairly
11 debatable standard applies. There is no more stringent test
12 which is applicable in these cases.

13 They go on in their arguments with respect to the
14 power of localities to suggest that somehow the state Waste
15 Management Act is applicable to the question of whether we
16 have powers.

17 We suggest to the Court that this is actually a
18 part of their preemption argument, and should appropriately
19 be considered in that venue.

20 There is simply no Virginia authority for the
21 proposition that everyone has an absolute right to make any
22 use of land he desires. The question of under what
23 circumstances we may impose restrictions on that is not

1 magical. It's not special. It's not new. It is
2 traditional. It is just a zoning case.

3 I want to turn if I can, sir, to the preemption
4 argument. And suggest that petitioners in this case have
5 got to do one of two things.

6 They have to convince you that we don't have the
7 power to prohibit uses, which we say is so clear on the face
8 of the statute as to beggar no belief, or disbelief.

9 The second of course, is to say that well, even
10 if we can, assuming that we can, that the state has pretty
11 much swept us out of the picture.

12 This issue is not, however, dispositive with
13 respect to the matters that are before this Court. They
14 only wish it so, because if it were so, then they would have
15 to avoid trial on what Mr. Bettius candidly acknowledges is
16 the dispositive issue, or would be the dispositive issues in
17 this case, which is the fair debatability of the Board
18 enactment.

19 They assert in making the position, making their
20 position to the Court that the Virginia Waste Management Act
21 constitutes a comprehensive scheme which regulates, quote,
22 all aspects, unquote, of solid waste management.

23 Your Honor will, if you have not already done so,

1 read the Waste Management Act, and you will see that this is
2 simply not so. The Waste Management Act's manifestly enters
3 into an arena which it never entered into before.

4 It collects a number of regulations and statutes
5 that used to be in the health code and other places, to
6 bring them into a comprehensive body of law, to be sure with
7 respect to those things which it seeks to address.

8 They say in effect that since the state has
9 authorized private landfills in the Waste Management Act --
10 and we don't dispute that -- that therefore it has required
11 us to permit it. Because the state says they can get
12 permits, that's the end of it for us.

13 We say that's not what that Act does at all.
14 This is a misunderstanding of what the Act does, and it
15 assumes what they must prove, i.e., that the scheme
16 purports, or actually does transfer zoning power where it
17 has always resided, and where Section 15-1.427 of the Code
18 of Virginia has kept it for some number of years -- perhaps
19 70 now in previous versions of that statute -- where the
20 zoning powers have as equally if not, it's in a better
21 developed body of law than the class of solid waste
22 management -- they're saying that somehow by the merest
23 inference all that's gone now.

1 But what they do there is try to avoid the effect
2 of 10-271(a). They cite it to the Court, and I'm sure the
3 Court has seen it.

4 They dismiss this section, which says that before
5 a permit may be issued, the Department of Waste Management
6 must receive notification from the locality that the
7 location of the facility is consistent with local planning,
8 zoning, and subdivision ordinances.

9 I don't know what can be clearer on the part of
10 the General Assembly that it did not intend to preempt local
11 zoning control than a statement like that.

12 They attempt to dismiss it by calling it a power
13 to comment. As if that somehow dismissed the matter.

14 Now, let me suggest to the Court that if you turn
15 to Section 10-270.1 of the Code, which is the immediately
16 preceding section of the statute, that section provides for
17 notice of an application for a solid or hazardous waste
18 disposal facility to the locality, which may then conduct a
19 public hearing on the question if it chooses to do so, and
20 then may provide, quote, recommendations to the Department
21 of Waste Management with respect to the application.

22 There are some procedural requirements, but
23 that's the guts of the section. I suggest that that's the

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1 power to comment.

2 Section 10-270.1(a) says that we must certify,
3 notify the Commonwealth of compliance with our local zoning
4 ordinances.

5 What happens if we say no? We would proffer to
6 the Court, and this would come in I presume at a full trial,
7 that the fact of the matter is the Commonwealth has stopped
8 processing their application, too. When the notification
9 was received that we had done what we did, they stopped
10 processing the application.

11 The situation is simply --

12 MR. BETTIUS: Your Honor, I
13 must object. He's totally outside the record at this point
14 about what he's going to prove at trial. This is a Motion
15 for Summary Judgment.

16 MR. FOOTE: Your Honor,
17 considering the proffer of evidence previously before the
18 Court, I don't think I've stepped too far out of bounds.

19 But I will step back from that and suggest to the
20 Court that you don't need to know that and consider that, to
21 be aware of the fact that the Section 10-270.1 provides for
22 a notice. 10-270.1(a) says that we have to give
23 notification of consistency with local zoning ordinances.

1 I suggest to the Court what's the question then?
2 What happens if we say no?

3 We have 30 days to answer. I agree if we don't
4 act within 30 days, then our ability to interpose our zoning
5 power between the location of a facility and the approval of
6 a permit -- assuming it meets all the other requirements of
7 the Act -- is in fact vitiated. We're in fact at that stage
8 vitiated.

9 Within that 30-day window, however, I submit that
10 the General Assembly has acknowledged that our local zoning
11 powers must be acknowledged under the state Waste Management
12 Act.

13 If the General Assembly had wanted localities not
14 to have this power, it clearly could have said so. It's
15 done so in other locations. It's done so in no portion of
16 the Waste Management Act.

17 The petitioners simply cannot overcome the
18 ancient tradition of statutes, and the statute which grant
19 the locality the power to zone.

20 There is no preemption by merest implication in
21 the state. In fact, I would submit to the court that case
22 law suggests that Virginia disfavors preemption generally as
23 a matter of law.

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1 There has been a great deal of argument
2 concerning the Tiny House case. We submit that to the
3 extent it is apposite at all, it's forced the position the
4 county has taken by finding no preemption in that case of
5 local zoning ordinances in the face of what we submit to
6 have been an even more detailed scheme of regulation than is
7 present in this case.

8 There is a great deal of discussion of the fact
9 that the locality there had not enacted a complete, quote,
10 prohibition, unquote.

11 Read the case carefully, the use of prohibition
12 in that term is clearly in the 18th Amendment sense of
13 prohibition of the sales of and consumption of alcohol.
14 That was a specific scheme entirely separate from that here.

15 In fact, what happened in that case was the
16 Supreme Court said that localities are not preempted in the
17 exercise of zoning powers by the mere existence of this
18 comprehensive ABC regulatory structure.

19 There is a different scheme at issue here. It
20 does not, as we suggest, regulate all aspects of solid waste
21 management.

22 Petitioners, we submit, misunderstand the
23 purposes of the Act itself. Perhaps the foremost two

1 purposes of this Act are to assure address of the issue both
2 locally and regionally.

3 They mention to you that there is provision for
4 regional provision of solid waste services. The statute
5 makes it plain that that's when the governor has so
6 directed. Otherwise localities are required to provide for
7 solid waste management under the Act.

8 That's the primary responsibility, and that's the
9 responsibility that the Board of Supervisors is attempting
10 to meet at the present time.

11 The question of how it accomplishes that, we
12 submit, is not preempted by this Act. This bill simply is
13 not a private industry trade bill.

14 The purpose, the other principal functions of the
15 Solid Waste Management Act, Your Honor, are to control the
16 design, construction, operation, maintenance, and closure of
17 landfills. Once a facility exists on the earth, how shall
18 it be designed, built, kept, and closed?

19 That is the bulk of the provision of this Act.
20 After you assume that we must take care of it.

21 We assume that we are no longer at liberty to
22 ignore it. Therefore, these arguments to the extent that
23 somehow that we are behaving, or could behave, parochially,

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1 we submit have in fact been addressed by the Commonwealth.

2 The question of how we address it remains in our
3 jurisdiction to determine. And nowhere in that Act is it
4 manifest that the state intended to transfer the zoning
5 power to the Commonwealth.

6 We submit that in 270.1(a) it says to the
7 contrary. More importantly, and beyond that, there is
8 absolutely no mandate anywhere in this Act that localities
9 address it with private facilities.

10 In this regard, there has been argument to the
11 effect that the provisions of the Act dealing with
12 hazardous waste facilities specifically express a
13 governmental policy that private facilities will be
14 encouraged.

15 There are a couple of points we'd like to make
16 about that, the first of which, sir, is that there is no
17 similar provision with respect to solid waste facilities.
18 The Act is broken, at least to that extent, into two major
19 chunks. Hazardous waste facilities, which the Commonwealth
20 recognizes have certain dimensions worthy of specific
21 address, and solid waste facilities.

22 It is not enough to say that, gee, because they
23 meant it with these more serious landfills, they must also

1 have meant it over here. The General Assembly cannot be
2 assumed to act in that fashion. It clearly had before it
3 the Act. It chose not to include that language. It's not
4 there with respect to solid waste facilities.

5 Suggesting once again, not that it's a less
6 important issue, but somehow, that in that area they chose
7 to let the localities make greater determinations about how
8 they would address those problems.

9 Again, nothing mandates in that Section --
10 nothing mandates a private facility. It only applies -- it
11 says, if you assume that there is some kind of, by analogy,
12 there is some kind of application of the hazardous waste
13 facility policy statement to solids -- it says, it can be
14 done by public or private facilities, private facilities
15 shall be used to the extent feasible.

16 It's easy for the petitioners to focus on the
17 question of private facilities without emphasizing to the
18 extent feasible. The question we ask the Court is: Who
19 shall determine the extent feasible? Under the Act, as it
20 is drafted, it is manifestly not the side of the
21 Commonwealth that that shall be done.

22 The General Assembly could clearly have said,
23 well, since we're going to decide whether it's feasible or

1 not, we're going to let the Board of Waste Management or the
2 Department of Waste Management make that assertion -- or
3 make that determination, rather.

4 They don't say that. The question is who decides
5 it's feasible because of the primary local responsibilities
6 of a landfill, and particular solid waste landfiling
7 locally in the United States, and certainly in this state.

8 We submit that that is a local responsibility in
9 the first instance. Certainly nothing in the Act suggests
10 to the contrary.

11 And finally, we submit to Your Honor, that even
12 if that were the case, the question of feasibility is
13 inherently a factual question.

14 You can't simply come in here and say, well,
15 we're private, and we can do it as good as or better than
16 the public sector, and therefore it's feasible for us to do
17 it, and the locality has nothing more to say about that.
18 It's a factual question; is it not?>

19 And they make much of the fact that the County
20 has in its Answers to Interrogatories said, well, gee,
21 private ones can be just as good as the public.

22 We submit if that's the case, we win. Because on
23 the fair debatability standard, the decision of whether

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1 under that circumstance one shall be permitted or the other
2 is a fairly debatable question.

3 The locality can determine that for the better
4 protection of the long-term health, and safety and welfare
5 of its citizens, it may choose to do it, for reasons which
6 would be addressed at a full hearing on the merits.

7 THE COURT: Does that include
8 the sort of things Mr. Bettius was talking about?

9 MR. FOOTE: I'm sorry, Your
10 Honor?

11 THE COURT: Does that
12 eventually include gas stations, or people who sell guns,
13 and all the other possible potentially dangerous
14 occupations?

15 MR. FOOTE: In other
16 jurisdiction, it most certainly has. There are
17 jurisdictions which have permitted the whole exclusion of
18 gasoline stations, revolving signs, any number of matters
19 which we have cited to the Court in our memorandum.

20 Our point is not that the County or the locality
21 can always do that and successfully do that. The question
22 is the justification of which they put forward and a matter
23 of evidence for it.

1 If, upon hearing, the Court determines that the
2 justification simply doesn't bear weight -- say, for example
3 we say you can't do gasoline stations -- well, the arguments
4 against that are, give me your justification. Well, of
5 course, it's hazardous.

6 But on the other hand, it's never been a
7 traditional local function to prohibit the sale of that kind
8 of material, unlike landfills.

9 The question is not whether it can be done. The
10 question is when it can be done. Under what circumstances.
11 Which we submit is a matter of full development on full
12 record.

13 THE COURT: Okay.

14 MR. FOOTE: The petitions in
15 this case -- and I repeat ably, I'm sure -- ask this Court
16 to make, they ask you to make the leap that because the Act
17 contemplates solid waste management needs being met by
18 private parties, that it necessarily can forbid the locality
19 to make further decisions with respect to its zoning powers
20 in this area.

21 We submit that this is too great a leap, and that
22 simply no court which you can, which has been cited to you
23 has taken that leap.

1 I would like to address, even more briefly,
2 arguments which have been raised by the Virginia Waste
3 Industries Association.

4 MR. BETTIUS: Your Honor, we do
5 not adopt the position of the Virginia Waste Management
6 Association. We've allowed them to file an amicus brief,
7 but I want the record to clearly indicate that we don't
8 necessarily adopt their position in this case.

9 It's interesting, but...

10 MR. FOOTE: We understood that
11 from Mr. Bettius before the proceeding began, and frankly,
12 we can understand why.

13 Because when you shake the VWIA's position down
14 -- and they are in this case filing an amicus brief, and
15 therefore their position in this matter is of significance
16 to the Court -- it frankly does not assist the petitioners
17 in much of any respect.

18 The VWIA asserts a number of principles of law
19 which no one can disagree with, but in the end they do not
20 advance the preemption argument beyond where it was. They
21 don't even address Section 10-270.1(a).

22 And so we don't believe that their arguments with
23 respect to preemption can be very persuasive, unless they

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1 deal with the fact that zoning powers have been expressly
2 recognized by the General Assembly.

3 They suggest somehow that there has been a long-
4 public policy between private enterprise and waste
5 management, citing a 1984 and a 1986 statute, which we
6 suggest five and three -- four and two years ago doesn't
7 exactly express a long state policy of involvement in this
8 area. In fact, we submit to you that the history of it has
9 been to the contrary.

10 They also deal with the question of our having
11 exceeded our zoning powers. This is, of course, the Dillon
12 Rule argument all over again, and it is not advanced beyond
13 the arguments that have been made to the Court before.

14 Then they go on, however, to deal at some length
15 with the question of whether what we have done, what the
16 County has done here, is reasonably or substantially related
17 to the ends which are advanced. Which, of course, we assert
18 is the critical issue before the Court.

19 It's not a preemption or a Dillon Rule question.
20 It's a due process, equal protection kind of question, which
21 has been addressed by other courts and other jurisdictions.
22 And the way we suggest would be approached in Virginia.

23 The arguments which are extended by the VWIA,

1 however, suggest our very point; that this is a fact-laden
2 inquiry. The question of whether what we have done advances
3 the public welfare in a permissible way, which the Court
4 could then determine, is simply one that can't be determined
5 on the record.

6 Its argument as a matter of law that somehow
7 there is not substantial relationship here is that because
8 a locality is exempt from local zoning powers, and because
9 it is exempt from the financial guarantees --

10 (To Mr. Bettius:) Marc, did you provide those to
11 the Court yet?

12 MR. BETTIUS: Pardon me, sir?

13 MR. FOOTE: The regulations?

14 They're not crucial right now --

15 MR. BETTIUS: I'll be glad to.

16 MR. FOOTE: -- but we would
17 certainly concur in making those available to the Court.

18 -- that because the locality is exempt from the
19 financial guarantees, then the legal conclusion that must
20 flow from that proposition is that the locality, not private
21 sector, can circumvent, or completely avoid supervision.

22 Well, number one, one can reach that conclusion

23 --

1 MR. BETTIUS: That's not our
2 point, Your Honor. We would stipulate that's not our point.

3 MR. FOOTE: I don't mean to
4 suggest that it is. I didn't say petitioners. However, it
5 is a matter the Court must consider in this cause.

6 But the opposite conclusion is equally possible,
7 we submit. And that is that the General Assembly has made
8 the conclusion that we are better able to make zoning or
9 locational decisions than is the private sector because
10 of 456 review, and the fact that we have the power of
11 eminent domain, and the fact that we are not constrained of
12 what it is we own, and we can find the best site.

13 And secondly, that we can raise all the needed
14 revenue. That's how we'd meet the financial guarantees.

15 So my point with respect to VWIA's argument is
16 that as a matter of law, you can't reach the conclusion that
17 they have reached.

18 It is a point in both briefs, not as developed
19 perhaps in the petitioners' brief as in the VWIA brief, that
20 this is an equal protection case as well.

21 However, the VWIA quite properly acknowledges
22 that this does not involve suspect classification. It
23 involves no fundamental right. And thus, as a matter of

1 equal protection analysis, it's subject only to the minimal
2 scrutiny test which is routinely applied in cases of
3 governmental line drawing.

4 Several rules follow from that, the first of
5 which is that those line drawings are presumed to be valid.

6 Secondly, that if there is a set of facts which
7 may be conceived with rational support, they must be
8 assumed.

9 And that that's why the burden of producing
10 evidence to demonstrate the denial of equal protection or --
11 in fact the rules are about the same -- due process of
12 petitioners, the burden of producing evidence is on them,
13 and not on the County.

14 No cases support the proposition asserted that
15 the distinction between the public itself and the private
16 sector generally is an equal protection question at all.

17 The question is whether the government has
18 impermissibly discriminated among groups. You will labor to
19 find cases in which the question is whether somehow distinct
20 from the government and everybody else is an equal
21 protection case.

22 Moreover, even if you were, the government and
23 the private sector simply are never similarly situated. The

1 government is the government. It has the powers of
2 government. Private parties come and go. Some are better
3 than others.

4 It may be an imperfect match to the ideal, but
5 the public sector is indeed -- at least in theory, and often
6 in practice -- more responsive to the public will than any
7 private party is, because of the nature of private business.
8 We are publicly responsible. They are not.

9 More money. The County often has more money --
10 not always, of course. BFI could come in here and, my
11 goodness, BFI could probably buy the county.

12 But the fact of the matter is we have to regulate
13 for everybody here. It may be the petitioners in this case
14 are the finest landfill operators in America. It may be
15 that they have all the money out there to do what they do.

16 But we're not regulating these people out of
17 business, except as a consequence of what the Board has done
18 here.

19 We are regulating for the future of this County.
20 And we are saying that there are going to be operators who
21 don't have the money that we have and the ability to raise
22 it.

23 And finally, the County is in one place and it's

1 never going to move. The private operators, as I say, are
2 going to come and go.

3 I mention all that only with respect to the
4 question of whether we are ever similarly situated to the
5 private sector.

6 We submit that if you get to the question of
7 equal protection, that must be resolved on a factual basis,
8 and it can't as a matter of law be resolved against the
9 County.

10 In conclusion, Your Honor, we will suggest to you
11 that the petitions in this case are asking what -- so far as
12 we can tell -- virtually no court in American has given.
13 And that is a decision on the basis of a Bill of Complaint
14 that no set of facts exists which can substantially justify
15 the course of action that the Board has taken.

16 We suggest that there is in fact power in the
17 locality to make this decision. That it is not preempted by
18 the Commonwealth of Virginia. And consequently, if we may
19 do it, the question is under what circumstances we may do
20 it.

21 And the Court might be completely convinced upon
22 a hearing that we cannot successfully do it in this case.
23 But it cannot do it upon a Bill of Complaint.

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1 Thus, was what the Board did fairly debatable?
2 An essentially traditional zoning case. It has been
3 suggested that the question on all these cases is whether
4 one may properly sacrifice private rights to the public
5 good.

6 I think that's an excellent formulation of many
7 of the issues which are presented in this case, with respect
8 to essentially that core question. The question that will
9 be before this Court upon hearing is whether that balance
10 has been struck in an appropriate way.

11 It is not a question of the facial invalidity of
12 an attempt by the Board of Supervisors of this County to
13 address the mere long-term public welfare issues which are
14 presented by a traditional, if now heavily regulated
15 function.

16 We ask this Court for judgment, therefore, that
17 there is an existing enabling legislation. That there is no
18 preemption. That there is no antitrust violation. No
19 taking of property without just compensation or due process.
20 And that trial is required on all else.

21 Thank you, sir.

22 THE COURT: Mr. Foote?

23 MR. FOOTE: Yes, sir.

1 THE COURT: If I understand you
2 correctly, you concede -- or do you concede that the
3 question of whether or not you have the authority, express
4 or implied, to enact this legislation is something that the
5 Court can rule upon now?

6 MR. FOOTE: Yes, sir. We say
7 so because we submit that the question of whether this is --
8 whether the Dillon Rule authorizes the adoption of the
9 ordinance does not require an external factual inquiry.

10 It is our submission simply that the enabling
11 legislation is manifest.

12 THE COURT: So your Motion for
13 Summary Judgment is the other side of their coin?

14 MR. FOOTE: Yes, sir.

15 THE COURT: You say that you do
16 have it, and they say you don't. You both agree that that's
17 not something that needs any factual development --

18 MR. BETTIUS: So stipulated.

19 THE COURT: -- one way or the
20 other. It can be decided on the pleadings before the Court?

21 MR. FOOTE: Yes, sir.

22 THE COURT: Subject to
23 presumptions of whether they exist or don't exist.

1 MR. FOOTE: And that would be
2 true actually of, in effect of the other points upon which
3 we have sought judgment.

4 I don't -- I believe Mr. Bettius and I are in
5 fundamental agreement that our point is that the record is
6 not sufficient to dispose of what we perceive to be the
7 critical and dispositive issue.

8 Mr. Bettius states to the contrary. He thinks
9 the dispositive issues reached earlier can be reached on the
10 facial invalidity which is apparent on the record. We don't
11 disagree with that.

12 THE COURT: Thank you.

13 MR. MCSWEENEY: Good morning,
14 Your Honor. I can still say that safely for the next four
15 or five minutes. I'm Patrick McSweeney.

16 Your Honor in an order earlier this year allowing
17 two individuals and an organization of which they are
18 members to intervene in this case, and we have intervened on
19 the side of the Defendants.

20 I won't repeat, I hope -- and I hope Your Honor
21 will stop me if I begin to -- any arguments that have been
22 made by Mr. Foote.

23 In fact, we think this case is very narrowly

1 positioned. Indeed, we think that, and join in the Board's
2 motion, cross Motion for Summary Judgment. And in its
3 opposition to the Motion for Summary Judgment by Mr. Bettius
4 on behalf of the Plaintiffs.

5 We think it is a summary judgment case, Your
6 Honor, entirely. And I think it's important to look at just
7 what the case is about.

8 In the appendix to the Board's memorandum in
9 support of its cross motion in opposition to Mr. Bettius'
10 motion, you will find the official action of the Board.

11 Now, it's interesting that the action of the
12 Board challenged was a deletion of the zoning ordinance, a
13 deletion, a removal, a striking-through of provisions
14 already existent in the zoning ordinance.

15 Clearly the action of the Board was a zoning
16 action. I think it would be preposterous to argue
17 otherwise.

18 The interesting thing about the Plaintiffs'
19 argument is that they don't challenge the right of the
20 County as a general proposition to exempt itself from its
21 own zoning ordinance.

22 Indeed, that is a proposition of law so well
23 established in Virginia as not to require any argument

1 today. That is what happened in this action.

2 The Board of Supervisors flatly prohibited all
3 debris landfills in the County. That is the only language
4 in the ordinance today.

5 Actually the absence of a permitted use applies
6 facially to everyone. But in decades of opinions, the
7 Attorney General has ruled, and it has never been challenged
8 to my knowledge with one exception before today, in a case
9 arising in my home county, Powhatan County. It went to the
10 Supreme Court, and was mooted.

11 The question whether the County can exempt itself
12 and favor itself where it has a governmental function -- and
13 again the proposition was so well established in Virginia
14 that the disposal of solid waste is a governmental function
15 -- it's not a proprietary function. It is not a new
16 governmental function. It is an age-old governmental
17 function.

18 The fact that that governmental function is from
19 time to time carried out by proprietary or commercial
20 interests does not change the essential fact that the
21 disposal of solid waste, including debris, is a governmental
22 function.

23 And Your Honor does not have to reach that hoary

1 and frightening spector that the Plaintiffs advance for you
2 that the County will have a foot in the door and will next
3 begin to regulate trade and industry broadly. That's not
4 what this case is about.

5 This case -- the County, which in statutes and as
6 a result of statutes which the Plaintiffs cite, has been
7 given direct and clear, unavoidable responsibility,
8 sovereign responsibility, for the disposal of municipal
9 solid waste and other non-hazardous solid waste, has to be
10 read together with the zoning enabling laws. They can't be
11 divorced.

12 Under the zoning law, the Board has properly
13 argued that in Virginia, local governing bodies can exclude
14 uses. And the depiction of the zoning power of local bodies
15 is not as Mr. Bettius would have you believe. It is not
16 limited to the narrow questions of light and air, setback,
17 bulk, and size.

18 It goes to any of those actions likely and
19 reasonably related to carry out the purposes in 15.1-489,
20 which can be exercised by specific ordinance under the
21 powers section of the Code, which is 493 -- 15.1-493.

22 The County clearly has the right to prohibit
23 uses, and that's what they've done in the case. They've

1 prohibited the use.

2 THE COURT: Well, they haven't
3 actually prohibited the use. They've just prohibited
4 private people using it that way.

5 MR. MCSWEENEY: Your Honor,
6 what they have -- that is, they have not done anything as
7 yet. They have prohibited the use. As far as the existing
8 ordinances are concerned, they have flatly prohibited the
9 use. Now, that hasn't been challenged.

10 What has been challenged is that the County,
11 because of its underlying power, because of the longstanding
12 proposition of Virginia law, that a local governing body
13 does not have to -- may choose not to be governed by its own
14 zoning ordinance, and the opinions of the Attorney General -
15 - which I'd like to hand up to Your Honor, and I have copies
16 for counsel -- establish the proposition so clearly that the
17 point really deserves no further argument.

18 But I would like to identify those opinions, Your
19 Honor. They're obviously not the only ones, because it goes
20 back several decades.

21 I might say, Your Honor, that obviously --

22 MR. BETTIUS: Your Honor, we'll
23 stipulate the fact the Code gives the County direct

1 authority to be in the business. That's not an issue. It's
2 a governmental function, as well as a private function. And
3 we don't dispute that at all.

4 MR. MCSWEENEY: Let me get two
5 other points out of the way, Your Honor, so we can get back
6 to the one question this case is about.

7 It is not a preemption case. It clearly is not a
8 preemption case. The preemption rule applied in Virginia --
9 Tiny House articulates the general rule -- is that the
10 state, or if the argument were a federal brief, it's the
11 same standard, must so pervasively or comprehensively deal
12 with a field and deal with it so completely and fully as to
13 exclude the local role.

14 And these opinions of the Attorney General
15 clearly establish that that is not what, in the opinion of
16 the Attorney General, the General Assembly has intended to
17 do. That is only an opinion.

18 However, under another clearly established rule
19 of Virginia law, which is set out in those opinions, when
20 the Attorney General has issued a formal opinion, and the
21 General Assembly has acted, or in case it has not acted at
22 all, but particularly where it has amended the very
23 provisions that are interpreted by the Attorney General, it

1 is presumed that the General Assembly has adopted that
2 interpretation.

3 Now, that's very significant here, because one of
4 those was issued in the week preceding the 1985 session of
5 the General Assembly. I'm speaking now about the opinion to
6 Mr. Dobbins which is at 1984-1985 report of the Attorney
7 General, at Page 91. It begins at Page 91.

8 If you turn to Page 93, if I may help Your Honor
9 -- I don't know whether I marked yours -- the last paragraph
10 of that opinion unequivocally states that the power to
11 regulate and establish sanitary landfills is not preempted.

12 That is under the old section, under Title 32.
13 Those sections have been amended for two reasons. One is to
14 change the act substantively, change the content, for
15 reasons that have no application in this case, no factual
16 application in this case.

17 But also to transfer from the Board of Health and
18 the state Department of Health the regulation of solid
19 waste. And to give it to a new state Department of Waste
20 Management. That's the only change.

21 Indeed, the Code Commission remarked in the 1985
22 replacement volume, in the supplement to the replacement
23 volume, cumulative supplement, that Section 32.1-178 was

1 amended, and the amendment has been incorporated in Section
2 10-266, which is comparable to the old law 32.1-178. The
3 law has not changed.

4 And the point of that exercise is to establish
5 that the Attorney General has rendered an opinion on the
6 preemption issue.

7 The General Assembly has acted twice to amend
8 that. One by changing the content for other reasons. And
9 another to transfer it to another agency. And has not
10 changed that interpretation or altered that interpretation.
11 And it's presumed that that is the correct interpretation.

12 And I do that because it's a shorthand way of
13 dealing with the preemption issue. We don't have to go
14 through elaborate argument, because it simply is not there.

15 The General Assembly did not intend to eliminate
16 the joint responsibility of the state and the local
17 government in an area that has traditionally been a role of
18 local government.

19 I'd like to address another point. Hazardous
20 waste is now regulated comprehensively by both the federal
21 and state governments. Indeed, by the state government
22 under what we might loosely call a delegation under federal
23 legislation.

1 Hazardous waste regulation is absolutely
2 different, Your Honor, from solid waste regulation for a
3 number of reasons. And I'll only cite two or three.

4 One, the hazardous waste problem is so, of such
5 concern to Congress that it created a cradle-to-grave
6 regulatory scheme. When you lay the two side by side, they
7 bear no resemblance one to the other.

8 Local government has never been involved
9 traditionally in hazardous waste disposal or handling. It
10 is an area that requires esoteric treatment, special
11 handling local governments are not equipped and would be
12 hard-pressed, because of the scale required to undertake
13 that kind of venture.

14 The language Mr. Bettius cited to you, artfully,
15 about encouraging private enterprise, appears nowhere in the
16 Waste Management Act as it applies to non-hazardous solid
17 waste. That is found only in -- Section 287, which he
18 referred to is part of the hazardous waste act, not the
19 provisions dealing with traditional landfills.

20 The state is not willing to move into the area of
21 traditional, solid waste, non-hazardous solid waste
22 management, for a number of reasons. But it is clear in
23 simply reading the face of the statute that there is no

1 preemption.

2 And that leaves only one question. And that is
3 whether the county has a delegated power to act as it has.
4 Not whether it's wise to have acted as it has -- and that
5 essentially is Mr. Bettius' argument, that the county has
6 acted unwisely. And that, I submit to Your Honor, is a
7 political question left to the General Assembly or to the
8 Board, but not to a judicial body.

9 The question whether the power is there can be
10 derived from a clear reading of the Code itself. Unlike the
11 regulation of alcoholic beverages, barber shops, or other
12 enterprises that are not a traditional function of the
13 sovereign, this area calls for a different treatment of
14 regulation.

15 Not under the zoning act necessarily, but under
16 the sovereign power of the state as delegated to this
17 county. And it is clear that the state has delegated that
18 responsibility to the county.

19 Now, if the county through the Board of
20 Supervisors decides that it is more appropriate for it to
21 occupy the field completely, it is within the range of
22 choice or choices, which is legally left to the Board of
23 Supervisors, because it is a governmental function.

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1 We don't have to reach -- and Your Honor needn't
2 reach -- the question whether in any state of facts,
3 regarding any enterprise that might have a potential impact
4 on the public, the Board may completely displace the private
5 sector. That is not the issue here. That is simply not the
6 question.

7 The question is whether the Board has the power
8 to exercise a governmental function, which admittedly it
9 has, in a way, that displaces the private sector.

10 And in the exercise of its judgment, it has
11 decided to leave solid waste disposal, which the state has
12 not preempted, namely the non-hazardous solid waste
13 disposal, to the county alone. As to debris landfills, the
14 county has established a monopoly. Not expressly, but as
15 the motion, the resolution of the Board indicated, they
16 clearly intended to eliminate commercial debris landfills.

17 The zoning ordinance itself does not address it.
18 It's silent on that question. The zoning action which would
19 be challenged then is the completely prohibition of
20 commercial and public, unless -- Your Honor, let me go back
21 and state it this way.

22 On the face of the ordinance there is no
23 permitted use which would allow a debris landfill to be

1 sited, period.

2 That does not conflict with any provision of
3 statute. Not in this state.

4 Mr. Bettius would argue, or has argued that the
5 tone of all of these theories underlying -- the federal
6 antitrust law, our Jeffersonian tradition, the hazardous
7 Waste Act -- somehow are blended and exhibit a preference or
8 at least an even-handedness between public and private.

9 That simply is not articulated anywhere in the
10 statute. Not the statute we're dealing with here, either
11 Section 510 of Title 15.1, or any other statute.

12 It is a confusing proposition, Your Honor, but
13 it's important for us to establish the distinction between
14 the zoning action the Board took, which was to prohibit --
15 and it could write an ordinance which prohibited it flatly
16 to anyone -- which falls then to the underlying question,
17 which is that the Board has traditionally had the power to
18 act in a governmental function to locate this facility, to
19 locate any governmental function, without regard to its own
20 zoning ordinance.

21 Now, what that implicitly says is that over the
22 decades, the General Assembly has implicitly adopted the
23 proposition that the county can have a monopoly, can

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1 exercise its power differently than it would allow private
2 enterprise to operate, at least in this area of governmental
3 function.

4 What Mr. Bettius has to do is convince Your Honor
5 not only that this is not a governmental function, but no
6 state of facts, no state of facts can be conjured up that
7 would deprive the Board of a reasonable justification, in
8 the exercise of its state delegated power, to regulate the
9 disposal of debris in this county.

10 And that he can't do. And all the political
11 theory in the world will not change what is in the Code and
12 in the Constitution.

13 The county has the power. Whether it exercised
14 it wisely or not, is a matter for the Board and the General
15 Assembly, and not for the Court, I respectfully submit to
16 Your Honor.

17 But I think upon review of the other opinions of
18 the Attorney General, it is clear -- and from a review of
19 the actual language of the statutes. I speak now both of
20 the zoning enabling law and the other statutes, particularly
21 Section 510 of Title 15.1 -- the County, independent of its
22 zoning power, has the power to operate in the field of solid
23 waste disposal.

1 And it has chosen to exercise both concurrently.

2 And it has done so within its power.

3 Again, your Honor, whether it's wise in its
4 decision is a matter that we could not entertain, even if
5 you had a hearing on the matter effectively, because it is
6 clearly within that appropriate range of factors that the
7 county can consider. And for that reason, we don't think a
8 trial on the merits would be appropriate in any event.

9 It is a matter for summary judgment, and the
10 Court can look at those provisions and determine for itself
11 whether it agrees with the Board and Intervenor that the
12 County has the power to act, even though it's implicit power
13 in the narrow context, the Assembly has explicitly acted to
14 give it the general power to do so.

15 Your Honor, the other questions, the antitrust
16 issues and the equal protection issues and so on, really
17 don't deserve treatment today because Mr. Bettius has not
18 asked for summary judgment on them, as I take it. He
19 certainly has not argued this morning.

20 But to the extent it would be helpful to the
21 Court --

22 MR. BETTIUS: They're not
23 before the Court on summary judgment, Your Honor.

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1 MR. MCSWEENEY: We have not had
2 a chance to review the Memorandum in support of the motion.

3 I might ask the Court -- if it would be helpful
4 to the court, we will respond by the middle of next week --
5 if it would assist you in reaching a decision on the case,
6 if it's not your pleasure to do so today -- a very short
7 memorandum respond to the cases and authorities cited, which
8 I have not been able to review, which are contained in Mr.
9 Bettius' Memorandum.

10 Otherwise, we urge the Court, as I said, we join
11 in the Board's motion and cross motion -- that is, its
12 opposition, and in its cross Motion for Summary Judgment.

13 I appreciate your giving us the time this
14 morning, Your Honor. I'd be happy to answer any questions
15 you might have.

16 THE COURT: No questions.

17 Thank you.

18 MR. MCSWEENEY: Thank you.

19 MR. BETTIUS: Your Honor, I
20 will attempt to be brief.

21 Your Honor, I've learned probably more in
22 marriage than in law, that if you let somebody else define
23 the argument, you're going to lose it.

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1 I have seldom won arguments in marriage, because
2 my wife is always defining what the issue is.

3 Both counsel in this case this morning have told
4 the Court that this is an issue of fairly debatable. But
5 they've both said something that totally contradicts that.

6 And Your Honor can put your finger right on it.
7 Are we here on summary judgment? Because if we're here on
8 summary judgment, what are they doing talking about fairly
9 debatable?

10 Those two concepts have nothing to do with each
11 other. Once you decide, as a jurist, that they do have the
12 legislative authority -- if you were to make that decision
13 -- then we'd get into the issue of fairly debatable.

14 The first threshold that you cross is where in
15 the world is their authority?

16 And I'm reminded as I listen to this, of that
17 commercial where the legal clinic gets up and its lawyers go
18 "Mumbo-jumbo, mumbo-jumbo, mumbo-jumbo." And the client is
19 sitting there, and he's trying to figure out what's going
20 on.

21 Well, Your Honor has just heard a whole bunch of
22 mumbo-jumbo.

23 I am now surprised that we even have Title 10 of

1 the Code of Virginia, because these people, the Waste
2 Management Board, aren't going to regulate debris landfills
3 or any other kind of landfills. These people are going to
4 regulate it.

5 And I take Your Honor back -- no mumbo-jumbo --
6 to King. What does King say? Are you dealing with a local
7 problem, or are you dealing with a regional problem?

8 And what does Title 10 say? Title 10 says it is
9 a statewide problem, to be addressed on a regional basis.
10 Not on a local basis.

11 And, Your Honor, anybody -- and I was once told
12 by a judge, who quotes an Attorney General's opinion in a
13 zoning case is setting sail in a paper boat in a hurricane.

14 What in the world an Attorney General's opinion
15 has to do with a law that was passed after the Attorney
16 General's opinion was written, I will never know.

17 Because the prior law said that local governments
18 could have prohibitions stronger than the state law, and
19 that was erased from the new law. Because for the first
20 time we are dealing with plenary regulation in the state.

21 Your Honor, if a state agency -- and there is a
22 great case, and I don't recall the name of it. Your Honor
23 may be aware of it -- where the state Water Control Board

1 started to issue regulations. And I do have the name of
2 it somewhere.

3 And I think Your Honor may want to look at it.
4 And I would submit that citation to the Court.

5 But in any event, the state Water Control Board
6 started to issue regulations which were unreasonable. And
7 the Court said that it was an implied duty, even of state
8 agencies, to act reasonably at all times.

9 If a state agency, the agency charged with the
10 regulation of this Act, had come out without hearings,
11 without legislative findings supported by fact, and said
12 that the public was better than private, the Supreme Court
13 would strike it down in a flash.

14 If these are regional problems, statewide
15 problems to be addressed on a regional basis, these people
16 are regulating.

17 Your Honor, please look at what Rowe said. Rowe
18 said, don't look at what an ordinance says it is. Look at
19 the mischief which it portends.

20 They want to get up here and tell you this is a
21 zoning ordinance. And Mr. Foote, who is a fine lawyer, gets
22 up and tells you there are two types of zoning ordinances,
23 inclusive and exclusive.

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1 What does this ordinance include or exclude? Not
2 land uses. It speaks only to ownership. I concede that
3 government can be in the landfill business. What I don't
4 concede is they can tell me my client can't be without the
5 benefit of a hearing.

6 What does this law do? If the county -- do we
7 come up here and assert that the county has given up zoning
8 regulation? Indeed we don't.

9 Do we say that the Waste Management Act conducts
10 zoning hearings? Indeed we don't.

11 What we say is that a citizen who files an
12 application is entitled to a hearing. He's entitled to due
13 process.

14 We haven't fiddled with their zoning one bit.
15 And if they give us a hearing and they deny us, they can
16 report that.

17 And the interesting thing is while they're
18 playing this vital role, if they don't report in 30 days,
19 down the tubes. They can have their absolute prohibition.
20 And if they don't report it, if it was legal, it would go
21 down the tube. It's waived.

22 Now, Your Honor, I have great respect for Mr.
23 Foote, but in that ABC case, if he thinks we're talking

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1 about prohibition in the sense of 1922, he should read the
2 opinion again.

3 Tiny House is a case where the Court said that
4 the land use regulation was incidental, it was incidental to
5 the regulation of alcohol, to the effect it regulated
6 alcohol at all, was only incidental. Because it didn't
7 prohibit alcohol. It wasn't talking about prohibition in
8 that sense. It was talking about land use regulation.

9 And if you read that case, it's totally
10 inconsistent. Because what does that reporting section say?
11 Does it say they can report on whether the county agrees or
12 disagrees with private landfills? Indeed it doesn't, Your
13 Honor.

14 It said it can comment on location. It doesn't
15 say as to existence.

16 And for the first time -- the county has gone
17 further in this case than I've ever heard a county go
18 before.

19 If you have a right, they say, to practice a
20 lawful occupation, trade, or business, the General Assembly
21 would have said so. This ain't the country my father came
22 to then, to avoid that sort of thing in Europe.

23 You've got that right. You have the right to do

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1 something which is lawful. And I don't have to bend down on
2 my knee and ask the county to do it. I may have to ask them
3 if I can do it in a particular location.

4 Your Honor, if we agree that there is in fact
5 statewide plenary concern about debris -- and there is, and
6 there is no doubt that there is. If this is an appropriate
7 regulation in this supposed zoning ordinance, what if the
8 county said, we like to create the trash, but we'd rather
9 see you take care of it, Fauquier, Loudoun, and Fairfax.
10 You can't have a private landfill. We're not going to
11 operate a public one. Or if we do operate a public one, we
12 don't want construction debris, so construction debris,
13 can't have it in this county.

14 Your Honor, that's not what this Act says. If
15 we're going to have effective waste disposal, we're going to
16 establish a body of expertise who can view applications, who
17 can look at the operation, who can secure financial
18 management and responsibility, and see whether or not we can
19 lick a tough statewide problem.

20 These folks, on the other hand, say they can go
21 to the essence of regulation, which is prohibition of the
22 use.

23 If these folks were doctors, they would say that

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1 the most effective way to halt the growth of cancer is to
2 shoot the patient. And it is an effective treatment. It
3 prohibits entirely the potential for carcinogenic
4 multiplication. And that's what they've done in this
5 ordinance.

6 Your Honor, I think the King case has a lot to
7 say. Judge McCarthy was right. Arlington County knew more
8 about the handling of vicious dogs than folks in Richmond
9 did.

10 If the folks in Richmond said you can't prohibit
11 dogs, Judge McCarthy would have said, well, that's the end
12 of it. But he said, the state has not acted in an
13 inconsistent manner.

14 Apparently it doesn't offend either public or
15 private counsel's sense of constitutional balance that in
16 legislative fiat the Board of Supervisors, just men like us,
17 can sit down and say you can't have this business.

18 Citizens, you can't have this landfill. Citizens
19 in other counties that surround, there will be no regional
20 possibility of multiple facilities -- some private, some
21 public, and all well operated -- because we regulate it.

22 The intrusion into a comprehensive state scheme
23 of regulation is so manifest, is so manifest that Your Honor

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1 it must be struck down.

2 I think that there is a nice concept -- and I'm
3 going to be accused of a taking argument again, but it
4 really isn't because Your Honor will read Rowe and see what
5 the Rowe case has to do.

6 Rowe did two things. It was a mandatory
7 dedication, and the exclusion of lawful uses from a
8 district.

9 And the Court began to talk on an issue -- the
10 Supreme Court talked on a issue that was fascinating, that
11 really, I think, capsulizes this case as to what your
12 threshold inquiry is limited to.

13 They say -- that is, "they," the county say that
14 you must afford to them a presumption of validity. To which
15 I go, not so. Your Honor has to see, looking in a negative
16 sense, or else you destroy Dillon's Rule, whether there is
17 legislative authority for what they did, under the police
18 power.

19 Now, I told Your Honor in my argument that
20 somewhere down the road these folks would start talking
21 about 15.1-510, and I hit it right on the button.

22 And 15.1-510, the general police power statute,
23 even before the adoption of the Solid Waste Act, played a

1 very vital role in the decision of two cases which I submit
2 to Your Honor are dispositive.

3 Look at Pumphrey and Taylor. Interesting cases
4 before we had a Waste Management Act.

5 And what happened in Pumphrey and Taylor were
6 regulations of disposable bottles, both alcoholic and non-
7 alcoholic.

8 And all the Supreme Court had to do in one of
9 those cases was to find that there existed a House
10 Resolution, Your Honor -- not even an ordinance or a statute
11 -- a House Resolution. It said that there was an interest
12 in uniform regulation within the Commonwealth.

13 And they took both ordinances and said no. You
14 are intruding into an area that belongs in general statewide
15 regulation.

16 And Your Honor, I would submit that much more
17 fundamental an issue than the disposal of trash is not
18 whether you've got a deposit on the bottle, but whether the
19 functions are to be carried out in the private enterprise,
20 the public enterprise, or in partnership. And this act
21 envisions a partnership.

22 I respect both lawyers. They've got a job to do.
23 But the arguments are frankly disingenuous, Your Honor, when

1 you read the Code.

2 Respect for the law is engendered in a scheme of
3 regulation that protects rights. This ordinance strips a
4 citizen, strips a business, strips an organization totally
5 of the right to ever have a hearing to determine whether or
6 not they belong in the business.

7 It deprives in true the regulatory authority from
8 making a comprehensive investigation of Prince William and
9 say, hmmm, we need a multiplicity of facilities here.

10 They can't do that, according to Mr. Foote. Mr.
11 Foote says as soon as they get our report, that's it. Can't
12 go any further.

13 Your Honor, if that's the case, they have
14 inviscerated Title 10 of that Code. And that they can't do.
15 That they simply cannot do.

16 Rowe says, look at the mischief which it
17 portends.

18 Your Honor asked a pointed question of Mr. Foote.
19 Well, can they get into gas stations? He wants to talk to
20 you about Tastee-Freezes.

21 Well, let's talk about Tastee-Freeze -- and it
22 really, I think underscores exactly what we're talking about
23 here. Mr. Foote's ordinance, if the County found that

1 Tastee-Freezes could produce salmonella, or that ice cream
2 improperly dispensed constitutes a danger, would prohibit
3 them.

4 But he'd go further. He'd say, the only way to
5 really make sure our kids get safe ice cream is if Prince
6 William comes out with Prince William vanilla and Prince
7 William fudge.

8 And he's saying that an ordinance which says that
9 only Prince William shall sell Tastee-Freeze ice cream, or
10 be in the Tastee-Freeze business, is a zoning ordinance.
11 And I tell you that's not a zoning ordinance; it's tyranny.

12 I mean, that's the kind of stuff that they got
13 hung for in the eighteenth century. For getting up and
14 saying that, you know, perhaps Prince William should control
15 tea shipments in and out of Prince William County, or Boston
16 for that matter.

17 Because that really is the fiber -- and when I
18 say this is fundamentally an ordinance that grips you, if
19 you are sensitive to the issues of separation of power, and
20 on the legislative and executive side, the delegation of
21 power, this ordinance fundamentally doesn't offend you, it
22 smacks you in the face.

23 It is the precursor of government socialization

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1 of private business. And, Your Honor, if that's an extreme
2 statement, they've already said maybe gas stations, maybe
3 Tastee-Freezes. I don't know.

4 But we don't have to get into the constitutional
5 esoterics of this case. Because Virginia puts the brakes on
6 that before it ever happens.

7 It says that you, municipality, are an empty
8 vessel, devoid of power. And we as the General Assembly
9 will either pour power into you as a vessel, or we'll take
10 it away.

11 And what they said it, before you assume that the
12 glass is half full, before you assume police power, find a
13 nexus, find a nexus, a sine qua non for the assumption of
14 that power.

15 There is no sine qua non, because that power here
16 is regulation of waste management. And both of them said
17 so. Both of them said that Prince William County was
18 regulating waste management.

19 And more directly, counsel for the Intervenors
20 said, it's a governmental function, and we're going to
21 invade the area and prohibit everybody else from doing it.

22 Your Honor, Tiny House doesn't leave any doubt
23 that that isn't right. For instance, what's neat about Tiny

1 House is it says what you have to do is apply for a special
2 permit or you can't have the use.

3 And the Court said, that's not prohibition of
4 use. That's regulation of use.

5 In this case there is absolute prohibition of
6 use, leaving nothing to regulate for the Waste Management
7 Board, but an application for a future landfill should
8 Prince William elect to file one.

9 Now, Your Honor, if that's going to lead to
10 effective statewide regulation, where are we?

11 Let's look at the decided body of law. We've
12 already said King says you can do it as a matter of local
13 interest, and the legislature hasn't spoken.

14 DeGroff, Horn, Davis, Rowe, all say, come on with
15 your zoning power. Don't use the zoning ordinance to do
16 what a zoning ordinance isn't said to do.

17 When you get to 510 and trash regulation, even
18 before this Act, Taylor and Pumphrey, down. Local
19 jurisdictions can't do it.

20 The County would have you believe, and the
21 Intervenor would have you believe that while it's
22 impermissible for them to attach a deposit to a bottle, it
23 is permissible for them to so comprehensively regulate solid

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1 waste disposal as to abolish it form the county.

2 Your Honor, that is a distinction of some
3 difference. It is like asking this Court to ignore the
4 elephant that's sitting in the jury box. And I don't think
5 the Court can do that.

6 Your Honor, I think probably all has been said
7 that needs to be said. I am not persuaded -- but I'm not
8 the person who has to make the decision -- by Attorney
9 General's decisions prior to the adoption of the ordinance.
10 But there is a neat point that I think Your Honor should
11 consider, and I'll close with it.

12 It is apparent that Prince William County doesn't
13 like private operators of landfills. And they've made that
14 legislative statement clear. And I think they said it in
15 argument this morning.

16 They've got the resources. They've got the
17 power. They've got the money. Maybe some do, but they're
18 the ones to do it.

19 And they said equal protection arguments never
20 affect government. Well, that's a big mistake. Equal
21 protection arguments do affect government, if they intrude
22 and monopolize an area where not authorized to do so.

23 Your Honor, there is no delegation of authority

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1 under the circumstances of a plenary regulatory scheme to
2 outlaw this private business.

3 In short, Your Honor, we believe, and both
4 parties have asked the Court to decide the issue. And we
5 pray that you will.

6 THE COURT: Anything further?

7 MR. FOOTE: Your Honor, I don't
8 believe that we have anything further.

9 THE COURT: All right. Do you
10 wish to submit a brief.

11 MR. MCSWEENEY: It will be a
12 brief brief, Your Honor.

13 THE COURT: Within seven days.

14 MR. MCSWEENEY: Yes, Your
15 Honor.

16 THE COURT: The Court is not
17 going to decide the issue today. There is too much to read
18 and too much to digest. I will let you know my decision as
19 soon as possible.

20 MR. BETTIUS: Thank you, sir.

21 MR. FOOTE: Thank you, Your
22 Honor.

23 THE COURT: The Court stands in

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1 recess.

2 (Whereupon, the hearing was
3 adjourned at 12:35 p.m.)

REPORTER'S CERTIFICATE

COMMONWEALTH OF VIRGINIA AT LARGE:

I, Christina A. Carter, a Stenotype Reporter and Notary Public in and for the Commonwealth of Virginia at Large, do hereby certify that I was authorized to and did report in stenotype notes the foregoing proceedings, and that thereafter the same was reduced to typewritten form under my supervision.

I further certify that the foregoing is a full, complete, and accurate transcript of the proceedings held and testimony adduced before me in the matter, on the date, and at the time and place set out on the title page hereof.

GIVEN under my hand this 8th day of December 1987.

Christina A. Carter
Notary Public

My Commission expires April 10, 1990.

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Northern Virginia Reporting
STENOTYPE COURT REPORTING

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V I R G I N I A :

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT,
INC., et al.

Petitioners

v.

THE BOARD OF SUPERVISORS OF
PRINCE WILLIAM COUNTY

Defendant

CHANCERY 23341

ORDER

THIS DAY came the parties and Virginia Waste Industries Association ("VWIA"), by counsel, on VWIA's Motion for leave to submit brief as amicus curiae.

It appearing to the Court that the Motion is unopposed by the parties to this cause, and that it presently presents primarily issues of law upon which VWIA's interests, expertise and informational resources may be of value to this Court, it is therefore

ORDERED that VWIA is hereby granted leave to submit a brief as amicus curiae to address the issues it has determined to arise from Plaintiff's Motion for Summary Judgment previously filed herein.

ENTERED this 14th day of September, 1987.


Circuit Court Judge

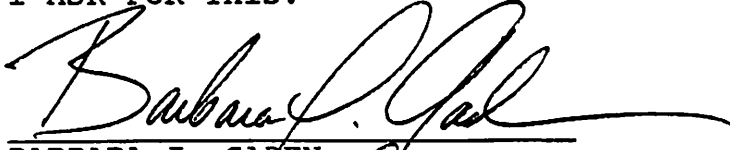
221

A CORRECTION
C. L. GIBBS, CLERK


By:



Deputy Clerk

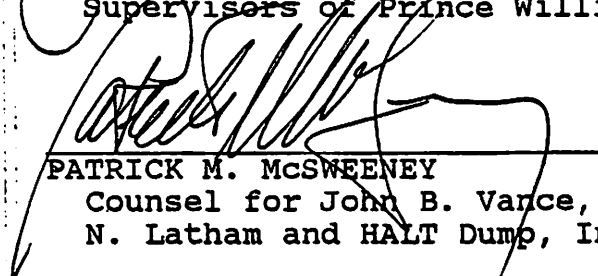
I ASK FOR THIS:


BARBARA J. GADEN
Counsel for Virginia Waste
Industries Association

SEEN AND AGREED TO:


JOHN B. CONNOR
Counsel for Resource Conservation
Management, Inc., Raymond C. Hawkins
and RCH Land Sales, Inc.


JOHN H. FOOTE
Counsel for Board of County
Supervisors of Prince William County


PATRICK M. MCSWEENEY
Counsel for John B. Vance, Carroll
N. Latham and HALT Dump, Inc.

A16:VWIAOrd

SEP 16 1987



COUNTY OF PRINCE WILLIAM

1 County Complex Court, Prince William, Virginia 22192-9201
(703) 335-6620 Metro 631-1703

COUNTY ATTORNEY

John H. Foote
County Attorney

September 15, 1987

The Honorable Frank A. Hoss, Jr.
Circuit Judge
9311 Lee Avenue
Manassas, Virginia 22110

Re: RCMI, et al. v. Board of Supervisors
Chancery 23341

Dear Judge Hoss:

I think it worthwhile to write briefly to clarify a point that should be evident from our memorandum, but which was not explicitly made during oral argument of this cause last Thursday. While the Board of Supervisors generally endorses the position set out by Mr. McSweeney for his Intervenor Latham, et al., it cannot go so far as to endorse any argument that this entire controversy is ripe for adjudication on summary judgment.

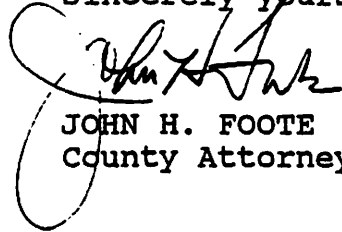
We do not understand the Intervenor to argue that no hearing with respect to the fair debatability of the challenged amendments is ever required, in any circumstance, but only to say that the Petitioners in this case have failed even to allege facts sufficient to overcome the presumption of validity attaching to any zoning ordinance. We have no fundamental disagreement with the position so stated.

But to the extent that argument is understood to go further, we emphasize that it is the Board's position that our Court would recognize no per se rule of facial invalidity with regard zoning ordinances which exclude private uses of land, even in those circumstances where other and independent provisions of law permit the public to conduct the same use. The proper inquiry in all cases of exclusion is into the factual bases for the justifications asserted by the locality, which inquiry can only be made on the basis of a record developed for the purpose.

It is not necessary for the Court to determine at this stage of the proceedings that the County will ultimately prevail in its contention of right, but only that it has

prima facie the power to act as it did, in the proper case. Whether this is a proper case simply cannot be answered on the present record.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "John H. Foote", is written over the typed name. The signature is fluid and cursive.

JOHN H. FOOTE
County Attorney

cc: Marc E. Bettius
Barbara J. Gaden
Patrick McSweeney

D3:Judge

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September 21, 1987

The Honorable Frank A. Hoss, Jr.
Prince William County Circuit Court
9311 Lee Avenue
Manassas, Virginia 22110

Re: RCM, et al. v. Board of Supervisors
Chancery No. 23341

Dear Judge Hoss:

I have received a copy of Mr. Foote's letter to you dated September 15, 1987, and am compelled to briefly respond to the points raised therein.

In his letter, Mr. Foote argues that that the entire controversy is not ripe for adjudication on summary judgment and that the Virginia Supreme Court would not recognize a per se rule of facial invalidity with regard to zoning ordinances which exclude private uses of land. Petitioners disagree.

As explained in petitioners' brief and during oral argument, petitioners challenge the validity of the ordinance "as drafted." Should the court rule, as petitioners have argued, that defendant lacked the requisite delegated authority to enact the ordinance or that the ordinance has been pre-empted by the Waste Management Act, then the ordinance is invalid as a matter of law, and the court need not inquire into the factual basis for the justifications asserted by the locality in enacting the invalid ordinance.

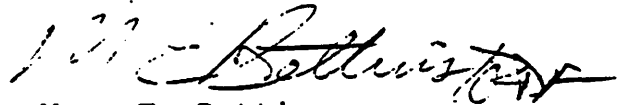
The Dillon Rule of strict construction is applicable to determine, in the first instance, whether a power exists at all. If the power cannot be found, the inquiry is at an end. Moreover, if the court has any doubt as to the question of the delegated power, such doubt must be resolved against the existence of such power. See Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977).

As defendant admitted in its brief and during argument, the issues whether defendant had the delegated authority to adopt the ordinance and whether the ordinance has been

The Honorable Frank A. Hoss, Jr.
September 21, 1987
Page Two

been pre-empted by state law may be decided by the court as a matter of law. Regardless of the court's ruling, petitioners do not intend to present any additional evidence in this case. Accordingly, the entire controversy is ripe for adjudication on summary judgment and petitioners respectfully request that the court enter summary judgment on their behalf.

Respectfully,


Marc E. Bettius

MEB:dk

cc: John H. Foote, Esquire
Barbara J. Gaden, Attorney at Law
Patrick M. McSweeney, Esquire

V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
RESOURCE CONSERVATION MANAGEMENT, INC.
ET AL, PETITIONERS

V.

CHANCERY NO. 23341

THE BOARD OF SUPERVISORS OF PRINCE WILLIAM COUNTY

OPINION

This matter came on to be heard on September 10, 1987 upon cross-motions for summary judgment filed by the Petitioners and the County. The court did not rule at the conclusion of the hearing as it wanted to review the briefs filed by the parties as well as the Amicus Curiae brief filed by the Virginia Waste Industries Association. Based on the oral argument presented at the hearing and the briefs submitted in support thereof the Court is of the opinion that there are three issues to be disposed of in this matter:

1) Whether the ordinance in question is invalid "as drafted" because it lacks sufficient enabling legislation.

2) Whether the ordinance enacted is invalid because the action taken by the County has been preempted by the Virginia Waste Management Act.

3) Whether restricting the ownership and operation of debris landfills to public entities is a valid exercise of the County's police power.

For the reasons hereinafter stated the Court is of the

opinion that the County should prevail on Issue No. 1, that judgment should be withheld at this time on Issue No. 2 and that Issue No. 3 cannot be reached on a motion for summary judgment.

I. WHETHER THE ORDINANCE IN QUESTION IS INVALID "AS DRAFTED" BECAUSE IT LACKS SUFFICIENT ENABLING LEGISLATION.

Petitioners argue that the ordinance is invalid on its face, that it is not really a zoning ordinance and that it regulates the ownership of property outside the authority granted to the County by statute. The County argues that there is ample authority in the statutes to allow a County to include debris landfills in specific areas and to exclude them as well. The County further argues that Section 15.1-486(a) of the Code of Virginia gives the County express authority to totally prohibit such debris landfills from any and all zoning districts.

Prior to the enactment of the present ordinance debris landfills were permitted uses of land, subject to the issuance of a special use permit, in three zoning districts: A-1, M-1 and M/T. While a duly filed request for such a special use permit by the Petitioners was pending the County enacted an ordinance removing such use from all three districts and did not provide for it's replacement in any district. Further, while the County has submitted exhibits indicating it was going to consider operating debris landfills on it's own, there is nothing in the language of the ordinance indicating the County would so act. The obvious effect of the ordinance is to prohibit private ownership of debris landfills leaving unsettled who may, or whether anyone would, operate such a facility.

The Court agrees with the County that, on its face at least, the ordinance in question merely removes from several districts that which the County had the power to put there in the first place. The fact that this action has the effect of banning private ownership of such landfills in favor of having the County operate them does not make the ordinance "as drafted" invalid. Both the Petitioners' argument that the County's action impermissibly regulates who may own property and the County's argument that they have express authority to prohibit landfills totally are really more properly addressed in regards to the constitutionality of the County's actions and not to the "as drafted" validity of the ordinance.

Thus, while the action taken by the County may be subject to attack on the grounds that it is in irreconcilable conflict with the Virginia Waste Management Act or that it is unconstitutional as hereinafter set out the Court is of the opinion that the ordinance can withstand a facial attack. Therefore the Petitioners' motion for summary judgment on that issue is denied. The cross-motion filed by the County on this issue is granted.

II. WHETHER THE ORDINANCE ENACTED IS INVALID BECAUSE THE ACTION TAKEN BY THE COUNTY HAS BEEN PREEMPTED BY THE VIRGINIA WASTE MANAGEMENT ACT.

It is the opinion of this Court that this case is likely to be reviewed by the Virginia Supreme Court. In the interests of judicial economy, that court has repeatedly urged the trial courts, whenever possible, to fully develop the record of the

cases before them in order that the Supreme Court may fully adjudicate the issues on review. Since, according to the ruling hereinafter set out, this case is going to have to proceed to trial on the issue of the constitutionality of the County's action, the Court is going to withhold ruling on the preemption question until it can rule on both issues at the same time. No further evidence need be developed on the preemption issue, however, as it is a question of law and will be decided on the briefs and arguments thus far submitted.

III. WHETHER RESTRICTING THE OWNERSHIP AND OPERATION OF LANDFILLS TO PUBLIC ENTITIES IS A VALID EXERCISE OF THE COUNTY'S POLICE POWER.

Although the preemption question may ultimately be dispositive of this case it is the police power question, at least at this point, that seems to this Court to be the ultimate issue to be resolved. In passing the ordinance the County has obviously taken the position that the County, and only the County, can best meet the needs of its citizens in the solid waste management area.

The Petitioners argue that the ordinance is unlawfully discriminatory in that it permits one landowner certain uses of land that it denies another which is similarly situated. They further argue that such discrimination is unlawful because it is "...not substantially related to the public health, safety or welfare which constitutes a denial of equal protection of the laws." Board of Supervisors v. Rowe, 216 Va. 128, 216 SE 2d 199 (1975).

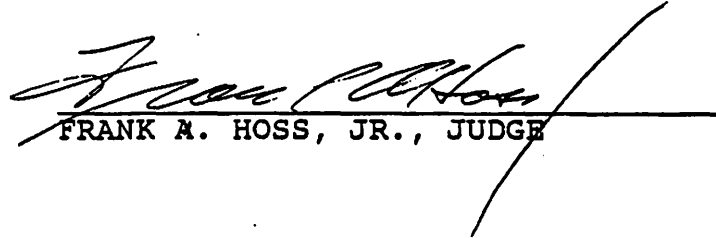
The County argues that the issue is "fairly debatable" thus compelling a finding in favor of the ordinance by the Courts and further, and more importantly at this stage of the proceedings, that no evidence has been yet presented to give a basis for either finding. In other words there "...remain(s) disputed issues of material fact and the case must therefore proceed to trial to determine whether there is sufficient evidence to assail, or then to support, the Board's action (page 2, County's brief).

The Court agrees that this issue is not "ripe" for summary judgment and that evidence is going to have to be taken to determine where the line should be drawn "...between land uses which the goverment can permit to itself but forbid to private enterprise". Kavanaugh v. London Grove Township, 404A 2d 393 (Pa. 1979). Such line drawing should only be attempted after all of the parties have been able to develop a factual basis upon which to rest such a determination. Thus, the motion for summary judgment on this issue is denied.

There was one other issue raised in the pleadings and the briefs submitted that being whether the County's action in prohibiting private landfills was in violation of Virginia and Federal Antitrust law. This issue was not fully developed by the parties at the hearing and, frankly, doesn't seem dispositive of the case. The Court will therefore not rule on that issue here reserving it for further argument should the parties deem it advisable.

The attorney for the County is directed to draw an order consistent with the rulings herein, to circulate the same to

counsel of record for their endorsement, and submit it to the Court for entry. The parties are further advised to prepare for trial on the substantially narrower issues remaining as the result of the rulings set forth herein.


FRANK A. HOSS, JR., JUDGE

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October 6, 1987

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MARC E. BETTIUS

The Honorable Frank A. Hoss, Jr.
Prince William County Circuit Court
9311 Lee Avenue
Manassas, Virginia 22110

Re: RCM, et al. v. Board of Supervisors
Chancery No. 23341

Dear Judge Hoss:

We are in receipt of your memorandum opinion in the above-captioned cause and, at the outset, wish to thank the Court for your thoughtful consideration and the precious time which the Court has spent in setting forth its rulings and analysis of the issues.

As much as Petitioners will elect to stand on the Motion for Summary Judgment, this is to inform the Court of Petitioner's intent not to further proceed with evidence in this case, and to request the Court to rule on the remaining issues in this case at this time.

The motion for summary judgment attacks the subject ordinance as drafted. The as drafted attack rests on two foundations. First, that the ordinance is unconstitutional under both state and federal constitutions in that it violates both substantive and procedural due process rights of the Petitioner.

The second ground is that the ordinance is facially violative of the Virginia legislative scheme wherein all police power is vested in the General Assembly. There is no express or implied delegation that authorizes this type of local legislative enactment. Furthermore, the ordinance is not a zoning enactment and Plaintiff's exercise of its purported police power is without other authority, either express or implied.

Moreover, Petitioner's pre-emption argument is appropriate for summary judgment when viewed in the light of the comprehensive scheme of regulation set forth in the Waste Management Act. In this regard the Court should take particular

The Honorable Frank A. Hoss, Jr.
October 6, 1987
Page Two

cognizance of the federal acts which gave rise to the Waste Management Act. While not dispositive of the issues in the case, these federal acts highlight the inappropriateness of an ordinance which purports to usurp major policy decisions on an issue of national concern.

The Court has, we believe, succinctly underscored this problem when it says on page two of its opinion:

"The obvious effect of the ordinance is to prohibit private ownership of debris landfills leaving unsettled who may or whether anyone would operate such a facility." (emphasis added)

Indeed, as stated in oral argument, in the context of a comprehensive scheme of waste management regulations, it is inappropriate to allow the regulated to determine whether or not the game will be played at all. It is incomprehensible in this context of state and national regulation to allow Prince William County to make the fundamental decision whether private or public ownership of waste management facilities is allowed.

In short Judge Hoss the pre-emption argument is the other side of the legislative authority coin. Succintly stated where there is an expression of state policy with reference to a particular issue no implied authority can be asserted otherwise the rationale for Dillon's Rule ceases to exist. The Board of Supervisors of Fairfax County v. Pumphrey, The Board of Supervisors of Loudoun County v. Tabler, and Commonwealth v. Arlington County Board cases clearly stand for the proposition that there can be no implied delegation in the face of contrary expressions of state intent.

As this Honorable Court has cogently pointed out, no further evidence need be submitted on this issue and Petitioners respectfully request that the Court immediately rule on the pre-emption issue. As you know, this will be a keystone ruling both in terms of the rights of this Petitioner, and the larger and critical issues of waste management regulation.

We respectfully disagree with the Court's conclusion that evidence is necessary to determine where the "line should be drawn" between private or public ownership. Virginia has, in a long line of decisions, indicated that the zoning ordinance is not the proper forum or vehicle to exclude or control ownership, and accordingly, Petitioner's rest on their pleadings and motion for summary judgment as sufficient to show the ordinance is unconstitutional on its face.

The Honorable Frank A. Hoss, Jr.
October 6, 1987
Page Three

Again we sincerely wish to express to the Court our appreciation for your time and the courtsey which has been extended to us in this matter.

Respectfully,

Marc E. Bettius

MEB/der

cc: John H. Foote, Esquire
Barbara J. Gaden, Attorney at Law
Patrick M. McSweeney, Esquire

A:MEB18.087

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October 12, 1987

The Honorable Frank C. Hoss, Jr.
Circuit Court of Prince William County
9311 Lee Avenue
Manassas, Virginia 22110

Dear Judge Hoss:

Re: Resource Conservation Management, Inc. et al.
v. Board of Supervisors of Prince William County
Chancery No. 23341

On behalf of the Interveners in this litigation, I am responding to the October 6, 1987 letter to you from Petitioners' counsel, Marc Bettius.

The issues submitted to the Court in Petitioners' motion for summary judgment differ significantly from those raised in the October 6th letter. Interveners respectfully ask the Court to reject Petitioners' attempt to present new arguments after the motion and the Board's cross-motion for summary judgment have been briefed and argued.

The arguments previously raised by Petitioners were three:

- 1) The Board of Supervisors has no delegated power to regulate ownership of debris landfills.
- 2) The challenged ordinance is inconsistent with the Virginia Waste Management Act.
- 3) Plaintiffs have been denied equal protection of the laws.

Those are the grounds on which summary judgment was formally requested by Petitioners. Interveners responded to each of these arguments in their legal memorandum filed with the Court on September 17, 1987. (A copy of that legal memorandum is enclosed.)

The Honorable Frank C. Hoss, Jr.
Circuit Court of Prince William County
October 12, 1987
Page 2

Even if the Court were to consider Petitioners' new arguments, it will discern no ground for invalidating the Board's action challenged in this litigation. Petitioners offer no argument or case authority that would demonstrate how the challenged action denies either substantive or procedural due process. The conclusory statement in the October 6th letter that the ordinance at issue is unconstitutional because it violates Petitioners' due process rights is an insufficient basis for judgment in their favor.

As noted above, Interveners have already responded to Petitioners' Dillon Rule (i.e., lack of delegated authority) and preemption arguments at pages 4-12 of their September 17th legal memorandum. The Court's attention is directed particularly at §15.1-28.01 of the Code of Virginia which answers both arguments. The pertinent passage from that statute reads:

It has been and is continuing to be the policy of the Commonwealth of Virginia to authorize each county, city or town, to displace or limit competition in the area of garbage, trash or refuse collection services and garbage, trash or refuse disposal services to provide for the health and safety of its citizens, to promote the generation of energy and the recovery of useful resources from garbage, trash and refuse, to protect limited natural resources for the benefit of its citizens, to limit noxious odors and unsightly garbage, trash and refuse and decay and to promote the general health and welfare by providing for adequate garbage, trash and refuse collection services and garbage, trash and refuse disposal services. Accordingly, the governing bodies of the counties, cities and towns of this Commonwealth are directed and authorized to exercise all powers regarding garbage, trash and refuse collection and garbage, trash and refuse disposal notwithstanding any anti-competitive effect.

Petitioners' belated efforts to bolster its preemption argument by invoking unnamed "federal acts which gave rise to the Waste Management Act" should be disregarded. Not only have the Petitioners failed to point to any specific language in federal legislation which has been violated by the Board, but they have waited for several weeks to suggest now for the first time that federal law somehow has a bearing on the state preemption issue. Of course, it does not.

The Honorable Frank C. Hoss, Jr.
Circuit Court of Prince William County
October 12, 1987
Page 3

Clearly, Congress has not preempted the traditional role of the states in nonhazardous solid waste management. City of Philadelphia v. New Jersey, 437 US 617 n.4 (1978). Indeed, Petitioners' argument appears totally without basis in light of the very language of the federal Resource Conservation and Recovery Act of 1976, which includes a congressional finding that "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies....." 42 USC §6901(a)(4). Petitioners appear to concede that point at page 2 of the October 6th letter by observing that the federal statutes are "not dispositive of the issues in the case."

How Virginia chooses to carry out the solid waste management functions not preempted by Congress is a matter left to the discretion of the General Assembly. In enacting §15.1-28.01 in 1984, the General Assembly unequivocally authorized local solid waste management programs even if they displace competition. (See pertinent language of that statute quoted above.)

Intervenors agree with Petitioners that this case may be disposed of by the Court at this point by summary judgment. Indeed, Petitioners have left the Court no other option as a result of their announced position not to present any further evidence.

Respectfully submitted,

CARROLL N. LATHAM, JOHN B. VANCE
AND HOMEOWNERS AGAINST LANDIFLL
TRACT/DUMP, INC.

By 
Counsel

PMM/dm
Enclosure

cc: John H. Foote, Esquire
Barbara J. Gaden, Attorney at Law
Mark E. Bettius, Esquire

V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
RESOURCE CONSERVATION MANAGEMENT, INC.

ET AL, PETITIONERS

V.

CHANCERY NO. 23341

THE BOARD OF SUPERVISORS OF PRINCE WILLIAM COUNTY

OPINION

This matter was heard on September 10, 1987 on cross-motions for summary judgment filed by the parties herein. On September 21, 1987 the Court, in a written opinion, and, in accord with the pleadings, motions and briefs filed in the case, found the issues presented to be as follows:

1. Whether the ordinance in question is invalid "as drafted" because it lacks sufficient enabling legislation.

2. Whether the ordinance enacted is invalid because the action taken by the County Board of Supervisors has been preempted by the Virginia Waste Management Act.

3. Whether restricting the ownership and operation of debris landfills to public entities is a valid exercise of the County's police power.

In its opinion the Court ruled that issue No. 1 should be resolved in the County's favor finding that Section 15.1-486 of the Code of Virginia did provide sufficient authority to allow the County to remove a portion of the ordinance that no one questions they had the authority to put there in the first

instance. The Court went on to withhold its decision on issue No. 2 for reasons of developing a full record in the event the matter should be reviewed by the Supreme Court of Virginia and found that issue No. 3 could not be reached by summary judgment in that evidence needed to be developed to permit the Court to resolve that issue.

By letter dated October 6, 1987 the Petitioners indicated that they did not intend "to further proceed with evidence in this case", elected to stand on their motion for summary judgment and requested the Court to rule on the remaining issues. In their letter the Petitioners restated and to some extent altered what had been previously urged as the issues to be decided. This Court, however, is of the opinion that the issues were properly identified, argued and briefed initially.

Accordingly, there are two issues remaining to be resolved as the result of the Petitioners position taken in their letter of October 6.

On the question of whether restricting the ownership and operation of debris landfills to public entities is a valid exercise of the County's police power the Court must rule in favor of the County. The County argues, and the Court agrees, that the ordinance is presumptively valid. County brief, page 35 citing Goreib v. Fox 145 Va 554, 134 S.E. 914 (1926), Aff'd, 274 US 603, 71 L.Ed 1228 (1927) and Board of Supervisors v. Carper, 200 Va. 653, 107 S. E. 2d 390 (1959). As indicated in its opinion issued on September 21, this Court found that this issue cannot be reached by summary judgment and evidence must be produced to determine if the zoning amendments enacted by the

County were "clearly unreasonable, arbitrary or capricious, and that (they bear) no reasonable or substantial relation to the public health, safety, morals, or general welfare." County brief, page 35 quoting from Carper at 107 S.E. 2d at 395. This Court feels that Justice Larson, of the Supreme Court of Pennsylvania in the case of Kavanaugh v London Grove Township, 404 A 2d 393 (Pa 1979) framed the dispositive issue in the subject case when he said:

"If government were to begin to enact laws which permitted certain entrepreneurial uses but only if the enterprise were conducted by government, it seems certain that in due course the role of government as entrepreneur would be increased to the detriment of private enterprise. It seems clear, therefore, that a zoning ordinance which permitted the operation of a gasoline station, for example, but only if run by government, would be held to be invalid. On the other hand, it is manifest that a zoning ordinance which permitted the operation of a jail, but only if run by the government, would be constitutional. There is, therefore, a line to be drawn between land uses which the government can permit to itself but forbid to private enterprise."

This Court, in its September 21 opinion, noted that evidence would have to be considered to determine where the line should be drawn in the context of solid waste disposal. Without such evidence, I am of the opinion that the County can rest on the presumption of validity attached to its legislative powers to enact zoning ordinances as set forth in Section 15.1-486 of the Code of Virginia.

This leaves the question of whether the Virginia Waste Management Act has preempted the field thus negating the action taken by the County.

The Virginia Waste Management Act provides a

comprehensive statutory scheme to control and regulate waste management activities in Virginia. Section 10-266 of the Code of Virginia. It is clear from the definitions set forth in Section 10-264, the bonding requirements of Section 10-273 and a reading of the Act as a whole that the legislature contemplated that such waste management facilities could be privately owned and operated. Petitioners argue that since private enterprise may operate such facilities this elevates their position to one of right. I disagree.

It seems clear to this Court that the purpose of the Act is to control and regulate debris landfills and not to determine who may or shall own and operate them. It is equally clear from the Sections noted above and a reading of the Act as a whole that local governments can also own and operate landfills. If the County is to undertake such an operation they will be subject to the same rules and regulations as any "person" as defined in the Act (with the exception of bond requirements).

Petitioners continue to rely on Section 10-287 as authority for the proposition that the Act mandates private persons be allowed to own and operate debris landfills. The problems with this position are three-fold: 1) Section 10-287 is in Article 5 of the act dealing specifically with the "Siting of Hazardous Waste Facilities" not that portion of the Act concerning "Solid Waste Management" (Article 2) 2) If the legislature had intended for the language encouraging private ownership and operation to include solid waste facilities it could easily have done so as it did in Section 10-287 and 3) Even the provisions of Section 10-287 do not mandate private ownership

as it merely states that such hazardous waste facilities "should" be privately owned but goes on to provide "...whether privately or publicly owned and operated...". There is nothing in the provisions concerning solid waste management facilities that even encourages a private ownership policy much less mandate it.

Petitioners further argue that by eliminating the landfill provisions from its ordinances the County can simply walk away from the solid waste disposal problem leaving the disposal of same to others which would adversely impact on the state as a whole and frustrate the purposes and intent of the Act. The problems with this position are two-fold: 1) The Act specifically provides that local governments cannot bury its head in the sand and ignore the problem because it does mandate that the Governor may designate regional boundaries for said waste management, requires that the "governing bodies of the counties, cities, and towns within any region so designated shall be responsible for the developemnt of a comprehensive regional solid waste management plan in cooperation with any planning district commission or commissions in such region", and further specifically provides that "Until such date as a county, city or town becomes subject to a regional solid waste management plan, such county, city or town shall be responsible for implementation of a local solid waste management plan which meets such standards as may be prescribed by the Department by regulations." Thus the County simply cannot walk away from the problem of solid waste disposal as to attempt to do so would be in contravention of the Act and the power of the state could be brought to bear upon such action. 2) The County, in fact, is not attempting to avoid the

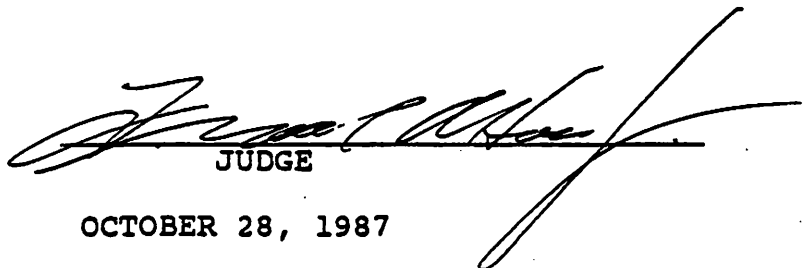
problem and is taking steps to directly address solid waste disposal. This is made apparent by the resolutions of the Board of Supervisors, attached as exhibits to the County's brief, indicating the employment of consulting engineers to assist in the selection of debris landfill sites, the adoption of a county Capital Improvements Plan showing capital planning for debris landfill purposes and the creation of a Citizen Advisory Committee to assist in the selection of such sites.

The Virginia Waste Industries Association in its Amicus Curiae brief filed in this cause sets forth the requirements necessary to find a conflict between a legislative act and a local ordinance (page 9): "A conflict exists when the local enactment stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (i.e., the General Assembly)." Ensco v Dumas, 807 F2d 743, 745 (8th Cir. 1986) (quoting Hillsborough County v Automated Medical Laboratories, 471 U.S. 707 (1985)). I find no such conflict here. As previously stated the Act's purpose is to regulate and control operations of solid waste disposal facilities. Should the County operate such a facility it is subject to that regulation and control. "If both the statute and ordinance can stand together courts are obliged to harmonize them, rather than nullifying the ordinance". Loudoun County v Pumphrey 221 Va 205 (1980). If the County proceeds to address the problem of solid waste disposal as mandated by Section 10-274 of the Act and if the County operates same pursuant to the rules and regulations prescribed by the Department of Waste Management then, indeed, the "accomplishment and execution of the full purposes and

objectives" of the Act would not be frustrated. On the contrary, they would be promoted.

Thus, for the reasons stated, this Court is of the opinion that the action taken by the Board of Supervisors in deleting privately owned and operated landfills from its ordinance is not in conflict with the Virginia Solid Waste Management Act and is thus not preempted by said Act.

Having addressed all of the issues raised and argued at the September 10 hearing and in the Petitioners' letter of October 6, the Court is of the opinion that final judgment should be rendered in favor of the County. The County Attorney is directed to prepare a final decree incorporating the rulings of the Court in its September 21 opinion and those expressed herein, circulate same for endorsement of counsel and submit it to the Court for entry.


JUDGE
OCTOBER 28, 1987



CHAMBERS OF
FRANK A. HOSS, JR.
JUDGE

THIRTY-FIRST JUDICIAL CIRCUIT OF VIRGINIA
PRINCE WILLIAM COUNTY
CITIES OF MANASSAS AND MANASSAS PARK

CIRCUIT COURT CHAMBERS
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October 30, 1987

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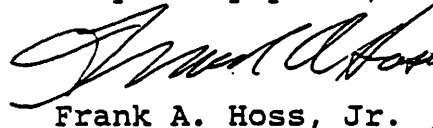
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Fairfax, VA 22030

Re: Resource Conservation Management, Inc.
vs.
The Board of Supervisors of Prince
William County
Chancery No. 23341

Dear Counsel:

I am enclosing herewith my Opinion on the above
referenced matter dated October 28, 1987.

Very truly yours,


Frank A. Hoss, Jr.

FAHjr/jam
Enclosure

246

V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT,)
INC., et al.,)

Petitioners,)

v.)

IN CHANCERY NO. 23341

BOARD OF SUPERVISORS OF PRINCE)
WILLIAM COUNTY,)

Defendant.)

NOTICE AND MOTION TO RECONSIDER

TO: BOARD OF SUPERVISORS OF PRINCE
WILLIAM COUNTY
c/o John H. Foote, Esquire
County Attorney
1 County Complex Court
Prince William, Virginia 22192-9201

PLEASE TAKE NOTICE that on Friday, December 18, 1987, at
10:00 a.m., or as soon thereafter as counsel may be heard, the
Petitioners, Resource Conservation Management, Inc., Raymond
C. Hawkins and RCH Land Sales, Inc., by counsel, will move the
Honorable Frank A. Hoss, Jr. to reconsider his decision set
forth in the Letter Opinions previously issued in this case.

RESOURCE CONSERVATION
MANAGEMENT, INC., RAYMOND C.
HAWKINS, and RCH LAND SALES, INC.
By Counsel

Marc E. Bettius
William L. Carey
MILES & STOCKBRIDGE
11350 Random Hills Road
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Fairfax, Virginia 22030
(703) 273-2440

By: 

William L. Carey
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of December, 1987, a true copy of the foregoing Notice and Motion to Reconsider was mailed, postage prepaid, to John H. Foote, Esquire, County Attorney, 1 County Complex Court, Prince William, Virginia 22192-9201, Counsel for Defendant; Patrick M. McSweeney, Esquire and Brian L. Buniva, Esquire, McSweeney, Burtch & Crump, P. O. Box 1463, 9 South 12th Street, Richmond, Virginia 23212, Counsel for intervenors Carroll N. Latham, John B. Vance and Homeowners Against Landfill Tract/Dump, Inc., and to Barbara J. Gaden, Attorney-at-Law, Hazel, Thomas, Fiske, Beckhorn & Hanes, 310 South Boulevard, P. O. Box 14515, Richmond, Virginia 23221.



William L. Carey

V I R G I N I A

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

----- X

RESOURCE CONSERVATION MANAGEMENT, INC.,
EL AL,

Plaintiff's,

versus,

BOARD OF SUPERVISORS OF PRINCE WILLIAM
COUNTY,

Defendant.

----- X

Manassas, Virginia

Friday, December 18, 1987

The above-entitled action came on to be heard
before the Honorable Frank A. Hoss, Junior, a Judge in and
for the Circuit Court of Prince William County, Prince William
County Judicial Center, 9311 Lee Avenue, Manassas, Virginia
22110, Courtroom Number Two, beginning at approximately
10:33 o'clock a.m., when there were present on behalf of
the respective parties:



1 APPEARANCES:

2 For the Plaintiff's:

3 MARC E. BETTIUS, ESQUIRE
4 and,

5 WILLIAM L. CAREY, ESQUIRE
6 Miles & Stockbridge

7 11350 Random Hills Road, Suite 500
8 Fairfax, Virginia 22030

9 For the Defendant:

10 JOHN FOOTE, ESQUIRE

11 Assistant County Attorney

12 One County Complex Court

13 Prince William, Virginia 22192

14 C O N T E N T S

15 Argument by Counsel on Motion

Page 3

16 E X H I B I T S

17 None.

22 250



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P R O C E E D I N G S

(The Court Reporter was sworn.)

THE COURT: All right. Resource Conservation Management, Incorporated versus The Board of Supervisors of Prince William County.

MR. BETTIUS: Your Honor, in view of the sterling results that I obtained the first time, we will let Mr. Carey argue it today.

MR. CAREY: Good morning, Your Honor. My name is Bill Carey, from Miles and Stockbridge. Your Honor, we have filed a brief in support of the petitioner's motion to reconsider, and had it delivered to chambers yesterday. I hope that you had an opportunity to review that.

THE COURT: I read it this morning, yes, sir.

MR. CAREY: All right. We set out our position I believe fairly clearly in that brief, and we think that the court has misconstrued -- partially misconstrued the issues that have been presented before it, and we see the primary issue involved in this case as the authority for the local government -- in the Dillons Rule Case (Phonetic)-- the authority of the local government to enact an ordinance

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1 that the court recognized in its first opinion, in effect,
2 prohibits private ownership of land fills within the entire
3 boundaries of the County.

4 The Court observed that the obvious
5 effect of the order isto prohibit private ownership of
6 debris land fills, leaving unsettled who may or whether anyone
7 would operate such a facility.

8 The effect of the ordinance is not in
9 question, Your Honor. It is the authority that the County
10 Government stands on to pass such an extraordinary ordinance
11 banning a lawful business within the County, that we believe
12 is the issue that the Court needs to focus on.

13 Under the Dillions Rule analysis, the
14 Court has to determine, first, whether there is an expressed
15 delegation of that power to the County. If the Court fails to
16 find an expressed delegation of that power, then the Court
17 has to make a determination whether that power is granted to
18 the County by implication.

19 And, Your Honor, even if -- as the Tabler
20 case holds, even if it is a power found by implication, the
21 intent of the Legislature to grant to the local authority
22 that power, has to be shown clearly. It cannot be gathered
23 by inference. The intent of the General Assembly has to be

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1 shown to be clear to grant that authority, and in the Tabler
2 case, as Your Honor recalls, there was a question having to
3 do with the deposit ordinance, and although there was a
4 statute in there that preempted that area from local regulation,
5 the Court said that there was a grandfather clause, and we
6 were not going to deal with the preemption issue, and we are
7 doing to deal with whether the General Assembly, in analyzing
8 the legislation of the General Assembly, whether we can find
9 in that analysis an intent to grant, a clear intent, to grant
10 that power.

11 And what they did is that they found
12 that the General Assembly had consistently over a number of
13 years denied and failed to enact a statute authorizing these
14 deposit ordinances; and from that, from a negative implication,
15 they found that there was no such authority.

16 In this case, Your Honor, we have much
17 more than simply a negative implication. We have a
18 regulatory scheme set forth in the Virginia Waste Management
19 Act; an affirmative statement by the General Assembly that
20 they are going to establish a comprehensive regulatory scheme,
21 controlled by an arm of the State Government, and that they
22 are going to include in that regulatory scheme, that is shown
23 throughout those statutes in that regulatory scheme, that

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1 private land fills are authorized.

2 If the Court is going to find an intent
3 of the General Assembly, either for or against this delegated
4 power, the Court has to consider the fact that the Virginia
5 General Assembly has spoken in the area, and the only analysis
6 or the only conclusion that can be drawn from the Virginia
7 Waste Management Act is that they had intended that privately
8 owned debris land fills would be authorized.

9 It is not a question of elevating that
10 to a matter of right, although we believe that is part of it.
11 It is a question of what the General Assembly's intent was.
12 In the absence of an expressed delegation, we need to find
13 a delegation by implication if we are going to uphold this
14 ordinance.

15 And the only intent we would submit that
16 can be drawn from what the General Assembly has stated in the
17 statute books is one that says that privately owned debris
18 land fills are going to be authorized, and no intent
19 whatsoever is shown in any of the statutes that would clearly
20 show an intent on the General Assembly to allow the local
21 governments to ban privately owned land fills.

22 I think that Mr. Foote himself has put
23 his finger right exactly on what the court has done. Mr. Foote

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1 has in promulgating this decision to his colleagues has stated
2 that this case stands for the general proposition that
3 Virginia localities possess the power in the proper and narrow
4 case to ban completely certain uses from within their
5 boundaries.

6 The Court apparently accepted our view
7 that the question in such cases is only one of fairly
8 debatable under all of the facts and circumstances and cause.
9 Your Honor, I think as this case presently stands that is
10 exactly what the Court has ruled; that the Court has not
11 focused on the issue of where that power comes from.

12 The Court has only said that they have
13 that power, and it is just a question of whether it is a
14 fairly debatable exercise of the power. We think the Court
15 has failed to focus on an essential first step, and that is to
16 determine from where the power derives for the local
17 government to ban a lawful land use, a lawful business.

18 Your Honor, our position is simply this.
19 That this exercise of power, even by the General Assembly of
20 the State of Virginia, is such an extraordinary power to ban
21 the operation of a lawful business, that it is carefully
22 scrutinized, and that is at the State level. If it is done
23 at the local level, then the Court has to first before it

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1 reaches the fairly debatable issue, it has to first seek within
2 the statutes of the Commonwealth of Virginia the authority
3 from which the local government derives its power to ban a
4 lawful business.

5 And, Your Honor, it is not granted by
6 express authority, and the only thing that remains is whether
7 it is granted by implication, and this is where the Virginia
8 Waste Management Act is key. That is where the General
9 Assembly has spoken in the area.

10 The only implication that can be
11 drawn from that Act is that privately owned land fills are
12 authorized. It is stated in the Act itself. We also believe
13 that is the one issue with respect to the Dillion's Rule,
14 with respect to the preemption issue, which is in one sense
15 the flip side of the Dillion Rule, because the Virginia
16 Waste Management Act clearly shows the intent of the General
17 Assembly to authorize that kind of land use, and that kind of
18 private ownership of a lawful business.

19 There is a preemption issue as well, and
20 it is simply that the General Assembly has authorized the
21 private ownership of land fills, and has set up a regulatory
22 scheme so that the regional coordination transcending the
23 local boundaries can be affected, and what this ordinance

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1 does is to prohibit what a State statute authorizes.

2 It is a classic case of preemption, and
3 a classic exercise of local government authority, and it is
4 inconsistent with the State statute. For both of those
5 reasons, Your Honor, we would ask the Court to reconsider
6 its decision and strike down the order.

7 THE COURT: Mr. Foote.

8 MR. FOOTE: Your Honor, we argued
9 these precise points at length, for about two hours in
10 September, and the County's position is that this is pretty
11 much old news. We would have nothing to add, sir.

12 THE COURT: Well, I have thought since
13 the first time I heard of this case and up until right now
14 that the County would be hard pressed, whether it be the
15 fairly debatable standard or what, but it would be hard
16 pressed to justify why they could be the one people to operate
17 a land fill as opposed to allowing private citizens to do so.

18 I think they would be hard pressed to
19 do this, especially in view of the fact that they acknowledge
20 in their pleadings that private persons could operate them
21 just as well as they could if they were properly policed, and
22 taken care of. We differ up on how we got to this point
23 procedurally.

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1 You think apparently that I should
2 have ruled on the basis of the ordinance's facial validity
3 and that it was invalid and I don't agree. I think this
4 thing should have been attacked on whether or not they
5 exercised properly their police powers.

6 I still agree with my opinion and I
7 am not going to change it at this point.

8 MR. FOOTE: Your Honor, we have an
9 agreed order to submit to the Court.

10 THE COURT: All right, sir.

11 (Whereupon, at approximately 10:44
12 o'clock a.m., the hearing was concluded.)

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CERTIFICATE OF COURT REPORTER

I, PAUL S. INTRAVIA, a Verbatim Court Reporter
and a Notary Public in and for the Commonwealth of Virginia
at large, do hereby certify that I took the notes of the
foregoing hearing by Stenomask and reduced the same to
typewriting; that the foregoing is a true record of said
hearing to the best of my knowledge and ability; that I am
neither related to nor employed by any attorney or counsel
employed by the parties thereto; nor financially or otherwise
interested in the outcome of the action.

Paul S. Intravia

PAUL S. INTRAVIA
Court Reporter

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V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RESOURCE CONSERVATION MANAGEMENT,)
INC., et al.,)

Petitioners,)

v.)

IN CHANCERY NO. 23341

BOARD OF SUPERVISORS OF PRINCE)
WILLIAM COUNTY,)

Defendant.)

FINAL DECREE

Petitioners and the Defendant Board of County Supervisors came before this Court on September 10, 1987, to be heard on their cross-motions for summary judgment previously filed. The Court then heard oral argument from counsel for the aforementioned parties, and for Intervenor Latham, et al., and has considered the memoranda submitted by them and by the Virginia Waste Industries Association, as amicus curiae.

Having considered the arguments, both written and oral, and having reviewed the record in this cause, for the reasons set forth in the Court's opinions filed September 21, 1987, and October 28, 1987, it is

ORDERED, ADJUDGED and DECREED that the Board of County Supervisor's Motion for Summary Judgment on the issues set forth in its Motion previously filed, is hereby GRANTED, and the Petitioners' motion is hereby DENIED, the Board being entitled to judgment that the ordinance amendments complained of should be sustained.

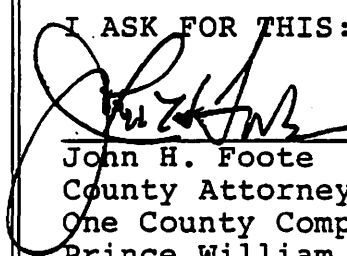
THIS MATTER came before the Court again on December 18, 1987, on the Motion for Reconsideration filed by the Petitioners herein. The Court heard oral argument from counsel for the parties and considered the Memorandum of Law submitted by the Petitioners and is of the opinion that the Petitioners Motion to Reconsider should be, and hereby is, DENIED.

THIS CAUSE IS ENDED.


FRANK A. HOSS, JR., JUDGE

ENTERED:

I ASK FOR THIS:

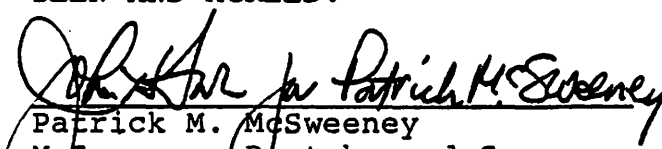

John H. Foote
County Attorney
One County Complex Court
Prince William, Virginia 22192
Counsel for Defendant

A COPY - TESTE:


C. E. GNADT, CLERK

By 
Deputy Clerk

SEEN AND AGREED:


Patrick M. McSweeney
McSweeney, Burtch, and Crump
9 South 12th Street
Richmond, Virginia 23212
Counsel for Intervenors Latham, et al.

SEEN AND OBJECTED TO:


Mara E. Bettius
Miles & Stockbridge
11350 Random Hills Road
Suite 500
Fairfax, Virginia 22030
Counsel for Petitioners

ASSIGNMENTS OF ERROR

1. The Trial Court Was Plainly Wrong in Ruling that the County Possessed Delegated Authority to Ban Private Ownership of Debris Landfills.
2. The Trial Court Was Plainly Wrong in Ruling that the County Ordinance was not Preempted by the Virginia Waste Management Act.
3. The Trial Court Erred in Entering Summary Judgment For the County When the Burden of Persuasion had Shifted to the County to Show the Reasonableness of Their Ordinance.