OPINION NO. 88-009

Syllabus:

1. Pursuant to R.C. Chapter 343, a board of county commissioners that has established a single county garbage and refuse disposal district has statutory authority to require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is publicly owned, whether or not revenue bonds have been used for financing the facility. (1985 Op. Att'y Gen. No. 85-058, modified.)

2. Pursuant to R.C. Chapter 343, a board of county commissioners that has established a single county garbage and refuse disposal district has no statutory authority to require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is privately owned.

3. In a county with a single county garbage and refuse disposal district containing a publicly-owned landfill financed by revenue bonds and a privately-owned incinerator, the board of county commissioners has no statutory authority to require that solid waste generated within the district must be taken to, and rejected by, the incinerator before it may be disposed of at the landfill.

To: Jim Slagle, Marion County Prosecuting Attorney, Marion, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 29, 1988

I have before me your request for an opinion concerning the operation of a single county garbage and refuse disposal district. You have raised the following questions:

1. Can a Board of County Commissioners, in a single county solid waste district, require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is publicly owned and financed by revenue bonds?

2. Can a Board of County Commissioners, in a single county solid waste district, require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is publicly owned but not financed by revenue bonds?

3. Can a Board of County Commissioners, in a single county solid waste district, require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is privately owned?

4. If the County Commissioners are operating a landfill in a single county solid waste district, which landfill is publicly owned and financed by general revenue bonds, is it permissible for the Commissioners to pass a resolution that the landfill will not

> accept any solid waste generated within the solid waste district unless the solid waste has first been taken to a designated privately owned incinerator, which is also located within the district? Stated differently, if a privately owned incinerator and publicly owned landfill financed by general revenue bonds were both operating within a solid waste district, could the Commissioners require that solid waste generated within the district not be disposed of at the landfill unless it were first taken to the incinerator and rejected by the incinerator?

R.C. 343.01(A) provides that a board of county commissioners "may, by resolution, lay out, establish, and maintain one or more garbage and refuse disposal districts in all or part of the territory within its county." R.C. 343.01(B) authorizes the boards of county commissioners of two or more counties to "enter into an agreement to lay out, establish, and maintain a joint garbage and refuse disposal district in all or part of the territories of the counties entering into the agreement." Your questions relate to a situation in which a single county garbage and refuse disposal district has been established pursuant to R.C. 343.01(A).

R.C. 343.01(F) authorizes a board of county commissioners to "make, publish, and enforce rules for the construction, maintenance, protection, and use of garbage and refuse collection and disposal, refuse recycling, or resource recovery facilities located within its county, but outside a joint district." Thus, when a single county garbage and refuse disposal district has been established, the county commisioners are authorized to adopt rules governing the use of garbage and refuse collection and disposal facilities. R.C. 343.01(F) provides that such rules may not be inconsistent with the rules of the Director of Environmental Protection. Rules of the Director of Environmental Protection are directed to matters of health and safety and do not appear to address the subjects with which you are concerned. *See, e.g.*, R.C. 3734.02(A) (authorizing the Director of Environmental Protection to adopt rules "having uniform application throughout the state governing solid waste facilities and the inspections and issuance of licenses for all solid waste facilities in order to ensure that the facilities will be located, maintained, and operated in a sanitary manner so as not to create a nuisance, cause or contribute to water pollution, create a health hazard, or violate 40 C.F.R. 257.3-2 or 40 C.F.R. 257.3-8, as amended"); 4 Ohio Admin. Code Chapter 3745-27 ("Solid Waste Disposal Regulations"); 4 Ohio Admin. Code Chapter 3745-37 ("Solid Waste Disposal Licenses"). ***See generally, e.g., North Sanitary Landfill, Inc. v. Board of County Commissioners***, 52 Ohio App. 2d 167, 369 N.E.2d 17 (Montgomery County 1976), ***motion to certify overruled*** (Ohio Sup. Ct. April 29, 1977). The issue raised by your request is whether the authority granted to county commissioners by R.C. 343.01(F) and related provisions permits the adoption of the requirements described in your four questions.

Your first question is whether, in a county with a single county garbage and refuse disposal district, the board of county commissioners may require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is publicly owned and financed by revenue bonds. I considered a similar question in 1985 Op. Att'y Gen. No. 85-058 and concluded, in paragraph 2 of the syllabus:

> A board of county commissioners which has established a county garbage and refuse disposal district is without authority to pass an ordinance requiring all solid waste collected or transported in the county to be disposed of at the single county approved landfill where the county commissioners have not adopted a general plan involving the issuance of revenue bonds for improvements for solid waste disposal.

Op. No. 85-058 clearly indicates that, where a publicly-owned solid waste disposal facility has been financed by revenue bonds, a board of county comissioners that has established a county garbage and refuse disposal district has the authority to require that all solid waste generated within the district be disposed of at that facility.

The conclusion reached in Op. No. 85-058 was based, in large part, upon *State v. Max W. Fenberg & Sons, Inc.*, 52 Ohio App. 2d 203, 369 N.E.2d 12 (Wyandot County 1976), *motion to certify overruled* (Ohio Sup. Ct. Oct. 22, 1976). In that case, the court considered the validity of a regulation requiring that all garbage and refuse generated within a county be disposed of in a privately-owned landfill, operated under a contract with the county. The court found that adoption of such a regulation exceeded the authority of the board of county commissioners under R.C. Chapter 343. The *Fenberg* case states, 52 Ohio App. 2d at 209-10, 369 N.E.2d at 16-17:

> In our opinion, particularly in consideration of these various statutory provisions [appearing in R.C. Chapter 343], *the legislature* contemplated private as well as governmental enterprise and *did not intend that a garbage and refuse monopoly should exist in a county unless the same were the result of a general plan approved by the commissioners resulting in the issuance of revenue bonds for improvements requiring "captive" customers for the production of income for their retirement.* It is apparent that except for an operation pursuant to such general plan and pursuant to the issuance of revenue bonds it was intended by the General Assembly that the freedom to contract both for the service and for the rates for service should exist between the board of commissioners and prospective users including boards of education, municipalities, and townships both within and without the county. A monopoly mandating the use of the landfill by all garbage and refuse producers within the county at a rate fixed unilaterally by the county commissioners and paid directly to the landfill operator is wholly inconsistent with such freedom of contract. Moreover, the fact that the General Assembly contemplated that garbage and refuse be brought in from another county indicates that *except where a general plan with improvements financed by revenue bonds should be involved, there should be freedom of movement of such garbage and refuse from one county to another.*
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> Accordingly, we are of the further opinion that except for the general plan situation the legislative intent with respect to bestowing on boards of county commissioners the authority to regulate the "use of garbage and refuse collection and disposal facilities" is to permit the regulation of the manner in which such facilities are used and not to compel their use. So construed, there being no general plan and revenue bonds involved, it was beyond the authority of the Board of County Commissioners of Wyandot County to require by regulation that the landfill here involved be used for all garbage and refuse originating within Wyandot County. If the General Assembly should decide otherwise, it is within its prerogatives to so legislate. (Emphasis added.)

The conclusion reached by the *Fenberg* court was based not solely upon R.C. 343.01(F), but also upon the general scheme for the provision of solid waste disposal facilities under R.C. Chapter 343. The provisions of R.C. Chapter 343 have been amended since they were considered by the *Fenberg* court. *See, e.g.*, 1983-1984 Ohio Laws, Part I, 1432 (Sub. H.B. 13, eff. March 19, 1984) (amending R.C. Chapter 343 to authorize creation of joint garbage and refuse disposal districts); 1975-1976 Ohio Laws, Part II, 3432 (Am. H.B. 993, eff. July 1, 1976) (amending R.C. Chapter 343 to permit the construction and operation of county refuse recycling and resource recovery facilities). The portions relied upon by the court in *Fenberg* do, however, remain within the existing statutes.

As currently in effect, R.C. 343.01(C) authorizes the board of county commissioners of a county garbage and refuse disposal district to "acquire, by purchase or lease, construct, improve, enlarge, replace, maintain, and operate such garbage and refuse collection systems...and such garbage and refuse disposal, refuse recycling, or resource recovery facilities...as are necessary for the public health." R.C. 343.01(F) prohibits the construction of a garbage and refuse disposal, refuse recycling, or resource recovery facility outside municipal corporations until plans and specifications have been approved by the board of county commissioners, and

authorizes the board of county commissioners to "contract with any individual, partnership, or private corporation for the operation and maintenance of any such facilities, regardless of whether such facilities are owned or leased by the county...or the contractor." R.C. 343.02 authorizes the commissioners of a county with a single county district to enter into contracts with municipal corporations for the furnishing of garbage and refuse disposal, refuse recycling, or resource recovery services of the district, and provides that contracts with municipal corporations for territory outside the county must be limited "to surplus capacity of the garbage and refuse disposal, refuse recycling, or resource recovery facilities of the county...remaining after the needs of the county...have been met." R.C. 343.02 also authorizes contracts to provide services to townships and boards of education.

R.C. 343.04 provides that, after establishing a county garbage and refuse disposal district, the board of county commissioners may have the county sanitary engineer prepare a general plan of garbage and refuse disposal, refuse recycling, or resource recovery facilities for the district. After that plan is approved by the board, the board shall have the engineer prepare detailed plans, specifications, and estimates of the cost of the improvement. After the detailed plans are approved, the board:

> shall adopt a resolution declaring that the improvement is necessary for the preservation and promotion of public health and welfare, designating the character of the improvement..., stating the place where the plans, specifications, and estimates are on file and may be examined, and...stating what parts of the costs of such improvement shall be paid by the county at large...and...what part shall be paid by the issuance of bonds payable from the revenues of the improvement as provided by [R.C. 343.07].

R.C. 343.04. Additional statutory language provides for a hearing (R.C. 343.04), a determination as to whether to proceed with the improvement and the adoption of the improvement resolution (R.C. 343.05), and an opportunity for appeal (R.C. 343.06). R.C. 343.07 authorizes the issuance of revenue bonds to pay for the improvement and, in addition, permits the county to issue general obligation bonds under R.C. 133.01-.65 to pay for the part of the cost of the improvement that is to be borne by the county at large. R.C. 343.08 governs the fixing and collection of rates or charges. *See generally* 1987 Op. Att'y Gen. No. 87-048.

The *Fenberg* case holds that, in light of this statutory scheme, a board of county commissioners may not require that all locally-generated solid waste be disposed of in a private landfill operated under contract with the county. The court in *Fenberg* was not directly faced with the question whether, when a solid waste disposal facility is publicly owned and financed by revenue bonds, the county commissioners have statutory authority to require that locally-generated solid waste be disposed of at the facility. The court did, however, clearly indicate that the answer to such a question would be in the affirmative. *Accord*, Op. No. 85-058. I concur with the analysis set forth in the *Fenberg* case and adopted in Op. No. 85-058, and I conclude that, pursuant to R.C. Chapter 343, a board of county commissioners that has established a single county garbage and refuse disposal district has statutory authority to require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is publicly owned and financed by revenue bonds.

It should, however, be noted that Op. No. 85-058 and the *Fenberg* case considered only the authority of county commissioners to act pursuant to state statutory provisions. They did not consider whether other provisions of state or federal law might prevent the commissioners from exercising their authority in particular circumstances. Your letter of request and materials that you have provided raise, in particular, the question whether a requirement that solid waste generated within a county garbage and refuse disposal district be disposed of at a county-owned facility financed by revenue bonds would run afoul of federal antitrust provisions, or whether it would come within the state action exemption to the Sherman Act, 15 U.S.C. §§1-7 (1982).

The state action exemption to the Sherman Act consists of a two-pronged test. The first prong requires that the anticompetitive behavior be derived from a clearly expressed state policy, and the second prong requires, in general, that there be active state supervision of the anticompetitive behavior. *See, e.g., Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Community Communications Co. v. City of Boulder, Colorado*, 455 U.S. 40 (1982); *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Parker v. Brown*, 317 U.S. 341 (1943). I am aware of no authority that directly addresses the situation with which you are concerned. A related situation was, however, considered in *Hybud Equipment Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). That case concerned a cooperative agreement between the City of Akron and the Ohio Water Development Agency (OWDA) to finance a "Recycle Energy System" (RES) for converting solid waste into steam. The OWDA agreed to issue revenue bonds to finance the project, and the City agreed to require that all collectors or haulers of solid waste dispose of solid waste generated within the City at the RES and also to prohibit the establishment of alternative waste disposal sites. It was determined that the requirement for disposal of all locally-generated solid waste at the RES was required in order to market the bonds, since it was necessary to assure the RES of a steady supply of waste. The court found that the arrangement there under consideration satisfied the two-pronged test for the state action exemption. The court relied upon the statutory provisions governing OWDA and the statutory provisions authorizing municipalities to regulate waste disposal. The holding of the court was as follows:

> We find that the ordinance and agreement under challenge bear a reasonable relationship to the state policy promoted by OWDA and the express powers delegated to OWDA and Akron. The ordinance is limited in scope to the collection and disposal of solid waste, and its promulgation was an essential element of a plan to carry out OWDA's statutory mandate. OWDA's reliance on the statutory authority of a municipality to regulate—even by monopoly—the disposal of refuse was a foreseeable result of the legislative grant of power to contract with municipalities. We hold, therefore, that the statutory delegation of regulatory power to the City conjoined with the powers and aims of OWDA satisfy the requirement that the challenged actions result from a clearly articulated and affirmatively stated policy to displace competition.
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> We find that the participation of OWDA in the agreement and in the continued operation of the RES satisfies the concerns underlying the test of active state supervision. OWDA's participation in the agreement insures that the exclusive rights granted the facility were designed to meet the legislative goals set forth in OWDA's mandate. As the district court noted, the cooperative agreement requires periodic reporting to OWDA and authorizes the agency to assume operating responsibility for the RES should the City fail to meet its obligations under the agreement.

742 F. 2d at 961-62, 964.

At the time of the above-quoted decision in the *Hybud Equipment Corp.* case, there was some question as to whether the second prong of the test for state action exemption required active state supervision of action by a municipality. *See Hybud Equipment Corp. v. City of Akron*, 742 F.2d at 962-64. In *Town of Hallie v. City of Eau Claire*, the United States Supreme Court considered that question and decided, 471 U.S. at 46, that "the active state supervision requirement should not be imposed in cases in which the actor is a municipality." The Court stated in a footnote to that conclusion:

> In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists. See

> *Southern Motor Carriers Rate Conference, Inc. v. United States, post*, at 62.

Town of Hallie v. City of Eau Claire, 471 U.S. at 46 n. 10.

The rationale for excluding municipalities from the active state supervision requirement was expressed as follows:

> [T]he requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. In [*California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)], we stated that the active state supervision requirement was necessary to prevent a State from circumventing the Sherman Act's proscriptions "by casting...a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U.S., at 106. Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Id. at 46–47. That rationale appears to be applicable also to such political subdivisions as counties, though that issue has not been directly addressed by the United States Supreme Court. *See, e.g., Hancock Industries v. Schaeffer*, 811 F.2d 225, 235 (3d Cir. 1987) (finding county defendants entitled to antitrust immunity under the state action exemption and stating of the *Hallie* decision: "The Court's conclusion that minimal risks are involved where the decisionmaker is a public body reinforces its insistence that routine state action not be subject to federal court antitrust scrutiny"); *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 769 F.2d 324, 329 (6th Cir.), *modified on other grounds*, 774 F.2d 162 (6th Cir. 1985) ("the second prong requires active supervision of the anticompetitive behavior, but only when the actor is a *private* party rather than a municipality, a modification or clarification of previous law"). *See generally Southern Motor Carriers Rate Conference, Inc. v. United States*; *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987).

The facts under consideration in the *Hybud Equipment Corp.* case differ from the situation with which you are concerned, since your situation involves a county, rather than a city, and since there is no indication of participation by the OWDA. The *Hybud Equipment Corp.* case does, however, suggest that the statutes authorizing a county to establish and finance a solid waste disposal system contemplate that the county will require that locally-generated solid waste be disposed of through that system, thus satisfying the first prong of the test for state action immunity. *See Hybud Equipment Corp. v. City of Akron*, 742 F.2d at 960 (the test is "whether the restraints in question are a reasonable and foreseeable exercise of delegated powers within the scope of an agency's authority" (footnote omitted)). *See also State v. Max W. Fenberg & Sons, Inc.*, 52 Ohio App. 2d at 209, 369 N.E.2d at 16; *North Sanitary Landfill, Inc. v. Board of County Commissioners*, 52 Ohio App. 2d at 173, 369 N.E.2d at 21 (upholding the decision of a board of county commissioners to deny the request of a private corporation to construct a facility that would compete with the facility operated by a garbage and refuse disposal district and stating: "Obviously, the allowance of such a request and of others of a similar nature could destroy the public utility and result in financial disaster for the public"); Op. No. 85-058. As discussed above, recent cases indicate that the second prong – active state supervision – is not applicable where the action in question is that of a governmental entity. Accordingly, it appears that the action

proposed in your first question is not, under current law, prohibited by federal antitrust provisions.

In conversations with my staff you have also expressed concern as to whether provisions of the Commerce Clause, U.S. Const. art. I, §8, cl. 3, might prevent the county commissioners from taking the proposed action. It does not appear that provisions requiring that locally-generated solid waste be disposed of locally would run afoul of those provisions. *See generally, e.g., Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187, 1194-95 (6th Cir. 1981), *vacated and remanded on other grounds*, 455 U.S. 931 (1982); *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671, 678-79 (6th Cir. 1979), *affirmed sub nom. Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981); *City of Cincinnati v. Reed*, 27 Ohio App. 3d 115, 500 N.E.2d 333 (Hamilton County 1985); 1987 Op. Att'y Gen. No. 87-017 at 2-109 n. 1.

In response to your first question, I conclude, accordingly, that, pursuant to R.C. Chapter 343, a board of county commissioners that has established a single county garbage and refuse disposal district has statutory authority to require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is publicly owned and financed by revenue bonds.

Your second question is whether, in a county with a single county garbage and refuse disposal district, the board of county commissioners may require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is publicly owned but not financed by revenue bonds. As discussed above, the court in *Fenberg* held that county commissioners lacked authority to require that all solid waste generated within a county be disposed of at a privately-owned landfill operated under contract with the county and, in *dicta* discussing the authority granted by R.C. Chapter 343, concluded that the General Assembly intended to permit a garbage and refuse monopoly only if such a monopoly resulted from a general plan, approved by the commissioners, with improvements financed by revenue bonds. The *Fenberg dicta* thus indicates that your second question should be answered in the negative. *See also* Op. No. 85-058. I am, however, in disagreement with that *dicta*.

The statement by the *Fenberg* court that a monopoly is permitted only if revenue bonds are issued is not essential to the holding in that case. It can be argued that the court drew an unnecessarily narrow line, and that R.C. Chapter 343 permits the commissioners to require the disposal of locally-generated solid waste at a designated facility whenever the facility is publicly owned, regardless of whether the facility is financed by revenue bonds. The *Fenberg* court suggests that the issuance of revenue bonds requires captive customers for the production of income to retire the bonds; a similar argument may be made that captive customers are necessary for the successful operation of a public facility financed by other means. For example, R.C. 343.07(B) authorizes the issuance of general obligation bonds to pay for the part of the cost of an improvement that is to be borne by the county at large and provides that "such general obligation bonds may also be made payable primarily from the net revenues derived from such improvement and such net revenues may be pledged for the payment of the interest and principal thereof." *See generally* 1958 Op. Att'y Gen. No. 3144, p. 718 (syllabus, paragraph 1) (finding that a board of county commissioners is authorized by R.C. 343.04 and 343.07 "to finance the entire cost of construction of disposal facilities for refuse by the issuance of general obligation bonds"). The language of R.C. 343.01(F) does not address the issue of when use of a particular facility may be mandated. Rather, as the *Fenberg* court indicated, authority to require disposal of locally-generated solid waste at a particular facility is derived from the statutory scheme that allows county commissioners to establish a general plan for the disposal of solid waste. *See* R.C. 343.01-.08. That scheme permits the financing of public solid waste disposal facilities by means other than the issuance of revenue bonds, and it is reasonable to construe the scheme as permitting county commissioners to take steps to protect the public investment in such facilities, even when bonds are not issued, by requiring, in appropriate circumstances, that locally-generated waste be disposed of at the facilities. It would be anomalous to conclude that a county could acquire the capacity to impose such a requirement by arranging to have a small portion of

the expense covered by revenue bonds, but that the county would not have such power if the project were financed entirely by other means.

The argument that statutory authority to direct the place of disposal of locally-generated solid waste extends to all publicly-owned facilities finds support in *North Sanitary Landfill v. Board of County Commissioners*, in which the court upheld the refusal of a board of county commissioners to approve the construction of a disposal facility that would compete with the county disposal system. The court stated:

> R.C. 343.01 through 343.08 establish a governmental agency known as a garbage and refuse disposal district, much the same as existing conservancy districts, for the purpose of meeting an urgent public necessity. The flood of garbage and refuse may well be compared to the disaster of the 1913 flood. To accomplish this purpose, ***the legislature provided for the creation of the district, the issuance of public bonds and the method for repayment by all to whom the service is available.*** Boards of county commissioners are authorized to fix rates to be paid by everyone who owns premises where the collection or disposal of garbage and refuse is available. ***In effect, the legislature established a public utility to be operated by the county commissioners. To insure its successful operation, the repayment of its loans and fair and reasonable rates***, the legislature required that no other such facility be constructed without the approval of the board operating the public refuse district.
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> The importance of the latter factor appears in the minutes of the board when it rejected the request for the approval of the private, independent operation. It was pointed out that approval would create ***competition for the existing public incinerators and may even defeat or destroy the existing public refuse system*** as well as a recycling system that may be adopted.
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> ...Here we have the management of the operation of a local public utility, operated by county commissioners, considering a request of a private corporation to construct a competing facility that is desirous of also serving the public within the same district. ***Obviously, the allowance of such a request and of others of a similar nature could destroy the public utility and result in financial disaster for the public.***

52 Ohio App. 2d at 169, 173; 369 N.E.2d at 19, 21 (emphasis added). The *North Sanitary Landfill* case recognizes the authority of a board of county commissioners to refuse to license a competing solid waste disposal facility in order to protect the viability of a public facility. *See also Hybud Equipment Corp. v. City of Akron*, 742 F.2d at 959-962.

Op. No. 85-058 (syllabus, paragraph 2) concludes, in conformance with the *Fenberg* case, that a board of county commissioners lacks authority to pass an ordinance requiring that all locally-generated solid waste collected or transported in the county be disposed of at the single county-approved landfill "where the county commissioners have not adopted a general plan involving the issuance of revenue bonds for improvements for solid waste disposal." The opinion states that the ordinance in question "is intended to require that all the solid waste collected within the county be disposed of at the only landfill located in the county." Op. No. 85-058 at 2-215. The opinion does not indicate whether the landfill is owned by the county but does state that "the county has no interest in adopting a general plan involving revenue bonds for any improvements." *Id.* at 2-216. To the extent that Op. No. 85-058 excludes circumstances in which a county adopts a general plan involving means other than revenue bonds for financing publicly-owned improvements, I hereby modify that opinion, concluding, instead, that whenever a general plan under R.C. Chapter 343 provides for the acquisition, construction, or repair of publicly-owned facilities for solid waste disposal, the board of county commissioners may require the disposal of locally-generated solid waste at such facilities, regardless of whether revenue bonds are used to finance the facilities.

In response to your second question, I conclude, accordingly, that pursuant to R.C. Chapter 343, a board of county commissioners that has established a single county garbage and refuse disposal district has statutory authority to require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is publicly owned, even if no revenue bonds have been issued.

Your third question is whether, in a county with a single county garbage and refuse disposal district, the board of county commissioners may require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is privately owned. The *Fenberg* case considered that question, in a situation in which the privately-owned landfill was operated under a contract with the board of county commissioners, and answered it in the negative. The *Fenberg* court stated that, except for the general plan situation, the legislative intent in authorizing county commissioners to adopt rules governing the use of solid waste disposal facilities was to permit regulation of the manner in which the facilities are used, and not to compel their use. *State v. Max W. Fenberg & Sons, Inc.*, 52 Ohio App. 2d at 209, 369 N.E.2d at 16. Nothing in the overall scheme of R.C. Chapter 343 indicates a legislative intent to grant counties the authority to procure a garbage and refuse monopoly for a private owner. *See State v. Max W. Fenberg & Sons, Inc.* In concurrence with the *Fenberg* case and with Op. No. 85-058 I conclude, accordingly, that pursuant to R.C. Chapter 343, a board of county commissioners that has established a single county garbage and refuse disposal district has no statutory authority to require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is privately owned.

Your fourth question is whether, in a county with a single county garbage and refuse disposal district containing a publicly-owned landfill financed by general revenue bonds and a privately-owned incinerator, the board of county commissioners may require that solid waste generated within the district must be taken to, and rejected by, the incinerator before it may be disposed of at the landfill. This requirement would be a variation on the requirement set forth in your third question - *i.e.*, a means of channeling waste to a particular private facility. The statutory scheme does not appear to authorize such a requirement. As discussed in *Fenberg*, the implied authority to create a monopoly under R.C. Chapter 343 extends only to instances in which the monopoly results from provisions that are directed to the protection of public investments. Counties are not given statutory authority to promote the interests of a particular private disposal facility.[1]

There may, however, be lawful means by which certain of the goals sought in your fourth question may be accomplished. The authority of a board of county commissioners to adopt rules for the use of solid waste facilities clearly authorizes

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[1] Any arrangement involving the intermingling of public and private interests should be examined in light of the provisions of the Ohio Constitution that govern the lending of the credit of the state and its subdivisions. Ohio Const. art. VIII, §6 generally prohibits a county from entering into a business partnership with private individuals or entities. *See generally, e.g., Walker v. City of Cincinnati*, 21 Ohio St. 14, 54 (1871) (Ohio Const. art. VIII, §6 "forbids the union of public and private capital or credit in any enterprise whatever"); 1985 Op. Att'y Gen. No. 85-047. *See also* Ohio Const. art. VIII, §4. Ohio Const. art. VIII, §13 does, however, provide certain exceptions to the lending credit prohibitions for stated purposes, including the disposal of solid waste. *See generally, e.g.*, 1985 Op. Att'y Gen. No. 85-011; 1981 Op. Att'y Gen. No. 81-095. The provisions of Ohio Const. art. VIII, §§6 and 13 should, thus, be considered when county and private interests unite for the provision of solid waste disposal facilities. Of course, no such arrangement may be undertaken without appropriate grants of statutory authority.

them to restrict the types of waste that may be disposed of at a particular facility. They might, for example, adopt a rule prohibiting the landfill from accepting certain types of materials that are particularly well-suited for incineration. It might also be possible for the landfill to accept a wide variety of solid waste materials and for landfill personnel to transport to an incinerator such items as are suitable for incineration.

In response to your fourth question, I conclude, accordingly, that in a county with a single county garbage and refuse disposal district containing a publicly-owned landfill financed by revenue bonds and a privately-owned incinerator, the board of county commissioners has no statutory authority to require that solid waste generated within the district must be taken to, and rejected by, the incinerator before it may be disposed of at the landfill.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. Pursuant to R.C. Chapter 343, a board of county commissioners that has established a single county garbage and refuse disposal district has statutory authority to require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is publicly owned, whether or not revenue bonds have been used for financing the facility. (1985 Op. Att'y Gen. No. 85-058, modified.)

2. Pursuant to R.C. Chapter 343, a board of county commissioners that has established a single county garbage and refuse disposal district has no statutory authority to require that all solid waste generated within the district be disposed of at a designated facility within the district when that facility is privately owned.

3. In a county with a single county garbage and refuse disposal district containing a publicly-owned landfill financed by revenue bonds and a privately-owned incinerator, the board of county commissioners has no statutory authority to require that solid waste generated within the district must be taken to, and rejected by, the incinerator before it may be disposed of at the landfill.