IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HAAS TRUCKING, INC. **APPELLANT**

V. **No. 2009-CA-00373**

HANCOCK COUNTY SOLID WASTE AUTHORITY AND HANCOCK COUNTY BOARD OF SUPERVISORS **APPELLEES**

BOUDIN's ENVIRONMENTAL SERVICES, LLC **AMICUS CURIAE**

BRIEF OF AMICUS CURIAE BOUDIN'S ENVIRONMENTAL SERVICES, LLC

IN THE APPEAL
OF HAAS TRUCKING, INC., FROM
THE CIRCUIT COURT OF HANCOCK COUNTY

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IV. STATEMENT OF THE CASE.

Boudin's Environmental Services, LLC (Boudin), owns and operates a Class II rubbish disposal facility (the Rubbish Site or the Boudin Site) as that term is defined by the regulations of the Mississippi Commission on Environmental Quality.[1] Mississippi Environmental Quality Permit Board General Permit for Class II rubbish landfills authorizes all who hold certificates of coverage under that Class II permit to own and operate Class II rubbish disposal facilities. Boudin holds certificate of coverage R2093 which evidences its authority under the Class II general permit to operate the Boudin Site.

Boudin previously applied to the Mississippi Environmental Quality Permit Board for an upgrade of its Class II rubbish site to a Class I rubbish site.[2] Mississippi Code Ann. § 17-17-229

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[1]According to Mississippi Commission on Environmental Quality (MCEQ) Regulation SW-2, "Class II Rubbish Site" means a rubbish site, which receives only the type of rubbish described in Section VI.C." of those same regulations. MCEQ Reg. SW-2, Section II. Appendix at 8. All statutes, constitutional provisions, and regulations cited herein are included in the appendix to this brief.

[2]The Boudin site was used as an emergency Class I site in the aftermath of Hurricane Katrina and, as demonstrated by its Class I application with MDEQ, meets in all respects the requirements for a class I site. According to Mississippi Commission on Environmental Quality (MCEQ)

(Appendix at 7) provides that no permit shall issue "for any nonhazardous solid waste management facility" unless that facility that is "consistent with the approved local nonhazardous solid waste management plan." The Mississippi Commission on Environmental Quality (MCEQ) interprets that statute as requiring that any new facility, in order to receive a permit, must be specifically described in the local solid waste plan. MCEQ Reg. SW-2, Section II, C. Appendix at 8.

Consequently, in order for Boudin to receive approval from the Mississippi Department of Environmental Quality, it was first necessary for the Authority to amend its local solid waste plan to include the Boudin site as a class I rubbish site. Boudin applied for such inclusion. In November 2006 the Authority formally approved an amendment to its plan that included the Boudin site as one of eight (some existing, some not) Class I Rubbish Sites to be approved in its plan. RE 13.[3]

State law provides that any local solid waste plan must be approved by the Mississippi Commission on Environmental Quality prior to becoming effective for the jurisdiction by which it was adopted. Miss. Code Ann. § 17-17-227 (6). The Authority submitted the plan to MCEQ for its approval. RE 6. MDEQ staff, without authority of law, subsequently notified the authority that it had not established need for eight class I rubbish sites [RE 52-53][4] and that it must "re-evaluate" the

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Regulation SW-2, "Class I Rubbish Site" means a rubbish site, which receives the types of rubbish described in Section VI.B. of these regulations. MCEQ Reg. SW-2, Section II. Appendix at 8.

[3]"RE" references are to Appellant Haas Trucking's Record Excepts. The record is unavailable to Amicus for citation as of this writing. The Authority initially selected the eight sites, including the Boudin sites, as sites that qualified from among 13 proposals.

[4]The MCEQ, not the MDEQ, has the sole authority to notify an authority of deficiencies in its plan. In any event, the eight sites did not constitute a deficiency in the Authority's solid waste plan within the meaning of state law. Miss. Code Miss. Code Ann. § 17-17-227 (i) requires that a planning authority include within its plan a determination of need by the authority for any new or expanded facilities. Appendix at 4. The statute makes the planning agency the sole determining authority of that need. Moreover, the purpose of the Nonhazardous Waste Planning Act of 1991,

proposed amendment. *Id.* MDEQ staff (MDEQ) also offered the assistance of Neel-Shaffer Engineers, then under contract to MDEQ for the purpose of performing post-Katrina work, to assist the Authority in revising its proposed amendment to comply with MDEQ requirements. *Id.*

Responding to the MDEQ staff, the Authority elected to use Neel-Shaffer. That firm subsequently reduced the number of Class I rubbish sites to be included in the plan to three, [RE 77-96, 105-129] two of which were selected by the Authority. RE 4-5, 100-04. The Boudin site was eliminated by the Authority as a future Class I site and was not included as such in the final version of the amendment submitted to the Mississippi Commission on Environmental Quality for approval as part of the local solid waste management plan. The Authority included in its final plan only the existing Magnolia Landfill site and the as yet undeveloped and unpermitted King site. *Id.*

According to Neel Shaffer's calculations adopted by the Authority, Hancock County's 20 year projected class I rubbish disposal capacity is 13.2 million cubic yards. The firm calculated that the County's existing and projected capacity would be in excess of 14 million cubic yards. The now closed Magnolia Landfill site has [had] an existing capacity of 4.6 million cubic yards. That leaves 8.6 million cubic yards of projected needed capacity dependent upon the permitting and development of the as of now nonexistent King site.

Miss. Code Ann. § 17-17-201, through -235, is to assure adequate capacity for the twenty year planning period. The clear purpose of the Act is to guarantee a minimum of capacity, not to limit capacity. Even if a purpose of the act were to insure against excess capacity, which it manifestly is not, inclusion in the plan does not guarantee a facility will be built or permitted. MCEQ, as we have already seen, requires specific inclusion in a plan as a condition for applying receiving a permit. Accordingly, it is prudent for an Authority to include numerous sites in its plan to insure adequate land available for permitting in the event some sites eventually do not qualify for permits or are not permitted for other reasons (*e.g.*, for business reasons, the owner could decide not to seek a permit or not to open a site approved in the plan, or, as in the case of the Magnolia site, the owner could decide to close the site).

V. SUMMARY OF THE ARGUMENT

A. THE AUTHORITY'S DECISION WAS NOT BASED UPON SUBSTANTIAL EVIDENCE.

The Boudin site previously was included in the Authority's local solid waste plan. The Authority's decision to remove it was based solely on the unauthorized directive of the Mississippi Department of Environmental Quality to the effect that the Plan contained too many Class I rubbish sites without sufficient need for the same demonstrated in the Plan. The decision did not consider whether the Magnolia site would remain open or whether the King site would or could be permitted. Moreover, no evidence considered required removal of the Boudin site or any other specific site. A decision to include or exclude a site in a solid waste plan is a land use decision analogous to a zoning decision. A change in zoning involving a single or a very few properties should be made only where new or additional facts or other considerations materially affecting the merits have intervened since the adoption of the regulations, and whether such a change will be permitted depends on whether the change is reasonably related to the public welfare. No such need was shown.

The planning law requires a state to demonstrate adequate capacity for the twenty-year planning period. Miss. Code Ann. § 17-17-227 (1) (e), (h). Appendix at 4. The Plan, with all but two of the eight sites dropped, failed to demonstrate the requisite 13.2 million cubic yard 20-year capacity. Indeed, since the King site is not yet permitted and may never be permitted, the only capacity demonstrated was the then opened but now closed Magnolia/Allied site. The plan, then, demonstrated no real capacity at all for future disposal of class I rubbish, much less the required 20-year capacity. Further, nothing in the law prohibits *more* than 20 years' capacity.

B. THE DECISION WAS ARBITRARY AND CAPRICIOUS.

An act is "arbitrary" if done without adequately determining principle, depending upon the will alone, and implying either a lack of understanding of or a disregard for the fundamental nature of things. An act is capricious if done without reason, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles. The Authority's removal of the Boudin site from its plan did not consider the disposal needs of the county, whether sites retained in the Plan would remain open or could be permitted, or even the fact that the Boudin site was appropriate in every way for permitting as a Class I site. Accordingly, the Authority acted arbitrarily and capriciously in removing the Boudin site from its Plan as a proposed Class I facility.

C. THE DECISION WAS BEYOND THE POWER OF THE AUTHORITY TO MAKE.

1. The Decision Was Based Upon an Unlawful Delegation of Authority.

The Authority essentially turned over to a private engineering firm the selection of the previously approved Class I sites to be removed from the Plan. This amounted to an unlawful delegation of a governmental function to a private entity. Accordingly the resulting decision must be reversed as beyond the Authority's power to make.

2. The Decision Was Barred by the Doctrine of *Res Judicata*.

County decisions regarding land use are *res judicata*. Accordingly, the decision to remove the previously approved Boudin site and other rubbish sites from the list of approved sites violated the Authority's previous order and must be reversed as beyond the power of the Authority to make.

VI. ARGUMENT

A. STANDARD OF REVIEW.

As this Court knows, its duty upon review of a board's decision by bill of exceptions is to "affirm or reverse the judgment," and, "if the judgment be reversed, . . . [to] render such judgment as the board . . . ought to have rendered, and certify the same" to said board. Miss. Code Ann. § 11-51-75.

It is also axiomatic that questions of law are reviewed *de novo*. *Board of Supervisors of Harrison County v. Waste Management, Inc.*, 759 So. 2d 397, 400 (Miss. 2000). Equally familiar to this Court, no doubt, is the well-known standard of review for decisions of boards and agencies. That standard asks only whether the agency's decision was (1) based upon substantial evidence; (2) arbitrary or capricious; (3) beyond the scope or power granted to the agency by the legislature; or, (4) violative of Appellants' statutory or constitutional rights. *Eidt v. City of Natchez*, 421 So. 2d 1225, 1231-32 (Miss. 1982); *Board of Supervisors of Clay County v. McCormick*, 207 Miss. 216, 42 So. 2d 177 (Miss. 1949).

In a land use matter such as is before this Court, there is an added dimension. While this is not a zoning case *per se*, it certainly is a case involving a decision by a local governing authority as to how land may be used. Our jurisprudence indicates that land-use restrictions by local governments are zoning actions however styled. *See Board of Supervisors of Harrison County v. Waste Management, Inc.*, 759 So. 2d 397 (Miss. 2000). Accordingly, it certainly seems to be a species of zoning. "A person seeking a change in a zoning ordinance has the burden of proving a public need for the amendment in question." *City of Jackson v. Bridges*, 243 Miss. 646, 139 So. 2d 660, 664 (1962). That burden clearly was not met in this case.

Appellate review under these standards is no rubber stamp. *McFadden v. Mississippi State Board of Medical Licensure*, 735 So. 2d 145, 151 (Miss. 1999). This Court must not "[wear] blinders" but must determine whether there is "such relevant evidence as [should be] accepted as adequate to support a conclusion." *Mississippi State Board of Examiners v. Anderson*, 757 So. 2d 1079 (Miss. App. 2000).

The substantial evidence that must underlie agency findings may be "something less than a preponderance" but it is "more than a scintilla or glimmer." *Mississippi Department of Environmental Quality v. Weems*, 653 So. 2d 266, 280-81 (Miss. 1993). Findings must be specific enough on fact issues to enable the reviewing court to determine whether that criterion has been met. *Sierra Club v. Mississippi Department of Environmental Quality*, 819 So. 2d 515 (Miss. 2002).

B. THE AUTHORITY'S DECISION WAS NOT BASED UPON SUBSTANTIAL EVIDENCE.

The Boudin site originally was included in the Authority's local solid waste plan amendment No. 6. RE 6-29. The Authority apparently had found an affirmative need for the site. The solid waste planning law places determinations of need for facilities squarely within the jurisdiction of the local planning agency, in this case, the Authority. Miss. Code Ann. § 17-17-227 (1) (i). Appendix at 4. While the Mississippi Commission on Environmental Quality (MCEQ) is charged with evaluating the local plan to insure it meets legal criteria and that it adequately provides for sufficient disposal capacity, Miss. Code Ann. Section 17-17-225, [Appendix at 3] it has no authority to require a reduction of capacity by a county. In any event, in this case, it was the *MDEQ*, not the *MCEQ*,

that advised the Authority it should reduce its number of rubbish facilities. The MDEQ had absolutely no evidence for making any determination regarding the plan.

Morever, the MDEQ could not possibly have reached such a conclusion rationally. Sites approved for rubbish disposal in a plan are just that: sites approved. There is absolutely no guarantee the approved sites will ever receive a permit or ever receive even a pound of waste. In this case, for instance, only one site (the now-closed Magnolia site) was already permitted for Class I rubbish. The other sites were either Class II sites whose owners planned to apply for upgrades to Class I permits, or greenfield sites that held no permit whatsoever. For the MDEQ to say that the Authority had no need for eight sites assumed future permitting for all eight sites and that all eight sites, once permitted, would remain open, an assumption that could not rationally be made and has proved faulty.[5] The planning law requires a state to demonstrate adequate capacity for the twenty-year planning period. Miss. Code Ann. § 17-17-227 (1) (e), (h). Appendix at 4. The plan, as it now stands, demonstrated no actual capacity (*i. e.*, there is no currently opened class I site in the planning area) at all for future disposal of class I rubbish, much less the required 20-year capacity.

The decision to remove the Boudin site and the other sites flew in the very face of Neel-Shaffer's projection of a need for 13.2 million cubic yards of disposal capacity for the next 20 years.[6]

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[5]Neel-Shaffer did not consider whether the sites could be permitted or would be economically feasible to operate. The Mississippi Gulf Coast, as anyone familiar with the area knows, has much lowlying land subject to flooding. As Director Thriffiley noted when the amendment excluding the Bodin site was adopted, Neel-Shaffer did not provide a flood-plain analysis of any of the sites at issue. On information and belief, the King site apparently has serious flood plain issues that may make permitting cost prohibitive. RE 97-99.

[6]In the document styled "Plan Amendment, October 5, 2007, December 18, 2007, Comments Addressed."

What was especially egregious about this process was that some of the sites apparently were not even visited by Neel-Shaffer before being dropped from the Plan. RE 97-99.

The MDEQ's overreaching on this issue and the Authority's unquestioning compliance therewith have left the Authority in a very real bind as far as rubbish disposal is concerned.

The Authority, in removing the Boudin, Haas, and other sites, acted totally without evidentiary support and entirely on the MDEQ's unauthorized directive, which, in turn, was unsupported by any evidence (and unappealable). In doing so, the Authority acted without evidentiary basis and in clear violation of Boudin's rights. That decision must be reversed. *See, Board of Supervisors of Clay County v. McCormick*, 207 Miss. 216, 42 So. 2d 177 (Miss. 1949).

Moreover, a decision to include or exclude a site in a solid waste plan is a land use decision analogous to a zoning decision. The Supreme Court of this State has made clear where it stands on local governments tampering with the rights of property owners under the pretext of land use regulation. "A change in zoning regulations involving a single or a very few properties should be made only where new or additional facts or other considerations materially affecting the merits have intervened since the adoption of the regulations, and whether such a change will be permitted depends on whether the change is reasonably related to the public welfare . . . ." Further, "*[a] person seeking a change in a zoning ordinance has the burden of proving a public need for the amendment in question* (emphasis in original)." *City of Jackson v. Bridges*, 243 Miss. 646, 139 So. 2d 660, 664. "There must be a positive showing of physical, economic or social change rather than esthetic or group *caprice* . . . (emphasis added)." *Bridges*, 139 So. 2d at 664. Zoning policies will not be changed "at the behest of community or group pressure, if in doing so, constitutional guaranties are undermined." *Bridges*, 139 So. 2d at 664.

The situation before this Court is similar. Just as the city in *Bridges*, the Authority had a legal obligation to demonstrate a real need to remove the Boudin site from the plan. The record, though, reflects no new or additional facts or "other considerations, materially affecting the merits, which had intervened since the original" decision. *Bridges*, 139 So. 2d at 664. The only thing that had happened was that MDEQ, with no statutory authority, had issued a letter questioning the need for eight sites. The Authority well knew that removing the Boudin property from the plan as an approved class I site would render it ineligible for use as a class I rubbish facility and likely would devalue the property. No public need was demonstrated that could justify subjecting Boudin or the other exclude site owners to such a hardship and loss. *See Bridges*, 139 So. 2d at 665.

Plainly, the Authority did not meet its evidentiary burden in this case and should be reversed.

C. THE DECISON WAS ARBITRARY AND CAPRICIOUS.

The Authority's acceptance of the MDEQ directive and its subsequent removal of the Boudin site from its plan was done without any regard for whether sites selected for the plan could or would be permitted, or without regard to whether the one existing Class I site would remain open. Moreover, the Authority made its decision to drop six of the eight sites without evening visiting all of them or having its state supplied contractor, Neel-Shaffer, visit them.

The sites included in the plan after the Boudin site, the Haas site, and the D. K. site were eliminated were either nonexistent (*e. g.*, the King site) or destined for closure (the Allied/Magnolia Waste site). Yet, the excluded Boudin site was (and is) an existing, permitted, Class II site that had been approved for Class I wastes in the wake of Katrina, had proved its suitability for Class I status in an application on file with MDEQ, and was in all respects appropriate for inclusion in the plan.

The Boudin's status as an existing Class II establishes that it is an entirely suitable site with no wetlands problems. Its status as a former emergency Class I site establishes that the MDEQ already has considered it to be safe for disposal of Class I Rubbish.

Accordingly, the decision to drop the Boudin (and other sites) from the plan was "not done according to reason or judgment, but depending upon the will[7] alone" and in a manner "implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.[8]" *McGowan v. Mississippi State Oil & Gas Board*, 604 So. 2d 312, 322 (Miss. 1992). In short, the Authority's decision in that regard was the very model of an arbitrary and capricious act.

D. THE DECISION WAS BEYOND THE POWER OF THE AUTHORITY TO MAKE.

1. The Decision Was Based Upon an Unlawful Delegation of Authority.

Faced with a decision it did not wish to make, *i. e.*, the reduction of rubbish sites from eight to two, the Authority simply followed the suggestion of MDEQ and handed the decision off to a private contracting firm, Neel-Shaffer Engineers. In doing so, the Authority unlawfully delegated its governmental functions to a private group. The resulting decision should not be permitted to stand. *See State v. Allstate Ins. Co.*, 231 Miss. 869, 97 So. 2d 372 (1957).

2. The Decision Was Barred by the Doctrine of *Res Judicata*.

Once a local government has made a decision regarding land use, that decision is *res judicata*. Our Supreme Court settled that issue over a century ago in *Keenan v. Harkins*, 82 Miss. 709, 35 So.

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[7]Primarily the will of the MDEQ staff.

[8]*I. e.*, the actual number of sites that could or would be permitted.

177 (1903). There, the Board of Supervisors had enlarged (over the objection of the appellant) the portion of the County to be classified as stock-law[9] territory. On appeal, the Supreme Court sustained the decision of the Circuit Court dismissing the appeal. "The board of supervisors," the Court said, "has ordinarily no power to review or reverse or vacate its own judical action after final adjournment." Such has continued to be the law in Mississippi. *See, e. g., Westminster Presbyterian Church v. Jackson*, 253 Miss. 495, 176 So. 2d 267 (1965) (land use decisions not appealed are res judicata).

Accordingly, the decision here appealed was barred by the doctrine of *res judicata* and, thus, was beyond the power of the Authority to make.

D. THE DECISION VIOLATED THE CONSTITUTIONAL AND STATUTORY RIGHTS OF THOSE EXCLUDED AS CLASS I SITES.

The Authority's unauthorized removal of the Boudin and other Class I sites from its plan, as demonstrated above, violated the judicial precedents of the State of Mississippi and was contrary to the legislative policy set forth in Miss. Code Ann. §§ 17-17-225 and -227. Accordingly, that decision violated the rights of Boudin and others similarly situated to equal protection of the law and due process of law as guaranteed by the fifth and fourteenth amendments to the United States Constitution and Miss. Const. 1890, Art. 3, § 14.

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[9]In the stock-law territory, cows, hogs, and horses were required to be fenced and were not allowed to range freely.

E. ADOPTION OF OTHER ARGUMENTS.

Amicus adopts such arguments of the Appellant insofar as they militate in favor of returning this matter to the Authority for reconsideration of all sites originally proposed as class I rubbish sites by the Authority.

VII. CONCLUSION.

The Authority clearly removed six of the eight sites already approved as proper locations for Class I facilities purely and simply because of a Mississippi Department of Environmental Quality staff letter that had behind it absolutely no legal authority. It was not a decision of the Mississippi Commission on Environmental Quality, the agency charged with reviewing and approving or rejecting local plans. The letter was simply the opinion of a state bureaucrat. Based on that letter, and without any evidentiary support, the Authority removed six sites previously approved from its plan. Some of those sites were never even visited by the state contractor who recommended removal. Plainly, there was no real evidentiary basis for the decision to remove the six sites, including the Boudin site. Plainly, the decision to do so was arbitrary and capricious.

The foregoing considered, Amicus Curiae Boudin's Environmental Services, Inc., prays that this Court will reverse the judgment or decision of the Hancock County Solid Waste Authority here appealed and enter its judgment requiring the Authority to place the six sites removed back into its local solid waste plan.

In the alternative, Amicus prays that this Court will enter its order requiring the Authority to reconsider its removal of those six sites, or that this Court will render such other judgment, as in the judgment of this Court, ought to have been made by the Board of the Authority herein.

Respectfully submitted, this the 30th day of September 2009.

BOUDIN'S ENVIRONMENTAL
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VIII. PROOF OF SERVICE

I, the undersigned counsel for the Amicus Curiae Boudin's Environmental Services, LLC, certify that I have this day served by United States mail, postage prepaid, a copy of the above and foregoing document upon the following persons:

1. Patrick W. Kirby, Esquire
   Ronald L. Artigues, Jr., Esquire
   833 Highway 90
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2. R. Hayes Johnson, Jr., Esquire
   Post Office Box 717
   Long Beach, Mississippi 39560-0717

3. Honorable Lawrence P. Bourgeois, Jr.
Circuit Judge
Post Office Box 1461
Gulfport, Mississippi 39502

This the 30th day of September 2009.

James T. McCafferty

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IX. APPENDIX

CONSTITUTION OF THE STATE OF MISSISSIPPI

Article 3, Section 14. Due process.

No person shall be deprived of life, liberty, or property except by due process of law.

UNITED STATES CONSTITUTION

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 11-51-75. Appeal to circuit court from board of supervisors, municipal authorities.

Any person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision, and may embody the facts, judgment and decision in a bill of exceptions which shall be signed by the person acting as president of the board of supervisors or of the municipal authorities. The clerk thereof shall transmit the bill of exceptions to the circuit court at once, and the court shall either in term time or in vacation hear and determine the same on the case as presented by the bill of exceptions as an appellate court, and shall affirm or reverse the judgment. If the judgment be reversed, the circuit court shall render such judgment as the board or municipal authorities ought to have rendered, and certify the same to the board of supervisors or municipal authorities. Costs shall be awarded as in other cases. The board of supervisors or municipal authorities may employ counsel to defend such appeals, to be paid out of the county or municipal treasury. Any such appeal may be heard and determined in vacation in the discretion of the court on motion of either party and written notice for ten (10) days to the other party or parties or the attorney of record, and the hearing of same shall be held in the county where the suit is pending unless the judge in his order shall otherwise direct.

Provided, however, that no appeal to the circuit court shall be taken from any order of the board of supervisors or municipal authorities which authorizes the issuance or sale of bonds, but all objections to any matters relating to the issuance and sale of bonds shall be adjudicated and determined by the chancery court, in accordance with the provisions of Sections 31-13-5 to 31-13-11, both inclusive, of the Mississippi Code of 1972. And all rights of the parties shall be preserved and not foreclosed, for the hearing before the chancery court, or the chancellor in vacation. Provided, further, nothing in this section shall affect pending litigation.

Sources: Codes, Hutchinson's 1848, ch. 51, art. 5 (45, 46); 1857, ch. 59, art. 33; 1871, § 1383; 1880, § 2351; 1892, § 79; 1906, § 80; Hemingway's 1917, § 60; 1930, § 61; 1942, § 1195; Laws, 1940, ch. 245; Laws, 1955, Ex ch. 33; Laws, 1962, ch. 240, eff from and after passage (approved June 1, 1962).

§ 17-17-225. Establishment of criteria for evaluation of local nonhazardous solid waste management plans.

Before July 1, 1992, the commission shall establish criteria for the evaluation of local nonhazardous solid waste management plans. These criteria shall include, but not be limited to, the following:

(a) The unit of local government's demonstration of the understanding of its nonhazardous solid waste management system, including the sources, composition and quantities of nonhazardous solid waste generated within the planning area and transported into the planning area for management, and the existing and planned nonhazardous solid waste management capacity, including remaining available capacity;

(b) The adequacy of the local strategy for achieving the twenty-five percent (25%) waste minimization goal;

(c) The reasonableness of the twenty-year projections of nonhazardous solid waste generated within the planning area; and

(d) The adequacy of plans and implementation schedules for providing needed nonhazardous solid waste management capacity for the twenty-year period.

Sources: Laws, 1991, ch. 494 § 14; Laws, 1992, ch. 583 § 5, eff from and after passage (approved May 15, 1992).

§ 17-17-227. County adoption of local nonhazardous solid waste management plan; contents; municipality participation; interlocal agreements; notice, ratification, review and implementation; alternative procedure for modifications; department to maintain copies; noncompliance with publication requirements.

(1) Each county, in cooperation with municipalities within the county, shall prepare, adopt and submit to the commission for review and approval a local nonhazardous solid waste management plan for the county. Each local nonhazardous solid waste management plan shall include, at a minimum, the following:

(a) An inventory of the sources, composition and quantities by weight or volume of municipal solid waste annually generated within the county, and the source, composition and quantity by weight or volume of municipal solid waste currently transported into the county for management;

(b) An inventory of all existing facilities where municipal solid waste is currently being managed, including the environmental suitability and operational history of each facility, and the remaining available permitted capacity for each facility;

(c) An inventory of existing solid waste collection systems and transfer stations within the county. The inventory shall identify the entities engaging in municipal solid waste collection within the county;

(d) A strategy for achieving a twenty-five percent (25%) waste reduction goal through source reduction, recycling or other waste reduction technologies;

(e) A projection, using acceptable averaging methods, of municipal solid waste generated within the boundaries of the county over the next twenty (20) years;

(f) An identification of the additional municipal solid waste management facilities, including an evaluation of alternative management technologies, and the amount of additional capacity needed to manage the quantities projected in paragraph (e);

(g) An estimation of development, construction, operational, closure and post-closure costs, including a proposed method for financing those costs;

(h) A plan for meeting any projected capacity shortfall, including a schedule and methodology for attaining the required capacity;

(i) A determination of need by the county, municipality, authority or district that is submitting the plan, for any new or expanded facilities. A determination of need shall include, at a minimum, the following:

(i) Verification that the proposed facility meets needs identified in the approved local nonhazardous solid waste management plan which shall take into account the quantities of municipal solid waste generated and the design capacities of existing facilities;

(ii) Certification that the proposed facility complies with local land use and zoning requirements, if any;

(iii) Demonstration, to the extent possible, that operation of the proposed facility will not negatively impact the waste reduction strategy of the county, municipality, authority or district that is submitting

the plan;

(iv) Certification that the proposed service area of the proposed facility is consistent with the local nonhazardous solid waste management plan; and

(v) A description of the extent to which the proposed facility is needed to replace other facilities; and

(j) Any other information the commission may require.

(2) Each local nonhazardous solid waste management plan may include:

(a) The preferred site or alternative sites for the construction of any additional municipal solid waste management facilities needed to properly manage the quantities of municipal solid waste projected for the service areas covered by the plan, including the factors which provided the basis for identifying the preferred or alternative sites; and

(b) The method of implementation of the plan with regard to the person who will apply for and acquire the permit for any planned additional facilities and the person who will own or operate any of the facilities.

(3) Each municipality shall cooperate with the county in planning for the management of municipal solid waste generated within its boundaries or the area served by that municipality. The governing authority of any municipality which does not desire to be included in the local nonhazardous solid waste management plan shall adopt a resolution stating its intent not to be included in the county plan. The resolution shall be provided to the board of supervisors and the commission. Any municipality resolving not to be included in a county waste plan shall prepare a local nonhazardous solid waste management plan in accordance with this section.

(4) The board of supervisors of any county may enter into interlocal agreements with one or more counties as provided by law to form a regional solid waste management authority or other district to provide for the management of municipal solid waste for all participating counties. For purposes of Section 17-17-221 through Section 17-17-227, a local nonhazardous solid waste management plan prepared, adopted, submitted and implemented by the regional solid waste management authority or other district is sufficient to satisfy the planning requirements for the counties and municipalities within the boundaries of the authority or district.

(5) (a) Upon completion of its local nonhazardous solid waste management plan, the board of supervisors of the county shall publish in at least one (1) newspaper as defined in Section 13-3-31, having general circulation within the county a public notice that describes the plan, specifies the location where it is available for review, and establishes a period of thirty (30) days for comments concerning the plan and a mechanism for submitting those comments. The board of supervisors shall also notify the board of supervisors of adjacent counties of the plan and shall make it available for review by the board of supervisors of each adjacent county. During the comment period, the board of supervisors of the county shall conduct at least one (1) public hearing concerning the plan. The board of supervisors of the county shall publish twice in at least one (1) newspaper as defined in Section 13-3-31, having general circulation within the county, a notice conspicuously displayed containing the time and place of the hearing and the location where the plan is available for review.

(b) After the public hearing, the board of supervisors of the county may modify the plan based upon the public's comments. Within ninety (90) days after the public hearing, each board of supervisors shall approve a local nonhazardous solid waste management plan by resolution.

(c) A regional solid waste management authority or other district shall declare the plan to be approved as the authority's or district's solid waste management plan upon written notification, including a copy of the resolution, that the board of supervisors of each county forming the authority or district has approved the plan.

(6) Upon ratification of the plan, the governing body of the county, authority or district shall submit it to the commission for review and approval in accordance with Section 17-17-225. The commission shall, by order, approve or disapprove the plan within one hundred eighty (180) days after its submission. The commission shall include with an order disapproving a plan a statement outlining the deficiencies in the plan and directing the governing body of the county, authority or district to submit, within one hundred twenty (120) days after issuance of the order, a revised plan that remedies those deficiencies. If the governing body of the county, authority or district, by resolution, requests an extension of the time for submission of a revised plan, the commission may, for good cause shown, grant one (1) extension for a period of not more than sixty (60) additional days.

(7) After approval of the plan or revised plan by the commission, the governing body of the county, authority or district shall implement the plan in compliance with the implementation schedule contained in the approved plan.

(8) The governing body of the county, authority or district shall annually review implementation of the approved plan. The commission may require the governing body of each local government or authority to revise the local nonhazardous solid waste management plan as necessary, but not more than once every five (5) years.

(9) If the commission finds that the governing body of a county, authority or district has failed to submit a local nonhazardous solid waste management plan, obtain approval of its local nonhazardous solid waste management plan or materially fails to implement its local nonhazardous solid waste management plan, the commission shall issue an order in accordance with Section 17-17-29, to the governing body of the county, authority or district.

(10) The commission may, by regulation, adopt an alternative procedure to the procedure described in this section for the preparation, adoption, submission, review and approval of minor modifications of an approved local nonhazardous solid waste management plan. For purposes of this section, minor modifications may include administrative changes or the addition of any noncommercial nonhazardous solid waste management facility.

(11) The executive director of the department shall maintain a copy of all local nonhazardous solid waste management plans that the commission has approved and any orders issued by the commission.

(12) If a public notice required in subsection (5) was published in a newspaper as defined in Section 13-3-31, having general circulation within the county but was not published in a daily newspaper of general circulation as required by subsection (5) before April 20, 1993, the commission shall not disapprove the plan for failure to publish the notice in a daily newspaper. Any plan disapproved for that reason by the commission shall be deemed approved after remedying any other deficiencies in the plan.

Sources: Laws, 1991, ch. 494, § 15; Laws, 1993, ch. 600, § 1; Laws, 1998, ch. 498, § 2; Laws, 2006, ch. 587, § 1, eff from and after July 1, 2006.

§ 17-17-229. Facility permits for nonhazardous solid waste management; application requirements and criteria.

(1) After approval of a local nonhazardous solid waste management plan by the commission, neither the department, the permit board nor any other agency of the State of Mississippi shall issue any permit, grant or loan for any nonhazardous solid waste management facility in a county, municipality region, or district which is not consistent with the approved local nonhazardous solid waste management plan.

(2) The commission shall adopt criteria to be considered in location and permitting of nonhazardous solid waste management facilities. The criteria shall be developed through public participation, shall be enforced by the permit board and shall include, in addition to all applicable state and federal rules and regulations, consideration of:

(a) Hydrological and geological factors, such as floodplains, depth to water table, soil composition, and permeability, cavernous bedrock, seismic activity, and slope;

(b) Natural resources factors, such as wetlands, endangered species habitats, proximity to parks, forests, wilderness areas and historical sites, and air quality;

(c) Land use factors, such as local land use, whether residential, industrial, commercial, recreational, agricultural, proximity to public water supplies, and proximity to incompatible structures such as schools, churches and airports;

(d) Transportation factors, such as proximity to waste generators and to population, route safety and method of transportation; and

(e) Aesthetic factors, such as the visibility, appearance and noise level of the facility.

Sources: Laws, 1991, ch. 494, § 16; Laws, 1998, ch. 498, § 3; Laws, 2006, ch. 587, § 2, eff from and after July 1, 2006.

SECTION II. PERMIT PROCEDURES

C. No new solid waste management facility nor any lateral expansion of an existing facility beyond the area previously approved shall be granted either an individual permit from the Permit Board or a certificate of coverage under a general permit, unless such facility is consistent with the approved local solid waste management plan for the area in which the facility is located. Solid waste management facilities existing prior to the date of Commission approval of the applicable local plan are considered to be consistent with such local plans, even if there is no recognition of such facilities in the plan. However, any lateral expansion of such existing facilities which has not been approved by the Permit Board prior to the date of Commission approval of the plan must be expressly recognized in the plan in order to be considered consistent with the plan.

SECTION VI. RUBBISH SITE REQUIREMENTS

B. A Class I Rubbish Site may receive the following wastes for disposal:

1. construction and demolition debris, such as wood, metal, etc.
2. brick, mortar, concrete, stone, and asphalt
3. cardboard boxes
4. natural vegetation, such as tree limbs, stumps, and leaves.
5. appliances (other than refrigerators and air conditioners) which have had the motor removed
6. furniture
7. plastic, glass, crockery, and metal, except containers
8. sawdust, wood shavings, and wood chips
9. other similar wastes specifically approved by the Department.

C. A Class II Rubbish Site may receive the following wastes for disposal:

1. natural vegetation, such as tree limbs, stumps, and leaves
2. brick, mortar, concrete, stone, and asphalt
3. other similar rubbish specifically approved by the Department.

RULE 29. BRIEF OF AN *AMICUS CURIAE*

(a) Grounds for Filing. A brief of an *amicus curiae* may be filed only by leave of the appropriate appellate court, except that leave shall not be required when the brief is presented by the state and sponsored by the Attorney General or by a guardian *ad litem* who is not otherwise a party to the appeal. A motion for leave shall demonstrate that (1) *amicus* has an interest in some other case involving a similar question; or (2) counsel for a party is inadequate or the brief insufficient; or (3) there are matters of fact or law that may otherwise escape the court's attention; or (4) the *amicus* has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case.

(b) How and When Filed. A motion for leave to file an *amicus* brief shall be filed no later than seven (7) days after filing of the initial brief of the party whose position the *amicus* brief will support. The motion must be accompanied by the proposed brief of *amicus curiae* which shall be a concise statement not to exceed 15 pages. The party filing the motion shall also file with the motion a brief stating why the motion satisfies the requirements of Rule 29(a).

(c) Response to Motion. An opposing party who does not object to the motion for leave may respond to the *amicus* brief in the opposing party's response or reply brief pursuant to Rule 28(b) or 28(c). An opposing party who objects to the motion for leave shall file a response in opposition within seven (7) days pursuant to Rule 27 stating why the requirements of Rule 29(a) have not been met. For the purpose of Rule 31(a), the time for filing the next brief will run from the date the appropriate court enters an order on the motion for leave.

(d) Oral Argument. A motion of *amicus curiae* to participate in oral argument will be granted only for extraordinary reasons.

[Adopted to govern matters filed on or after January 1, 1995; amended effective June 27, 2002.]