

TCEQ DOCKET NO. 2017-0791-MSW

PINTAIL LANDFILL, LLC

V.

**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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BEFORE THE TEXAS

COMMISSION ON

ENVIRONMENTAL QUALITY

**PINTAIL LANDFILL, LLC’S REPLY BRIEF ON ITS PETITION FOR
CONTESTED CASE HEARING ON REGULATORY TAKING**

To The Honorable Commissioners:

COMES NOW, Pintail Landfill, LLC (“Pintail”), and submits its Reply Brief on its Petition for Contested Case Hearing on Regulatory Taking (the “Petition”), pursuant to Tex. Gov’t Code § 2007.022, to determine whether actions of the Executive Director and, therefore, the Commission have resulted in a regulatory taking. In support thereof, Pintail shows as follows:

I. The Executive Director’s and OPIC’s Response Briefs Miss the Point

The Executive Director and the Office of Public Interest Counsel (“OPIC”) each submitted a Response Brief in this proceeding. The arguments made by both the Executive Director and OPIC focus entirely on the merits of the contested case and, even then, address only one of the three takings claims raised by Pintail. In addition to neglecting to address two entire sets of takings claims made by Pintail, the Executive Director and OPIC also entirely fail to contest, and thereby concede, that Pintail is entitled to a contested case under Tex. Gov’t Code § 2007.022.

II. The Executive Director and OPIC Raise Several Issues of Fact

Through their Response Briefs, the Executive Director and OPIC raise several issues of fact, which further validates Pintail’s basis for a contested case. For example, the Executive Director has raised fact questions as to whether actions of the Executive Director reflected agency policy; whether the Executive Director’s return of Pintail’s Application was taken in response to a real and substantial threat to public health and safety; whether the return of

Pintail's Application was designed to significantly advance a health and safety purpose; and whether the return of Pintail's application imposed a greater burden than necessary to achieve the health and safety purpose. OPIC contested Pintail's assertion that its property has lost at least 25% of its market value. These examples alone demonstrate the need for a contested case hearing to resolve whether the Executive Director's actions constitute a regulatory taking under Tex. Gov't. Code § 2007.022.

III. Pintail Alleged Each of the Required Elements for a Contested Case

As a private real property owner, Pintail may file, and has filed, a contested case with Commission to determine whether a governmental action of the agency resulted in a taking. Pintail filed the contested case with the Commission not later than the 180th day after it, the private real property owner, knew or should have known that the governmental action restricted or limited the its right in the private real property.¹ In three contexts, Pintail alleged each of the required elements for a contested case under Tex. Gov't Code § 2007.022.

A. Executive Director's New Policy on Considering Ordinances Caused a Taking

Specifically, Pintail's Petition alleged: (1) the Executive Director's return of Pintail's Application is a governmental action within the scope of Tex. Gov't Code ch. 2007; (2) the Executive Director issued new policy and guidance regarding the processing of Pintail's Application, that new policy and guidance constituted governmental action,² and the Executive Director enforced that governmental action through the return of Pintail's Application;³ (3) the Executive Director's governmental action affects Pintail's real property; (4) the Executive Director's governmental action restricts or limits Pintail's right to seek a permit for the operation of an MSW facility located on Pintail's real property; (5) the Executive Director's governmental action is the producing cause of a reduction of at least 25 percent in the market value of Pintail's real property; and (6) the Executive Director's governmental action therefore resulted in a taking of Pintail's property, as defined by Tex. Gov't Code § 2007.002(5)(B). Having so alleged the required elements of a cause of action for a regulatory taking, Pintail is entitled to a contested case hearing under Tex. Gov't Code § 2007.022(a). To the extent the Executive Director

¹ TEX. GOV'T CODE § 2007.022(b).

² TEX. GOV'T CODE § 2007.003(a)(1).

³ TEX. GOV'T CODE § 2007.003(a)(4).

disputes any of the above, that is a matter for the contested case hearing; it is not basis to deny the requested hearing, which is not discretionary within the Commission.

B. Commission's Overruling of Pintail's Motion to Overturn Caused a Taking

In addition, following the Executive Director's return of Pintail's Application, Pintail filed a Motion to Overturn the Executive Director's governmental action. Pintail's Motion to Overturn was overruled by operation of law. The Commission's enforcement of the Executive Director's new policy, by its decision to allow Pintail's Motion to Overturn to be overruled by operation of law, was itself a governmental action under Tex. Gov't Code §§ 2007.002(5)(B), 2007.003(a)(1), (4). The Commission's action in overruling Pintail's Motion to Overturn constitutes another action of the TCEQ that demonstrates Pintail is entitled to a contested case hearing under Tex. Gov't Code § 2007.022(a). Neither the Executive Director nor OPIC addressed, much less contested, Pintail's eligibility for a contested case hearing based on the Commission's action in overruling Pintail's Motion to Overturn.

C. Executive Director's New Policy on Transfer Station's Treatment under THSC §§ 363.112 and 364.012 Caused a Taking

Further, Pintail alleged a creation of policy or guidance that constituted a governmental action that caused a reduction of at least 25 percent in the market value of Pintail's real property and therefore resulted in a taking of Pintail's real property. Specifically, Pintail alleged the Executive Director established unprecedented policy or guidance through his determination that Pintail's MSW transfer station registration, which was issued prior to the adoption of either ordinance at issue in this matter, was not the type of MSW authorization that would limit a city's or a county's authority to adopt such a landfill siting limitation ordinance under Tex. Health & Safety Code §§ 363.112(c) and 364.012(e). The Executive Director's issuance of this new policy and guidance constitutes a governmental action resulting in the taking of Pintail's property in the same manner as discussed above and Pintail is entitled to a contested case hearing under Tex. Gov't Code § 2007.022(a). Neither the Executive Director's nor OPIC's Response Briefs even addressed Pintail's eligibility for a contested case hearing based on the Executive Director's policy and guidance regarding the type of MSW authorization that would limit a city's or a county's authority to adopt such a landfill siting limitation ordinance under Tex. Health & Safety Code §§ 363.112(c) and 364.012(e).

IV. Once a Regulatory Taking is Alleged, a Contested Case Hearing is Required

Pintail is entitled to a contested case hearing because it has alleged facts which, if established by a preponderance of the evidence, would constitute a regulatory taking. Nothing more is required at this stage of the proceeding. The issue now is whether Pintail has alleged a cause of action for a regulatory taking. Pintail has met this standard, and neither the Executive Director nor OPIC have argued this issue to the contrary.

OPIC argues Pintail is required to include in its Petition evidence to support its claim of a 25% reduction in property value, stating, “Pintail’s petition contains nothing more than an assertion that the property has lost the requisite amount of market value. Without further information or documentation, OPIC cannot find that Pintail has satisfied the reduced market value prong of the taking definition in § 2007.002.”⁴ Setting aside the fact that OPIC is not tasked to perform any “fact-finding” function in this matter or any other, OPIC’s statement is akin to a motion for summary disposition, which would only be appropriate if Pintail fails to meet its burden of proof after a contested case is completed. The Executive Director’s and OPIC’s Response Briefs further argue the merits in advance of any presentation or consideration of evidence. The respective Response Briefs are off point, incorrect and, at best, prematurely argue facts that have not been established in the requisite contested case proceeding.

Section 2007.022 establishes Pintail’s right to a contested case. This section states, “A private real property owner (Pintail) may file a contested case with a state agency (TCEQ) to determine whether a governmental action of the state agency results in a taking under this chapter (Tex. Gov’t Code ch. 2007).”⁵ Whether a governmental action results in a taking is a question of fact, to be determined by a trier of fact.⁶ The contested case is subject to Tex. Gov’t Code ch. 2001 except to the extent of any conflict with Tex. Gov’t Code ch. 2007, subch. B.⁷ Contested cases under Tex. Gov’t Code ch. 2001 have several distinct features, including the opportunity to present evidence and argument on each issue involved in the case;⁸ the right of cross-examination *required for a full and true disclosure of the facts*;⁹ and the right to conduct

⁴ OPIC Response Brief, at 5-6.

⁵ TEX. GOV’T CODE § 2007.022(a).

⁶ See TEX. GOV’T CODE § 2007.023(a), (b).

⁷ TEX. GOV’T CODE § 2007.022(c).

⁸ TEX. GOV’T CODE § 2001.051(2).

⁹ TEX. GOV’T CODE § 2001.087 (Emphasis added).

discovery, including written discovery and depositions.¹⁰ TCEQ's contested cases are typically heard by an administrative law judge at the State Office of Administrative Hearings ("SOAH"), but the Commission retains the authority to have a contested case heard by one or more commissioners.¹¹ Only through the admission of evidence and the consideration of direct and re-direct testimony, cross-examination, and any rebuttal testimony is a full record developed on which the trier of fact can make an initial recommendation for a decision by the Commission.¹²

Having alleged a taking by a governmental action of the Executive Director and Commission, Pintail is entitled to a contested case, through which all parties will have an opportunity to discover facts and litigate the relevant issues. Pintail respectfully requests the Commission refer this matter to SOAH for a contested case hearing.

V. Conclusion

Pintail has alleged each of the required elements of a cause of action for a regulatory taking under Tex. Gov't Code § 2007.022. Whether a regulatory taking has occurred is a question of fact.¹³ Pintail is entitled to a contested case hearing under Tex. Gov't Code § 2007.022, through which the parties can engage in discovery, present evidence, provide testimony, cross-examine witnesses, and present argument on the issues relevant to this proceeding. Through this process, a full and complete administrative record can be developed for the Commission's consideration to determine whether a regulatory taking has occurred and whether Pintail is entitled to invalidation of the governmental action or such other remedies as allowed by law. Neither the Executive Director nor OPIC has presented any argument or basis by which it can be shown Pintail is not entitled to a contested case on the takings issues. In fact, their respective Response Briefs demonstrate the existence of fact issues requiring a contested case hearing to resolve. Therefore, Pintail respectfully requests the Commission refer this matter to SOAH for a contested case hearing.

Respectfully submitted,

/s/ John A. Riley

JOHN A. RILEY

¹⁰ TEX. GOV'T CODE §§ 2001.089, .091 -.102.

¹¹ TEX. GOV'T CODE § 2003.047(b).

¹² TEX. GOV'T CODE § 2003.047(l).

¹³ TEX. GOV'T CODE § 2007.023.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Pintail Landfill, LLC's Reply Brief on Its Petition for Contested Case Hearing on Regulatory Taking has been served by email to counsel for the Executive Director and to the TCEQ's Public Interest Counsel on this the 5th day of September, 2017.

/s/ John A. Riley

John A. Riley

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