CAUSE NO. D-1-GN-16-006192

PINTAIL LANDFILL, LLC,	§	**IN THE DISTRICT COURT**
Plaintiff	§	
	§	
v.	§	
	§	
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	**TRAVIS COUNTY, TEXAS**
AND, IN HIS OFFICIAL	§	
CAPACITY, RICHARD A.	§	
HYDE, P.E., AS TCEQ	§	
EXECUTIVE DIRECTOR,	§	
Defendants,	§	
	§	
And	§	
	§	
CITIZENS AGAINST THE	§	
LANDFILL IN HEMPSTEAD,	§	
Defendant Intervenor	§	**126th JUDICIAL DISTRICT**

CITIZENS AGAINST THE LANDFILL IN HEMPSTEAD'S RESPONSE TO PINTAIL LANDFILL, LLC'S INITIAL BRIEF ON THE MERITS

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The Parties

In lieu of using the full names of the parties, this Brief may refer to the Parties as follows:

Full Name	Abbreviated Reference
Pintail Landfill, LLC	Pintail
Texas Commission on Environmental Equality	TCEQ
Richard Hyde, P.E., in his Official Capacity as TCEQ Executive Director	Executive Director (Executive Director and TCEQ collectively "Defendants")
Citizens Against the Landfill In Hempstead	CALH

Record References

This Brief will refer to the record as follows:

___ AR ____	Administrative record made before TCEQ in the matter styled *Pintail Landfill, LLC v. Texas Commission on Environmental Equality, et al*, in the 126th Judicial District Court of Travis County, Texas
App. ____	Appendix

ISSUES PRESENTED

1. **Issue 1** (Responsive to Pintail's Issues 1) – Defendants did not act arbitrarily or capriciously when they refused to grandfather Pintail's second landfill application for a landfill based on a previously issued transfer station registration or a previously returned deficient landfill application.

2. **Issue 2** (Responsive to Pintail's Issues 2(A) and 2(B)) – Defendants did not act arbitrarily or capriciously when it determined the City of Hempstead and Waller County Ordinances applied to the proposed Pintail site.

3. **Issue 3** (Responsive to Pintail's Issue 3) – Defendants did not act arbitrarily or capriciously when they refused to determine the validity of local ordinances.

4. **Issue 4** (Responsive to Pintail's Issues 4, 5, 6, and 7) – Defendants did not act arbitrarily or capriciously in returning Pintail's second landfill application because its decision was not based on any policy revisions, and its decision did not constitute rulemaking.

TO THE HONORABLE KARIN CRUMP:

This appeal follows the second unsuccessful attempt by Pintail Landfill, LLC ("Pintail") to obtain a landfill permit for an approximate 400-acre site, one mile north of the City of Hempstead. Specifically, the proposed landfill site is located just north of the intersection of State Highway 6 and State Highway 290. This intersection is affectionately referred to by Waller County residents as the "gateway to Hempstead."

The proposed landfill dump site is located on the geologic formation called the Willis Sand, which serves as a recharge feature for the Gulf Coast Aquifer. The Gulf Coast Aquifer is the sole source of drinking water for not just the residents of Northern Waller County and the City of Hempstead, but many people living in the surrounding region.

CALH and the City of Hempstead have been fighting the siting of a landfill at this important and sensitive site since June 2011, approximately six and a half years. For the first landfill application, CALH and the City of Hempstead fought on three separate fronts: 1) in Waller County District Court to void actions by a prior Commissioners Court, who acted in concert with Pintail to violate the Open Meetings Act; 2) at TCEQ to protest the issuance of a landfill permit; and 3) at the State Office of Administrative Hearings ("SOAH") during the contested case hearing on the first landfill permit application. After the open meetings defeat of

Waller County, there was a change in elected officials, and Waller County joined the fight.

After years of blood, sweat, and tears (funded not only by taxpayers, but also by community bake sales and garage sales), coupled with egregious bad conduct by Pintail, CALH, the City, and the County were eventually successful. TCEQ returned Pintail's first application for a landfill permit on October 5, 2015 because it was so deficient and TCEQ wanted to preserve the integrity of the municipal solid waste program.[1] TCEQ's return of the first application was an unprecedented win for CALH, the City, and the County.

However, rather than accept defeat, Pintail filed a second landfill application *for the same exact site*. For the second landfill application, it was undisputed that Waller County and the City of Hempstead had ordinances on the books that prohibited landfills at the proposed Pintail site *before* Pintail filed its second landfill application. Pintail argued that the ordinances were inapplicable and/or invalid. Rejecting those arguments, on December 1, 2016, TCEQ returned the second landfill application "since the City of Hempstead's and Waller County's ordinances prohibit landfills in the proposed location [and] were adopted before Pintail filed this application."[2] TCEQ's decision resulted in this appeal by Pintail. Although CALH has intervened in the appeal, neither the City nor the County have

[1] App. 1 – 2015 Letter returning First Application (3 AR 11).
[2] App. 2 – TCEQ Letter returning 2nd Landfill Application (3 AR 14).

intervened or are otherwise parties to this appeal.

Pintail's arguments in this appeal are nothing more than smoke and mirrors, in an attempt to complicate a fairly simply question. This is not a case of statutory construction, and the issue is not whether the City of Hempstead and Waller County adopted valid ordinances. In fact, this Court cannot determine the validity of those ordinances when the local governments are not parties to this proceeding. Instead, this Court must determine whether the Defendants acted arbitrarily or capriciously in returning a second landfill application that was barred on its face by local ordinances, which have never been declared invalid by a court of law.

TCEQ is not a court of law, and it is outside its delegation of authority to determine the validity of local ordinances. After already losing once in Waller County, Pintail has tried everything to avoid returning to Waller County. However, this Court should not expand TCEQ's authority to allow an end run around the proper procedural vehicle to determine the validity of local ordinances.

I. STATEMENT OF FACTS

The facts underlying this appeal arise out of two separate landfill applications filed by the same applicant for the same exact location. The history of the first landfill application is relevant in determining the Defendants did not act arbitrarily or capriciously in returning the second application. The facts related to each application are discussed below.

A. Pintail's First Application for a Landfill Disposal Facility.

In mid-2010, Pintail, which is a wholly owned subsidiary of a Georgia company, began searching for a proposed landfill site to serve the greater Houston area.[3] Prior to this, Pintail and its parent company had never operated a landfill in Texas. In December 2010, Pintail undertook a preliminary site investigation of what would become the proposed Pintail site.[4] The preliminary investigation noted that there were limited amounts of clay at the proposed Pintail site and that alternative liner systems would have to be used to mitigate the lack of clay.[5]

At the time of these initial investigations, Pintail did not own the proposed site. On April 27, 2011, Pintail entered into an option agreement with the owner of the land for the proposed site.[6] The option agreement granted Pintail an exclusive license to access the proposed site, and effectively prohibited any other person from gaining access for a site inspection, or to conduct any testing.[7]

In June of 2011, Pintail entered into an agreement with its consultants to develop a full landfill application for the proposed site.[8] The agreement stated, "It

[3] App. 5 – Joint Motion for Sanctions, p. 5 (3 AR 11).
[4] App. 5 – Joint Motion for Sanctions, p. 5 (3 AR 11).
[5] App. 5 – Joint Motion for Sanctions, p. 6 (3 AR 11). Clay is an important factor when constructing a landfill because it is considered a nearly impermeable material that greatly restricts the possibility of contaminates leaking from a landfill and poisoning nearby water supplies.
[6] App. 5 – Joint Motion for Sanctions, p. 9 (3 AR 11).
[7] App. 5 – Joint Motion for Sanctions, p. 9 (3 AR 11).
[8] App. 5 – Joint Motion for Sanctions, p. 10 (3 AR 11). A full landfill application consists of Parts I-IV.

is anticipated that the major permit application will be submitted approximately 12 months following authorization to proceed."[9] However, in July 2011, Pintail discovered that the Commissioners Court of Waller County was planning to adopt a landfill siting ordinance that would prohibit the siting of a landfill at the proposed site.[10] Knowing that its anticipated timeline of one year would be too late if the County passed a siting ordinance, Pintail decided to attempt to defeat the County siting ordinance by hurriedly compiling and filing a less technically-challenging request for a land use only determination.[11]

At the direction of Ernest Kaufmann, the president of Pintail, the Pintail consultants hurriedly filed a request for a land use only determination on July 20, 2011. The consultants timeline had shrunk from twelve *months* to eleven *days*.[12] The significance of the request for a land use only determination is that at the end of the process, TCEQ does not issue a permit for waste disposal.[13] Instead, the Executive Director processes the "partial permit application to the extent necessary to determine land-use compatibility alone. If the facility is determined to be acceptable on the basis of land use, the Executive Director will consider technical

[9] App. 5 – Joint Motion for Sanctions, p. 10 (3 AR 11).
[10] App. 5 – Joint Motion for Sanctions, p. 13 (3 AR 11).
[11] App. 5 – Joint Motion for Sanctions, p. 13 (3 AR 11). A land use only determination is less technically challenging because it only contains Parts I and II, which is half of a full landfill application, which must contain Parts I, II, III, and IV.
[12] App. 5 – Joint Motion for Sanctions, p. 14 (3 AR 11).
[13] Waste disposal is also not authorized upon obtaining a transfer station registration.

matters related to the permit application at a later time."[14] Pintail had no intention of completing the land use determination process, and in fact, discovery during the contested case hearing revealed this sham application was no more than a ruse.[15]

Later, on August 2, 2011, Pintail filed its transfer station registration application. A transfer station is a facility where solid waste is processed and transferred from small local trucks to larger long haul trucks, which will transport waste to a landfill facility. A transfer station registration does not authorize solid waste disposal.[16]

After Pintail filed its request for a land use only determination, the County passed Ordinance 2011-001, which prohibited solid waste disposal in Waller County, except for any area within a two mile radius of any privately owned solid waste disposal site holding a currently or previously valid permit for municipal or solid waste disposal issued by TCEQ, as of the date of the Ordinance, but not afterwards.[17]

Thereafter, Pintail eventually amended its request for a land use only determination to a full blown landfill application by filing Parts III and IV with

[14] 30 TAC §330.57.
[15] App. 5 – Joint Motion for Sanctions, p. 14 (3 AR 11).
[16] App. 3 – Transfer Station Documents (3 AR 11).
[17] App. 6 – Waller County Ordinance No. 2011-001 (3 AR 11) (A New Pintail Landfill Application is Prohibited by Local Ordinance, Attachment C).

TCEQ.[18] After multiple notices of deficiencies, TCEQ declared Pintail's first landfill application technically complete in December 2012. The first application was then referred to SOAH for a contested case hearing.

While the first landfill application was headed to SOAH, TCEQ granted Pintail's application for a transfer station registration on July 23, 2013.[19] Although CALH submitted comments to TCEQ on the transfer station registration, CALH was not entitled to a contested case hearing during the registration process.[20] Much like the request for land use only determination, Pintail had no intention of pursuing construction of the transfer station unless and until it obtained a landfill permit.[21]

Meanwhile, back at SOAH, the discovery process for the first landfill application involved multiple discovery abuses and Pintail's spoliation/tampering with evidence. Some of the misconduct that came to light included:

1) Denying CALH and the City of Hempstead access to the proposed site, while conducting earth moving activities to fill in ponds and hide evidence of wetlands;[22]
2) Disregarding SOAH judge orders requiring Pintail to provide CALH and the

[18] App. 5 – Joint Motion for Sanctions, p. 22 (3 AR 11).
[19] App. 3 – Transfer Station Documents (3 AR 11).
[20] 30 Tex. Admin. Code §50.139(b).
[21] App. 9 – Kaufmann Deposition
[22] App. 5 – Joint Motion for Sanctions, p. 24-29 (3 AR 11).

City site access, which thus required multiple hearings on the same issue.

3) Altering the final logs within the application, which show the geology under the proposed site, from what the field logs revealed was multi-colored gravel and sand to a non-existent four foot layer of hard clay thereby intentionally misrepresenting the subsurface characteristics.
4) Destroying 90% of the potentially inconsistent physical and documentary evidence from Pintail's subsurface investigation;[23]
5) Concealing and misrepresenting groundwater measurements related to the proposed deepest point of excavation in its application documents;[24]
6) Refusing to answer questions during deposition because of counsel's instruction not to answer based on "relevancy";[25]
7) Serving a misleading privilege log designed to obscure the fact that Pintail was withholding material documents that had been drafted or reviewed by its testifying experts;[26] and
8) Misrepresenting all responsive documents had been produced, and then after multiple Motions to Compel, producing in excess of 13,000 pages of documents and 2,000 native files.[27]

[23] App. 5 – Joint Motion for Sanctions, p. 16-22 (3 AR 11).
[24] App. 8 – Joint Motion for Summary Disposition, p. 5-8 (3 AR 11).
[25] App. 5 – Joint Motion for Sanctions, p. 36 (3 AR 11).
[26] App. 5 – Joint Motion for Sanctions, p. 37-38 (3 AR 11).
[27] App. 5 – Joint Motion for Sanctions, p. 39-40 (3 AR 11).

In addition to the discovery abuses committed by Pintail at SOAH during the contested case hearing, Pintail's role in conspiring with former officials of the County to violate the Open Meetings Act came to light in separate litigation pending in Waller County during this same time. Specifically, on December 18, 2014, a Waller County jury found that former officials of the County had engaged in multiple open meeting violations related to a subsequent 2013 ordinance that was passed by the County and a host agreement entered into with Pintail.[28] Interestingly enough, Pintail arranged the meetings leading to the open meetings violations.[29]

Despite Pintail's obstructive and intimidating tactics, CALH and the City continued to fight on. On July 17, 2015, after multiple orders from the SOAH judges, CALH was finally granted site access.[30] Prior to this visit, CALH had repeatedly argued that the groundwater measurements submitted by Pintail in its first application were inaccurate because they were taken during an exceptional drought.[31] Although CALH expected the measurements taken during the July site visit to be higher than stated in the first landfill application, CALH was wholly

[28] App. 5 – Joint Motion for Sanctions, p. 30 (3 AR 11). It should be noted that the 2013 Ordinance was voided as part of that litigation, and is not applicable to the current dispute with Pintail concerning its second landfill application. It is also worth noting that the former commissioners who were involved with the open meetings violations either did not run for re-election or lost their election. The current Commissioners' Court is supportive of CALH's position and has actively and openly opposed the landfill since they took office in January 2015.
[29] App. 5 – Joint Motion for Sanctions, p. 30 (3 AR 11).
[30] App. 8 – Joint Motion for Summary Disposition, p. 5-8 (3 AR 11).
[31] App. 8 – Joint Motion for Summary Disposition, p. 8 (3 AR 11).

taken by surprise to find a piezometer under artesian conditions.[32] Below are photos taken of the well expressing artesian conditions:[33]

Although Pintail had unfettered access to the proposed site, Pintail hid its head in the sand and did not take additional groundwater measurements until CALH was granted site access and requested to do so.[34] Specifically, Pintail took absolutely no groundwater measurements between December 14, 2012 and July 17, 2015.[35]

In light of the new groundwater data and in anticipation of the first Pintail application being returned, the City of Hempstead passed a siting ordinance on

[32] App. 8 – Joint Motion for Summary Disposition, p. 9 (3 AR 11). A piezometer is basically a well drilled to measure groundwater depth. An artesian well is one where the natural pressure produces a constant supply of water with little or no pumping.
[33] App. 5 – Joint Motion for Summary Disposition, p. 26-27, 31-32, 35, 38, 39 (3 AR 11).
[34] App. 8 – Joint Motion for Summary Disposition, p. 13 (3 AR 11).
[35] App. 8 – Joint Motion for Summary Disposition, p. 15 (3 AR 11).

September 8, 2015.[36] In the event the first landfill application was returned or denied, the City's Ordinance would operate to bar future applications at this proposed site.

The City of Hempstead's foresight for the need of a landfill siting ordinance would come to fruition. As a result of CALH and the City's insistence on site access and being allowed to take groundwater measurements, Pintail was forced to file a Motion for Continuance of the already-scheduled contested case hearing.[37] In its sworn Motion for Continuance, Pintail made the following admissions:[38]

- TCEQ rules require that an application for a municipal solid waste ("MSW") landfill permit include information on the seasonal high water level (SHWL);
- The SHWL affects significant aspects of a landfill's design;
- In order to have water level measurements to verify those taken by CALH, Pintail arranged for its geologist to also take water level measurements in the piezometers on that same day;
- Pintail's water level measurements show groundwater levels that are significantly higher than those previously measured at the site, by as much as nearly 7 feet higher;

[36] App. 7 – City of Hempstead Ordinance (3 AR 11) and App. 18 – Kelly Hart Letter to the Executive Director dated July 18, 2016, p. 3.
[37] App. 8 – Joint Motion for Summary Disposition, p. 15 (3 AR 11).
[38] App. 8 – Joint Motion for Summary Disposition, p. 15 (3 AR 11).

- Pintail's permit application no longer satisfied the requirements of TCEQ permitting rules; and
- The changes that Pintail would need to make to the application to be in compliance with TCEQ rules potentially affected nearly every aspect of the application.

In response to Pintail's Motion for Continuance, the first landfill application was remanded to the Executive Director on October 1, 2015.[39] Subsequently, on October 5, 2015, the Executive Director returned Pintail's first landfill application.[40] The letter returning the deficient application stated:

> Over the last four years, the agency has worked closely with your consultants to ensure that the technical portion of the application meets all necessary requirements. Specifically, TCEQ staff has spent over 1,300 hours reviewing the Pintail application and found over 400 instances of deficiencies, resulting in four formal written notices of technical deficiencies. Despite this significant effort, the application is still deficient….
>
> … Importantly, Pintail also acknowledged that the permit application no longer meets TCEQ's municipal solid waste rules.
>
> For the integrity of the municipal solid waste program, this is not where we want to be at this point in the process. The application has already undergone extensive technical review, a draft permit has been prepared and the matter has been referred to the State Office of Administrative Hearings. It is at this point that

[39] App. 18 – Kelly Hart Letter to the Executive Director dated July 18, 2016, p. 3
[40] App. 1 – 2015 Letter Returning First Application

> momentous site information is discovered which significantly alters the approach to the design of the facility. Based on these facts, we do not think an application amendment is appropriate and the only reasonable course available is to return the application as deficient.

After TCEQ's return of Pintail's first landfill application, Pintail did not timely file any appeal of that action. Instead, Pintail filed a Motion for Commission Review and Reversal of the Executive Director's Staff's Purported Return of its MSW Application on April 8, 2016, more than six months after its first application was returned.[41]

Pintail's Motion for Commission Review directly contradicts statements made to this Court in its initial brief. Specifically, without any citation to the record, Pintail represents to this Court that "the Executive Director agreed that Pintail would be allowed to submit a new MSW landfill application."[42] However, in the Motion for Commission Review, Pintail stated, "the Executive Director's staff has compounded the problem by asserting Pintail is prohibited from submitting a new permit application because of ordinances adopted by Waller County and the City of Hempstead."[43] This might have been an oversight by

[41] App. 18 – Kelly Hart Letter to the Executive Director dated July 18, 2016,. p. 4.
[42] Pintail's Initial Brief on the Merits, p. 8.
[43] App. 10 – Pintail's Motion for Commission Review, p. 5.

Pintail's new attorneys;[44] however, from CALH's perspective, it is another example of material misstatements by Pintail.

B. Pintail's Second Application for a Landfill Disposal Facility

On June 30, 2016, Pintail filed its second application with TCEQ.[45] Just like the first application, Pintail only filed Parts I and II.[46] In the second application, Pintail was specifically asked whether the facility was located in an area which the governing body of the municipality or county had prohibited the storage, processing, or disposal of municipal solid waste. Pintail responded "No" and stated "See Memorandum on the Inapplicability and Invalidity of the Waller County and City of Hempstead Ordinances, included in Part II, Section 1.3 of the Application."[47]

In response to Pintail's Memorandum, on July 18, 2016, the City of Hempstead sent TCEQ a letter summarizing the context surrounding the City's Ordinance and explaining the City's interpretation and applicability of same to Pintail's second application.[48] The City also quoted ignored portions of the infamous Travis County Commissioner's meeting transcript, which stated, "The statute that we are following is if someone files an application, then that would get

[44] The attorneys handling this appeal and Pintail's second landfill application were not involved in the Waller County open meetings litigation, the contested case hearing on the first application, or the application process at TCEQ for the first application.
[45] App. 4 – Pintail's Second Application (1 AR 1).
[46] App. 4 – Pintail's Second Application (1 AR 1, p. 1).
[47] App. 4 – Pintail's Second Application (1 AR 1, Part 1 Form, p. 8)
[48] App. 18 – Kelly Hart Letter to the Executive Director dated July 18, 2016.

their foot in the door. And there is a follow up issue that – that if that application were so deficient, we may end up returning that application, which would take their place out of – so it would no longer be in front of the county ordinance…."[49] As applied to Pintail's second application, the City noted Pintail attempted to stick its foot in the door, "but that foot in the door was removed and the door slammed shut when Pintail's 2011 application was found by TCEQ – and admitted by Pintail – to be 'so deficient' that TCEQ felt it had no choice but to return it to Pintail."[50]

The day after the City's letter, the Executive Director declared the second application administratively complete.[51] However, the Executive Director reserved any decision on the issue of local ordinances and stated, "this declaration does not constitute a determination on land use compatibility, including review of any local ordinances …. Rather, the Executive Director will review whether any local ordinance or order prohibits the processing of disposal of municipal solid waste in the proposed landfill area during the substantive technical review of the application."[52]

After the declaration of administrative completeness, CALH filed Initial Comments on the second application with TCEQ on September 14, 2016.[53]

[49] App. 18 – Kelly Hart Letter to the Executive Director dated July 18, 2016, p. 9.
[50] App. 18 – Kelly Hart Letter to the Executive Director dated July 18, 2016, p. 9.
[51] 3 AR 5.
[52] 3 AR 5.
[53] 3 AR 11.

CALH's Initial Comments noted several problems with the second application, including the Executive Director's lack of authority to declare local ordinances invalid.[54]

On September 27, 2016, TCEQ issued a Notice of Public Meeting.[55] The Notice stated once again, "During the substantive technical review, TCEQ will make a determination on the question of land use compatibility, including review of whether any local ordinance or order prohibits the processing or disposal of municipal solid waste in the area of the proposed landfill."[56] The public meeting went forward on October 25, 2016.

On December 1, 2016, the Executive Director returned the second application since the City of Hempstead and Waller County's Ordinances prohibited landfills in the proposed location, and were adopted prior to Pintail filing its second application.[57] The decision to return the second application at this stage made sense considering that TCEQ had previously spent over 1,300 hours processing the first application. The ordinances were a threshold issue and not addressing them first would have likely led to another wasted 1,300 hours in agency resources.

Thereafter, Pintail filed a Motion to Overturn the Executive Director's

[54] 3 AR 11.
[55] 3 AR 12.
[56] 3 AR 12.
[57] 3 AR 14.

decision returning the second application.[58] The Office of Public Interest Counsel, the Executive Director, the City of Hempstead, Waller County, and CALH all filed responses in opposition to the Motion to Overturn.[59] TCEQ Commissioners refused to set the matter for agenda and the Motion to Overturn was denied by operation of law on February 17, 2017.[60]

II. SUMMARY OF THE ARGUMENT

The Defendants' decision to return Pintail's second application should be affirmed because they did not act in violation of a constitutional or statutory provisions and did not act in excess of their statutory authority. The Defendants' action in returning Pintail's second application was supported by substantial evidence and was not arbitrary or capricious.

Specifically, Pintail has no authority for the proposition that a deficient landfill application that was returned is sufficient to grandfather future applications. Pintail has no authority for the proposition that a small transfer station registration can grandfather a large landfill operation. To follow Pintail's logic requires a tortured reading of the applicable statutes and the local ordinances. It also far exceeds the Legislature's intent at the time it created the grandfathering provisions.

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[58] 3 AR 15.
[59] 4 AR 17, 18, 19, and 20.
[60] 4 AR 23.

Furthermore, TCEQ was justified in not determining the validity of the City or County's ordinances when doing so would exceed its authority. The only proper place for Pintail to seek this relief is in a Waller County district court. Finally, Pintail's policy arguments fail because 1) the applicable statutes and regulations do not require metes and bounds descriptions and 2) statements made by a TCEQ employee during a Travis County Commissioners Court meeting do not rise to the level of pronouncing policy.

III. ARGUMENT

For the reasons set forth in more detail below, the Court should affirm TCEQ's return of Pintail's second landfill application and issue a take nothing judgment against Pintail.

A. Standard of Review

Pintail filed this appeal pursuant to Tex. Water Code §5.351 and 30 Tex. Admin. Code § 80.275 seeking a reversal of the Executive Director's decision to return Pintail's second application.[61] "The Texas Water Code does not define the scope of judicial review of a decision of the TCEQ, and thus [courts] review under the 'substantial evidence' standard."[62] Courts may not substitute their judgment for the judgment of TCEQ on the weight of evidence on questions committed to

[61] Pintail's Original Petition at ¶9.
[62] *Nadaf v. Tex. Comm'n on Environmental Quality*, 2014 Tex. App. LEXIS 4335, *10 (Tex. App.—San Antonio 2014).

TCEQ's discretion.[63] Courts should affirm the decisions of TCEQ if some reasonable basis exists in the record for TCEQ's action.[64]

The Court can only reverse TCEQ's decision and remand for further proceedings if Pintail's substantial rights were prejudiced because TCEQ's findings, inferences, conclusions, or decisions are:

(1) In violation of a constitutional or statutory provision;

(2) In excess of the agency's statutory authority;

(3) Made through unlawful procedure;

(4) Affected by other error of law;

(5) Not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(6) Arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[65]

Pintail's argument that a de novo standard applies is incorrect.[66] By way of its Original Petition, Pintail has not sought any declaratory judgments to determine the validity or interpretation of any statute or ordinance. By not seeking to conduct any discovery, by briefing entirely on the administrative record, and by not seeking

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[63] *Id*.
[64] *Id*.
[65] Tex. Gov't Code §2001.174(2). For ease of reference, this brief uses the term "arbitrary and capricious" to encompass all of these factors to the extent they apply.
[66] *See* Pintail's Initial Brief on the Merits, p. 31.

any trial setting, Pintail itself has treated this appeal as one based on a substantial evidence review, and not as based on a de novo review.

Furthermore, although Pintail includes allegations concerning the validity of the City of Hempstead or Waller County's ordinances, those issues are not properly before this Court, as set forth in more detail below, and cannot be the basis for a de novo review.

Finally, this is not a case of statutory interpretation. It is undisputed that the proposed site does not comply with the City's setback ordinance and the proposed site is not within the area authorized by the County's ordinance. Pintail has just asked TCEQ to disregard those valid ordinances and/or declare them invalid. Pintail has failed to point to any formal document issued by TCEQ where it made findings of fact or conclusions of law interpreting any statutes. As such, this court is confined to a substantial evidence review, which is less than that needed to sustain a verdict being attacked as against the great weight and preponderance of the evidence.[67]

B. ISSUE 1 –Defendants did not act arbitrarily or capriciously when they refused to grandfather Pintail's second landfill application for a landfill based on a previously issued transfer station registration or a previously returned deficient landfill application (Responsive to Pintail's Issue 1).

Pintail's grandfathering argument is without merit. First, Pintail argues that

[67] *League City v. Texas Water Comm'n*, 777 S.W.2d 802, 805 (Tex. App.—Austin 1989).

its second application was grandfathered from the applicability of the ordinances based on its first application. However, Pintail did not adequately brief this issue and thus it has been waived. Even if it wasn't waived, Pintail ignored the fact that the first application was returned as deficient and as such did not authorize any type of activity. Second, Pintail argues that its second *landfill* application should be grandfathered by a previously issued *transfer station* registration. Pintail ignores the fact that the transfer station registration did not authorize waste disposal.

1. Pintail waived its argument related to its ability to grandfather its second application through its first application which was returned as deficient.

In the heading for Issue 1, Pintail stated, "Pintail's July 2011 Application … prevents the County and City Ordinances from limiting the Commission's permitting authority with respect to the Pintail Landfill site."[68] However, the entirety of that section focuses on grandfathering as it relates to the transfer station registration and not the first landfill application. Since Pintail did not adequately brief this issue to the Court, it has been waived.[69]

[68] Pintail Initial Brief on the Merits at 37.

[69] *See* Travis County Local Rule 10.3 ("failure to brief an issue for the merits hearing waives the issue…"); *see also Barnett v. Coppell N. Tex. Court, Ltd.*, 123 S.W.3d 804, 826 (Tex. App.—Dallas 2003)(brief must provide clear and concise argument for contentions made with appropriate citations to authority, and failure to do so constitutes waiver of the alleged error); *See also City of McKinney v. Hank's Rest. Group, LP*, 412 S.W.3d 102, 121 (Tex. App.—Dallas 2013)("concluding that issue was waived because appellant did not analyze legal authority and made 'no suggested application of it to the facts"' and "'failure to provide substantive analysis waives issue on appeal'").

2. Even if the issue wasn't waived, Pintail ignored the fact that the first application was returned as deficient, and as such could not grandfather the second application when it did not authorize any type of activity.

Even if the argument that the first application grandfathered the second application was not waived, the concept that an unscrupulous out of state landfill company could preempt all future local regulations by filing a purposefully deficient landfill application violates all notions of common sense and fair play. The Court must reject this argument since the Austin Court of Appeals has already decided this issue in *Tex. Comm'n on Envtl. Quality v. Kelsoe*, 286 S.W.3d 91 (Tex. App. – Austin 2009).

There, Kelsoe submitted his landfill application to the TCEQ. At that time, the construction of a landfill was allowed in the area he sought to construct one.[70] After Kelsoe's application was submitted, the county passed an ordinance barring the construction of new landfills. Kelsoe's application was subsequently returned, and the Austin Court of Appeals stated he was no longer grandfathered under the old ordinances for subsequent applications filed for the same site. Pintail has no case law to the contrary.

3. Pintail cannot grandfather a landfill application based on a transfer station registration.

Pintail's next misplaced argument is that its application for and subsequent

[70] *Kelsoe*, 286 S.W.3d at n. 6.

issuance of a transfer station registration should be sufficient to grandfather its second landfill application. The Court should likewise reject this argument because the argument: (1) ignores the applicable statutory language that limits grandfathering to an *area for which authorizations have been issued*; (2) ignores the express authorizations listed in its transfer station registration, and (3) erroneously relies on a fictional "registration boundary" wherein no authorizations are granted in the vast majority of the acreage.

i. Applicable statutory language does not support Pintail's position.

The applicable statutes grant counties and municipalities authority to prohibit MSW processing or disposal through siting ordinances. However, the statutes prohibit siting restrictions in an *area* for which a permit or other *authorization* under Chapter 361 has been issued by the commission.[71] Thus, boiled down, the controlling statutes only allow grandfathering "in an area … for which … authorization … has been issued." "Area" is defined as "a flat surface or space; the amount of surface included (as within the lines of a geometric figure)."[72] The formula to calculate "area" is: Area = Length x Width ("A=LW"). Thus, the statutory language requires a determination of the "area" where an "authorization" has been issued by the commission.

[71] Texas Health and Safety Code §§ 363.112 and 364.012.
[72] App. 13 - Excerpt from Merriam-Webster Dictionary defining "area." (3 AR 11)

Here, Pintail's transfer station registration was expressly limited to the 1.16-acre area described in the registration application:

> The registrant is authorized to store and process waste, and to recycle recovered materials in accordance with the limitations, requirements, and other conditions set forth herein." (emphasis added).[73]
>
> The registrant is authorized to operate the facilities related to the separation, storage, and transfer of the wastes authorized, and recycling of the recovered materials, which shall include units, structures, appurtenances, or improvements as described in the registration application. The waste management units authorized at this facility include: the transfer station building; roll-off boxes, transfer trailers, and other suitable containers; and one 5,000 gallon contaminated water storage tank." (emphasis added).[74]

Pintail's corresponding registration application, in turn, described and depicted the specific operating area of the transfer station where authorizations were requested and issued. Pintail expressly stated in its application that "[t]he operating area of the transfer station is located within a mostly enclosed facility."[75] This "mostly enclosed facility" is the proposed transfer station building. Consistent with this statement, Pintail's application provided the "Transfer Station Layout Plan" ("Layout Plan") specifically depicting the area where authorizations were

[73] App. 3 – Transfer Station Documents; *see* Tex. Gov't Code § 311.011 (requiring that words and phrases in statutes be construed in context and according to the rules of grammar and common usage).
[74] App. 3 – Transfer Station Documents, Registration Application, at 4.
[75] App. 3 – Transfer Station Documents, Attachment G.

requested and providing the dimensions of that area.[76] Pintail's Layout Plan provides operating area dimensions of 230 feet by 220 feet. Calculating the area using the proper mathematical formula (A = LW), Pintail's operating area is 50,600 square feet, which is an area of approximately 1.16 acres.

In accordance with the registration and the corresponding application, the authorizations of the registration are expressly limited to this 1.16-acre area. Because the authorizations are limited to the designated 1.16-acre area, Pintail's request to be grandfathered for a separate proposed landfill area of 410-acres must fail. Indeed, there are no authorizations granted on the vast majority (approximately 99.7%) of the 410-acre area sought to be grandfathered, and the proposed landfill cannot be placed on the 1.16-acre area designated for the transfer station. Therefore, a second attempt at a 410-acre area for a prospective landfill could not be grandfathered by Pintail's transfer station registration.

Pintail's arguments to the contrary ignore the applicable statutes and employ a fictitious definition of "facility," noting a 410-acre "registration boundary," in its registration application. Pintail asserts that the entire 410-acre area should be grandfathered, but this argument fails for two reasons: First, as discussed above, grandfathering is expressly limited by statute to the *area for which authorization has been issued*, rather than a facility boundary. This means that under the statute,

[76] App. 3 – Transfer Station Documents, Attachment H.

only the *area* where the transfer station registration grants *authorizations* can be subject to any grandfathering. The registration boundary or facility boundary is irrelevant.

Second, even if the facility boundary was relevant, Pintail's 410-acre "registration boundary" is a mere fiction, and a stranger to TCEQ rules and definitions governing such facilities. The applicable TCEQ rule defines "[f]acility" as "[a]ll contiguous land and structures, other appurtenances, and improvements on the land *used for* the storage, processing, or disposal of solid waste." (emphasis added).[77] The express authorizations of the registration and Pintail's application reveal that storage and processing will only occur on a discrete 1.16-acre area of land. Therefore, none of the remaining area within Pintail's purported 410-acre "registration boundary" can be properly designated as part of the facility, according to the applicable TCEQ definition. Regardless of the fictional registration boundary, the fact remains that there are no authorizations granted on the vast majority of the 410-acre area Pintail seeks to grandfather. Therefore, the 410-acre area cannot be grandfathered and Pintail's argument must fail.

ii. A transfer station cannot grandfather a landfill.

Additionally, processing activities cannot grandfather disposal activities. The statutory language does not support using a transfer station registration (a

[77] 30 Tex. Admin. Code § 330.3(52) (defining "facility").

processing activity) to grandfather a landfill (a disposal activity). Rather, the statute distinguishes between processing and disposal activities as well as municipal and industrial solid wastes, indicating that each activity and waste type may be regulated separately and that each is separate for purposes of grandfathering. The relevant statutes state, "The commission may not grant an application for a permit to *process or dispose* of *municipal or industrial* solid waste in an area in which the *processing or disposal* of *municipal or industrial* solid waste is prohibited by an ordinance…" (emphasis added).[78] This language, and other similar instances in the statutes, indicate that processing and disposal can be treated differently by ordinance, and are subject to separate grandfathering qualifications. Similarly, municipal waste is distinct from industrial waste. Processing activities cannot grandfather disposal activities, and (although less relevant here) municipal waste cannot grandfather industrial waste. This is the only logical reading of the statute. Indeed, an alternative interpretation would illogically allow a landfill to be grandfathered by a transfer station, or even a mere notification for a compost operation.

This reading also makes sense from an environmental safety perspective. Here, a small construction and demolition transfer station and a large Type I MSW landfill are very different propositions with very different environmental risks. A

[78] Texas Health and Safety Code §§ 363.112(d) and 364.012(f).

new Type I MSW landfill has potential to pose a much higher risk to the environment than a small C&D transfer station enclosed above grade in a concrete-based building. This is especially true in the case of Pintail, where the proposed location is a rapid recharge zone of the local water supply with the top of the water table at or near ground surface.[79] Given the extreme variance in environmental risks, a registration of a small transfer station *processing* facility should not grandfather an application to permit a large MSW landfill for *disposal*, when local governments have decided that the location is not appropriate for a landfill. Accordingly, the language of the applicable statutes distinguishes between processing and disposal activities. This indicates that a transfer station (a processing activity) cannot be used to grandfather a landfill (a disposal activity).

Additionally, the substantial differences between Pintail's transfer station registration and second landfill application negate one grandfathering the other. Just a few of the differences are outlined below:

	Transfer Station Registration	**Landfill Application**
Activity regulated	- Separate, store, and transfer construction and demolition waste[80] - All waste must be transferred to authorized disposal facility[81]	- Disposal of municipal solid waste and asbestos containing material (aka burying trash in the ground)[82]

[79] App. 12 – A New Pintail Landfill Application is Prohibited, p. 10.
[80] App. 3 – Transfer Station Documents (3 AR 11).
[81] App. 3 – Transfer Station Documents (3 AR 11).

Capacity	94 tons per day or 100 tons within 72 hours[83]	1,500 tons per day; 973,934 tons per year; 44,000,000 tons over facility's lifetime.[84]
Footprint[85]	50,600 square feet or 1.16 acres[86]	410 acres, although 223 acres are actively used for disposal[87]
Administrative Process	Allows for public meeting, but no contested case hearing[88]	Public meeting and opportunity for contested case hearing[89]
Decision Maker	Executive Director can issue registration without TCEQ Commissioner's vote[90]	TCEQ Commissioners[91]

TCEQ Commissioners recently discussed this very issue on a different petition filed by Pintail with TCEQ related to the same site. On May 26, 2017, Pintail filed a Petition for Contested Case Hearing on Regulatory Takings with TCEQ alleging that TCEQ's denial of the second landfill application constituted a regulatory takings.[92] On October 4, 2017, TCEQ Commissioners considered Pintail's request.[93]

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[82] App. 4 – Pintail Landfill Permit Application (1 AR 1), p. I-3.
[83] App. 3 – Transfer Station Documents (3 AR 11).
[84] App. 4 – Pintail Landfill Permit Application (1 AR 1), p. I-3.
[85] *See* App. 19 – Site Layout Plan from Pintail's second application showing the transfer station versus the landfill foot print.
[86] *See* App. 3 – Transfer Station Documents, Attachment H (3 AR 11).
[87] App. 4 – Pintail Landfill Permit Application (1 AR 1), p. I-2.
[88] 30 Tex. Admin. Code §50.139(b).
[89] 30 Tex. Admin. Code, Chapter 55, Subchapter F.
[90] 30 Tex. Admin Code §330.9.
[91] Tex. Health & Safety Code 361.089.
[92] CALH asks the Court to take judicial notice of Cause No. D-1-GN-17-006103, styled Pintail Landfill LLC v. Texas Commission on Environmental Quality, in the 261st District Court of Travis County, Texas (hereinafter "Pintail's Takings Lawsuit).
[93] *Id*. at ¶6. CALH asks the Court to take judicial notice of the public meeting held by TCEQ on October 4, 2017 available at http://www.texasadmin.com/tx/tceq/agenda_meeting/20171004/. For the convenience of the Court, CALH has included a transcript of Item 3 in Appendix 11.

The basis for Pintail's regulatory takings claim was that "[i]n considering Pintail's [second] Application, the Executive Director issued a new policy and guidance determining the Commission could not process an MSW application for a site that was on its face subject to a local ordinance prohibiting the location of a landfill at its proposed site."[94] During that hearing, counsel for the Executive Director noted that the return of the second application was not an action based on a new policy, but instead was an action consistent with state law.[95] Pintail was not deterred and continued to argue that the decision to not allow Pintail's transfer station to grandfather a landfill was a new policy.[96]

The Commissioners rejected Pintail's argument and noted the concern about one type of facility potentially grandfathering a different type of facility. Specifically, Chairman Shaw stated, "[I]f you look at those different authorizations within Chapter 361, would that not also include, I believe even pet cemeteries are in Chapter 361, certainly recycling centers are covered there as well as hazardous waste landfills. Would we not be then faced with the same argument that by having a recycling center or pet cemetery, that that would therefore hold that space for a hazardous waste landfill to go in it at that site? Do you see? That sort of takes the extreme of where this could go if we conclude that was what the Legislature

[94] App. 11 – Transcription, at 4:15-21.
[95] App. 11 – Transcription, at 4:22-5:3.
[96] App. 11 – Transcription, at 10:2-9.

intended."[97]

Along the same lines, Commissioner Baker stated, "I can't imagine the outcry if we were to take the interpretation that we heard today with Chapter 361 and then apply that going forward. The precedent that that would set would be – it would open the door – imagine how many MSW sites or hazardous waste sites that would come on line because a recycling facility is located there, a citizen's collections facility is located there or a pet cemetery is located there… I don't think that when the Legislature wrote that that that was the intent."[98] This was the position of all three commissioners, and they voted unanimously to reject Pintail's request.[99]

iii. Legislative intent negates Pintail's position.

To maintain fairness, the Texas Legislature only allows counties and cities to pass siting ordinances to restricting locations of MSW processing or disposal as to applications filed after enactment of the ordinance. As discussed above, the statutory language does not support grandfathering a large area for a prospective MSW landfill with an authorization for a transfer station on a much smaller area.[100] This is consistent with the legislative intent of the applicable statutes. Legislative

[97] App. 11 – Transcription, at 12:9-21.
[98] App. 11 – Transcription, at 16:14-25.
[99] App. 11 – Transcription, at 17:7-21.
[100] *See* App. 19 – Site Layout Plan from Pintail's second application showing the area for the transfer station compared to the landfill foot print.

intent indicates that areas where permits or authorizations are issued are only grandfathered if they were pending or issued, respectively, before enactment of a siting ordinance prohibiting the relevant waste activity in that area. Indeed, legislative history indicates that the intent of the provision is as follows:

> [The grandfathering provision] would stop cities and counties from enacting ordinances in response to proposed landfills after the applicants have spent millions of dollars on their applications. It is unfair for a landfill applicant to buy or option land, spend millions of dollars for engineering studies and applications, and then be barred from a site one month before opening it because a city or county has passed an ordinance to stop the application. […]
>
> [The grandfathering provision] would continue to allow city and county ordinances to prohibit landfills in certain areas but would limit the application of those ordinances to permit applications filed with [TCEQ] *after* the ordinances took effect.[101]

Presumably, the Legislature was acting to address circumstances in which a developer purchased a proposed site and did all the engineering and legal work only to be thwarted by a local siting ordinance enacted right before the permit was to be granted.[102] Pintail, however, is in a completely different situation. It had its chance, but through sloppy work and dilatory tactics, Pintail blew that chance. This is consistent with the statements made by legal counsel for TCEQ at the infamous

[101] App. 14 – House Research Organization, Bill Analysis of SB 486, May 19, 1999 at 3.

[102] *TSP Dev. Ltd. v. Texas Nat. Resource Conservation Comm'n*, 16 S.W.3d 148 (Tex. App.__ Austin 2000); *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50 (Tex. 2006).

Travis County Commissioners Meeting, which were quoted above.[103] A placeholder only exists for a particular application and Pintail lost its place in line when its first application was returned as deficient.

For fairness purposes, an applicant is only held to the law in place when the application is filed. However, that fairness does not extend to allow indefinite bites at the apple no matter how bad the applicant and how poor the site. As such, it was not arbitrary or capricious for the Executive Director and TCEQ to return Pintail's second application.

iv. Policy Considerations further supported the Defendants' decision to return Pintail's second application.

Allowing Pintail to improperly grandfather a landfill would set a bad precedent that would have negative ramifications beyond Pintail's application. Three examples of the adverse impacts such a decision would cause are: (1) It would encourage applicants to utilize sham registrations or even notifications to thwart local siting ordinances; (2) It would result in repeated waste of staff resources reviewing applications for facilities that are not intended to be constructed, but rather, are filed only to defeat local ordinances; and (3) It would repeatedly and unnecessarily place TCEQ directly at odds with local governments.

"Absent evidence that the Commission is disregarding the plain language of

[103] *Supra* I(B) [note 48].

its rules, [courts] look to its expertise in calibrating various policy considerations. The agency responsible for regulating an industry must be afforded sufficient flexibility to determine and carry out its clear legislative mandate."[104] Here, the above articulated policy considerations support Defendants' decision and confirm that they did not act arbitrarily or capriciously.

Here, we know Pintail's transfer station registration application was a sham application designed to circumvent the impending Waller County Ordinance 2011-001. Allowing Pintail to improperly use its sham application for a transfer station registration to grandfather a landfill would encourage more sham applications.[105] Under such a precedent, applicants would be incentivized to try to circumvent local siting ordinances by submitting requests for permits, registrations, and notifications that are nothing more than a sham.

Furthermore, an increase in sham applications like Pintail's would result in measurable harm to TCEQ, legitimate applicants, taxpayers, and citizens of Texas, because sham applications waste TCEQ resources. If sham applications are allowed to avoid local ordinances, TCEQ staff would be required to spend countless hours reviewing the sham applications, communicating deficiencies with applicants, organizing and attending public meetings, and managing all other

[104] *Bexar Metro. Water Dist. v. Tex. Comm'n on Envtl. Quality*, 185 S.W.3d 546, 550-551(Tex. App.—Austin 2006).
[105] *See* App. 19 – Site Layout Plan from Pintail's second application showing the area for the transfer station compared to the landfill foot print.

actions required to review and approve the sham applications. This would result in a significant waste of the limited tax dollars allocated to fund TCEQ activities. This would also take TCEQ resources away from important jobs, such as reviewing legitimate applications, thus delaying the issuance of permits. The increased workload would also take away resources needed to protect the environment of Texas. Encouraging such a waste of TCEQ resources is bad policy, and serves as a reasonable basis for TCEQ and the Executive Director's decision to return the second application.

For all the above reasons, when Pintail's second application was returned, the Defendants did not act in violation of a constitutional or statutory provision, did not act in excess of their statutory authority, did not implement unlawful procedure, had substantial evidence to support their decision, and did not act arbitrarily or capriciously.

C. ISSUE 2 – Defendants did not act arbitrarily or capriciously when it determined the City of Hempstead and Waller County Ordinances applied to the proposed Pintail site (Responsive to Pintail's Issues 2(A) and 2(B)).

In Pintail's second issue, Pintail attempts to argue that its proposed facility is not prohibited by the City and County's ordinances. This argument is easily defeated based on the plain language of the ordinances themselves. However, if there was any doubt, the City specifically stated its understanding that its ordinance

prohibited the second landfill application during the technical review of Pintail's second application.

1. The City's interpretation of its own ordinance is entitled to deference.

City ordinances are properly interpreted using the same rules of construction applicable to statutes.[106] The objective in construing a municipal ordinance is to discern and give effect to the intent of the city council.[107] In making this determination, one looks first to the plain meaning of the words of the ordinance.[108] In doing so, however, one must consider the ordinance as a whole, and must not give one provision a meaning that is inconsistent or out of harmony with other provisions, even if it might be susceptible to such construction standing alone.[109]

Moreover, "[t]o enforce the plain language of the ordinance does not authorize [one] to employ a 'bloodless literalism in which text is viewed as if it had no context.'"[110] To the contrary, in construing an ordinance, whether or not it is ambiguous on its face, one should consider, among other things: 1) statutes and

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[106] *Lira v. Greater Houston German Shepherd Dog Rescue, Inc.*, 488 S.W.3d 300, 304 (Tex. April 1, 2016); *Bd. of Adjustment of San Antonio v. Wende*, 92 S.W.3d 424, 430 (Tex. 2002).
[107] *Lira*, 488 S.W.3d at 304; *Wende*, 92 S.W.3d at 430; *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999) ("It is a cardinal rule of statutory construction that we are to give effect to the intent of the Legislature.").
[108] *Wende*, 92 S.W.3d at 430; *Lira*, 488 S.W.3d at 304 ("When possible, we discern [the] intent [of the enacting body] from the plain meaning of the words chosen.").
[109] *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001); *Lira*, 488 S.W.3d at 304; *Wende*, 92 S.W.3d at 430.
[110] *City of Laredo v. Villarreal*, 81 S.W.3d 865, 868 (Tex. App.—San Antonio 2002, no pet.) (quoting *West Anderson Plaza v. Feyznia*, 876 S.W.2d 528, 532 (Tex. App.—Austin 1994, no writ).

other laws on the same or similar subjects; 2) legislative history; and 3) the circumstances under which the ordinance was passed.[111]

In addition, a city's interpretation of its own ordinance is entitled to deference.[112] Indeed, a city's construction need not even be the "best" construction, as long as the ordinance "can reasonably be read in the manner the [city] has chosen to interpret it."[113]

Here, there is no doubt that the City interpreted its ordinance as applying to the second application. On July 18, 2016, the City, through its attorneys, informed TCEQ of its interpretation.[114] Pintail has cited no authority to this Court for why the Court and TCEQ should have disregarded the City's own interpretation of its

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[111] *Villarreal*, 81 S.W.3d at 868; Tex. Gov't Code Ann. § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision."); *id*. § 312.005 ("In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.").

[112] *Howeth Invs., Inc. v. City of Hedwig Vill.*, 259 S.W.3d 877, 907 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) ("Courts will generally defer to the interpretation of the agency, like the [City Planning and Zoning] Commission, charged with enforcing an ordinance when that interpretation is reasonable."); *SWZ, Inc. v. Board of Adjustment*, 985 S.W.2d 268, 270 (Tex. App.—Fort Worth 1999, pet denied) (finding contemporaneous construction of an ordinance by municipal body charged with its enforcement entitled to serious consideration); *Texans to Save the Capitol, Inc. v. Bd. of Adjust. of the City of Austin*, 647 S.W.2d 773, 773 (Tex. App.—Austin 1983, writ ref'd n.r.e.); *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 175 (5th Cir. 1996) (finding city council interpretation of law that council was charged with enforcing cloaked with presumption of validity and giving it much deference).

[113] *See Tennessee Gas Pipeline Co. v. Rylander*, 80 S.W.3d 200, 205 (Tex. App.—Austin 2002, pet. denied); *City of Plano v. Public Util. Comm'n*, 953 S.W.2d 416, 421 (Tex. App.—Austin 1997, no writ.).

[114] 1 AR 4.

ordinance.

2. Application of the rules of construction to the city ordinance supports TCEQ's position that the second application is barred.

The City enacted the City Ordinance pursuant to statutory authority under Section 363.112 of the Texas Health and Safety Code, which expressly empowers city councils to pass ordinances designating where landfills should and should not be sited within their cities and ETJ.[115] The City was strongly guided by the language in Section 363.112, as well as the legislative history of Section 363.112.

i. The City Ordinance Designates the Areas Where Processing Is Allowed and, Thus, Where It Is Prohibited.

Subsection (a) of Section 363.112 provides that, "[t]o prohibit the processing or disposal of municipal or industrial solid waste in certain areas of a municipality," a city council "must by ordinance specifically designate the area of the municipality … in which the disposal of municipal or industrial solid waste will not be prohibited."[116]

In compliance with Subsection (a), the City ordinance provides that "[s]olid waste may be processed and disposed" in areas "located at least 5280 feet from" the following roadways and sensitive receptors:

(1) residences;

[115] Tex. Health & Safety Code Ann. § 363.112.
[116] *Id.* § 363.112(a).

(2) rights-of-way of an Interstate highway;

(3) rights-of-way of an U.S. highway;

(4) rights-of-way of a Texas highway;

(5) rights-of-way of a Texas Farm to Market road; and

(6) a public or private water well where the water is being used as a source for potable water.[117]

The Ordinance expressly provides that the "[p]rocessing and disposal of solid waste in areas not meeting" these requirements is prohibited.[118]

As previously discussed, it is undisputed that the Pintail site does ***not*** fall within the areas designated by the City Ordinance for the processing and disposal of industrial or municipal solid waste. In other words, Pintail does not contend that its proposed location is more than 5280 feet from the roadways and sensitive receptors listed in the City Ordinance.

ii. The City Ordinance Contains An Exemption for Pending Applications and Existing Permits.

Subsection (c) of Section 363.112 of the Health and Safety Code requires that pending applications and existing permits be exempted from local siting ordinances. Specifically, Subsection (c) provides that a city council "may not prohibit the processing or disposal of municipal or industrial solid waste in an area

[117] App. 7 – City of Hempstead Ordinance, § 3(A).
[118] App. 7 – City of Hempstead Ordinance, § 2.

… for which:

(1) an application for a permit … has been filed with and is pending before [TCEQ]; or

(2) a permit … has been issued by [TCEQ]."[119]

As discussed above, Subsection (c) was added by the legislature in 1999. The legislative history for the bill that added Subsection (c) makes it clear that the legislature's intent in doing so was to limit the applicability of local siting ordinances to permit applications filed with TCEQ ***after*** the effective date of the ordinance at issue.

Importantly, Subsection (d) of Section 363.112 provides that TCEQ "***may not grant an application*** for a permit to process or dispose of municipal or industrial solid waste in an area in which the processing or disposal of municipal or industrial solid waste is prohibited by an ordinance or order authorized by Subsection (a), ***unless the governing body of the municipality or county violated Subsection (c) in passing the ordinance or order***."[120]

Therefore, to avoid violating Subsection (c) of Section 363.112, the City included a provision in the Ordinance that mirrored the language of that statutory provision.[121] The City Ordinance, thus, states that it does not apply to areas for

[119] *Id*. § 363.112(c).
[120] Tex. Health & Safety Code Ann. § 363.112(d) (emphasis added).
[121] App. 18 – Kelly Hart Letter to the Executive Director dated July 18, 2016.

which:

1) "a ***pending application*** for a solid waste permit … has been filed with and declared administratively complete by the [TCEQ];" [or]

2) "a solid waste ***permit*** … has been **issued** by [TCEQ]…."[122]

The City's intent in including this language was to avoid violating Subsection (c) of Section 363.112.[123] Furthermore, in choosing this language for the City Ordinance, the City's intent was the same as the legislature's intent when it chose the language for Subsection (c) of Section 363.112 – *i.e.*, to prohibit the processing and disposal of waste in certain areas but to limit the effect of that prohibition "***to permit applications filed … after the ordinances took effect***."[124]

The City's interpretation of its own Ordinance is reasonable and entitled to deference. Pintail's interpretation on the other hand is illogical and not supported by any statute or case law. As such, it was not arbitrary and capricious for TCEQ to reject this argument and return Pintail's second application.

3. The County's Ordinance likewise prohibits Pintail's proposed facility.

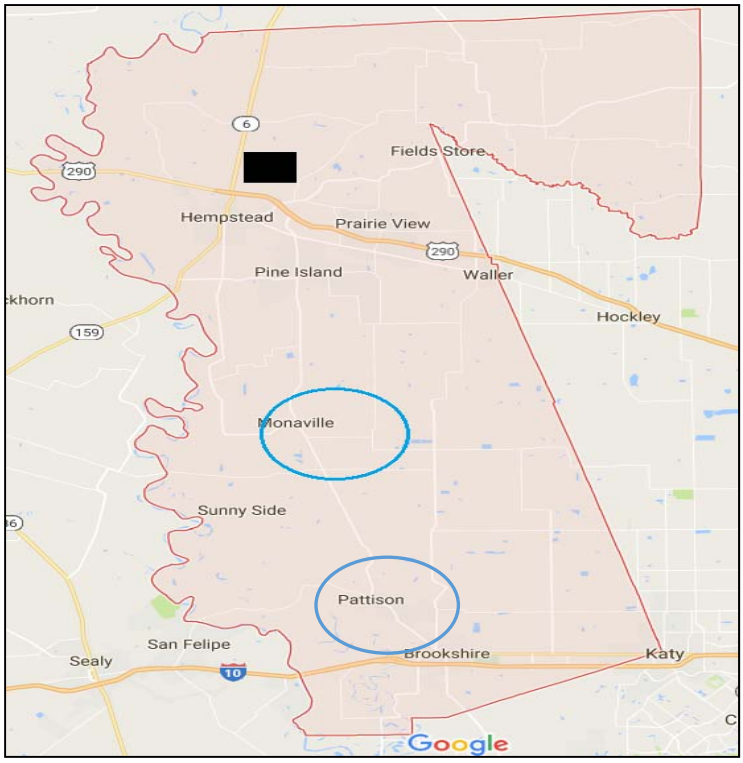
Pintail's interpretation related to the County's ordinance is likewise faulty. The County ordinance was adopted pursuant to Texas Health & Safety Code

[122] City Ordinance, § 2 (emphasis added).
[123] App. 18 – Kelly Hart Letter to the Executive Director dated July 18, 2016.
[124] *See* House Research Organization, Bill Analysis of SB 486 (May 19, 1999) at 3 (emphasis added).

Sections 363.112 and 364.012.[125] The County ordinance provides that "disposal of solid waste is not prohibited in … Any area within a two (2) mile radius of any privately owned solid waste disposal site holding a currently or previously valid permit for municipal or solid waste disposal issued by the Texas Commission on Environmental Quality … as of the date of adoption of this Ordinance, but not afterwards."[126] The ordinance further provided that "unless an area is specifically designated as an area where municipal or solid waste disposal is not prohibited… disposal of municipal or solid waste disposal in Waller County is prohibited."[127]

The existence of currently or previously valid landfill permits is easily determined by a search of TCEQ records. It was common knowledge that two privately owned landfill facilities within Waller County were permitted in the Monaville and Pattison areas. Pintail's proposed facility was miles away from the permissible area, as noted on the below demonstrative by way of the black box just north of the City of Hempstead, showing the proposed Pintail site, and the blue circle showing the approximate permissible location for a landfill facility.

[125] App. 6 – Waller County Ordinance. Section 364.012 is substantially similar to 363.112, with the main difference being that it applies to counties as opposed to cities.
[126] App. 6 – Waller County Ordinance.
[127] App. 6 – Waller County Ordinance.



Another interesting thing to note is that the Waller County ordinance does not even address transfer stations. Instead, it is aimed at municipal or solid waste disposal. It is therefore impossible for a transfer station registration to grandfather or else authorize a landfill for an area not specifically authorized by the explicit language of the County ordinance.

Because Pintail's proposed facility was not located within an authorized area under the Waller County ordinance, which was enacted years before the second application, it was not an abuse of discretion for TCEQ or the Executive Director to return Pintail's second application.

For all the above reasons, when Pintail's second application was returned, the Defendants did not act in violation of a constitutional or statutory provision,

did not act in excess of their statutory authority, did not implement unlawful procedure, had substantial evidence to support their decision, and did not act arbitrarily or capriciously.

D. ISSUE 3 – Defendants did not act arbitrarily or capriciously when they refused to determine the validity of local ordinances (Responsive to Pintail's Issue 3).

In its Issue 3, Pintail argued that the Executive Director erred in considering the City and County ordinances when those ordinances do not have a metes and bounds description. This is just another way of arguing that the Executive Director should have declared the City and County ordinances invalid, ignored them, and continued processing Pintail's second application. However, this position fabricates requirements not found in the Health and Safety Code or any regulation. Further, Pintail's arguments address the validity of the ordinance, which is not a decision the Executive Director or TCEQ is authorized to make.

The Defendants did not act arbitrarily or capriciously in returning Pintail's second application because, contrary to Pintail's argument, no statute or regulation requires landfill siting ordinances to have a metes and bounds description. Specifically, Section 363.112(a) of the Texas Health and Safety Code states that "to prohibit the processing or disposal of municipal or industrial solid waste in certain areas of a municipality or county, the governing body of the municipality or county must by ordinance or order *specifically designate the area* of the

municipality or county, as appropriate, in which the disposal of municipal or industrial solid waste will not be prohibited." Nowhere within this section did the Legislature use the words "metes and bounds," and Pintail cannot identify any regulation that uses the words "metes and bounds" on this issue either.

Here, the Court must take Section 363.112 as she finds it, and it would not be appropriate for the Court or Defendants to rewrite the Legislature's text. This is because courts "must presume the Legislature 'chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.'"[128]The Legislature certainly knows how to use the words "metes and bounds" when it deems it so necessary.[129] Likewise, TCEQ rules have specifically used the words "metes and bounds" when those words were necessary.[130] However, here, neither the Legislature nor TCEQ chose to use those words. As such, Pintail's argument that a city or county must use a metes and bounds description is without merit.

Furthermore, by this point of error, Pintail demands Defendants to act outside their jurisdiction. Section 363.112 of the Texas Health and Safety Code

[128] *Cadena Commercial USA Corp. v. Tex. Alcoholic Bev. Comm'n*, 518 S.W.3d 318, 325-326 (Tex. 2017).
[129] *See, e.g.*, Tex. Health & Safety Code 282.005, 286.022, and 775.013 (requiring petitions for special districts to contain metes and bounds descriptions)
[130] *See, e.g.*, 30 Tex. Admin. Code §326.71 (requiring a registration application to contain maps showing facility access and facility layout, including metes and bounds description).

grants TCEQ limited authority regarding the City and County Ordinances. Specifically, the statute provides:

> [TCEQ] may not grant an application for a permit to process or dispose of municipal or industrial solid waste in an area in which the processing or disposal of municipal or industrial solid waste is prohibited by an ordinance or order authorized by Subsection (a), ***unless the governing body of the municipality or county violated Subsection (c) in passing the ordinance*** or order. The commission by rule may establish procedures ***for determining whether an application is for the processing or disposal of municipal or industrial solid waste in an area for which that processing or disposal is prohibited by an ordinance*** or order.[131]

The statute, therefore, authorizes TCEQ to make two determinations, discussed below, with regard to the City and County's siting ordinances:

> First, does Pintail's second application seek to dispose of municipal solid waste in an area for which that disposal is not authorized by the City or County ordinances?
>
> Second, did the City or County violate Subsection (c) of Section 363.112 by prohibiting the disposal of municipal solid waste in an area for which an application for a permit had been filed and was pending before TCEQ?

The answer to the first question is "Yes." Pintail's second application seeks to dispose of MSW in an area not authorized by the City and County ordinances. As TCEQ has already correctly opined, the City ordinance bars applications filed after the enactment of the City ordinance from seeking to process or dispose of MSW in the area identified by Pintail. Pintail has never argued that the area that is

[131] Tex. Health & Safety Code Ann. § 363.112(d) (emphasis added).

the subject of its second application is not within the area prohibited by the City Ordinance – *i.e.*, within 5280 feet of certain roadways and sensitive receptors. Instead, Pintail argues that the prohibition is too comprehensive in scope, asserting that the ordinances "completely prohibit solid waste disposal."[132]

In the first instance, neither the City nor the County are here to defend their ordinances. As to the County, that statement is just wrong. As discussed above, according to public knowledge within the County, there were two sites that qualified as the marker for the two mile radius. Nevertheless, the appropriate forum to determine the validity of either ordinance is in a court of law in Waller County and not at TCEQ. Further, once Pintail admitted the ordinances' prohibitions cover the area of its proposed facility, TCEQ's analysis of this question was over.

The Answer to the Second Question is "No." The City and County did not violate Subsection (c) of Section 363.112. Subsection (d) of Section 363.112 provides that TCEQ may not grant an application for a landfill permit in an area in which a local siting ordinance prohibits the processing or disposal of municipal solid waste "unless the governing body of the municipality or county violated Subsection (c) in passing the ordinance."[133] Here, both ordinances were passed

[132] Pintail's Initial Brief on the Merits, p. 47.
[133] *Id.*

well before Pintail's second application was filed, and therefore, neither the City nor the County violated Subsection (c).

Furthermore, outside of the two questions above, Section 363.112 does not authorize TCEQ to decide that an ordinance is invalid or to otherwise disregard an ordinance on grounds other than noncompliance with Subsection (c). The appropriate path for seeking to have the City or County ordinance declared invalid is in a court of law in Waller County.

The Texas Uniform Declaratory Judgment Act provides that:

> A person … whose rights, status, or other legal relations are affected by a statute [or] municipal ordinance … may have determined any question of construction or validity arising under the … statute [or] ordinance … and obtain a declaration of rights, status, or other legal relations thereunder.[134]

Mandatory venue for a lawsuit to declare a city or county ordinance unconstitutional or otherwise invalid is in the district court for the county in which the city or county is located.[135] Unlike a district court, however, TCEQ has no authority to declare a city ordinance to be unconstitutional or otherwise invalid.

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[134] Tex. Civ. Prac. & Rem. Code Ann. § 37.004; *see Supermercado Teloloapan, Inc. v. City o*f Houston, 246 S.W.3d 272, 275 n.2 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding that district court had jurisdiction under the Declaratory Judgment Act to construe a city ordinance that purported to bar the issuance of a liquor license by a state agency).

[135] Tex. Civ. Prac. & Rem. Code Ann. § 37.006 (providing that, in any proceeding that involves the validity of a municipal ordinance, the municipality must be made a party); Tex. Civ. Prac. & Rem. Code Ann. § 15.0151 (providing that a suit against a municipality located in a county with a population of 100,000 or less (which includes Waller County) must be brought in the county in which the municipality is located).

In fact, the Texas Supreme Court has specifically held that administrative agencies lack the power to decide constitutional issues.[136] Moreover, while "Texas district courts are courts of general jurisdiction and are presumed to have subject matter jurisdiction over all claims unless a contrary showing is made"[137] there is no such presumption regarding the authority of administrative agencies to resolve disputes.[138] Rather, administrative agencies "'may exercise only those powers the law, in clear and express statutory language, confers upon them.'"[139]

Here, Section 363.112 provides the scope of TCEQ's inquiry regarding local landfill siting ordinances: TCEQ may issue a landfill permit despite the existence of a local siting ordinance ***only if*** the ordinance is not compliant with Subsection (c) or does not cover the area of the proposed landfill site. Otherwise, the bar created by the ordinance is absolute, and TCEQ may not issue the permit. Unlike a court, TCEQ is simply not authorized to declare a local ordinance unconstitutional

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[136] *City of Dallas v. Stewart*, 361 S.W.3d 562, 568 (Tex. 2012); *Central Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex. 1997) (holding that constitutional claims need not be brought before an agency because "the agency lacks the authority to decide [those] issue[s]"); 1 Ronald L. Beal, Texas Administrative Practice & Procedure § 9.3.1[c] (2011) ("No Texas agency has been granted the power to engage in constitutional construction, and any such attempt by the legislature to vest such power would raise serious and grave issues of a separation of powers violation."); *see also Mitz v. Texas State Board of Veterinary Medicine*, 278 S.W.3d 17, 22-25 (Tex. 2008) (holding that though statute gave administrative agency jurisdiction to administer the statute and determine whether the statute had been violated, the agency did not have jurisdiction to declare that part of the statute was unconstitutional); *Juliff Gardens, LLC v. Tex. Comm'n on Env'l Qual.*, 131 S.W.3d 271, 278-80 (Tex. App.—Austin 2004, no pet.) (same as *Mitz*).

[137] *Mitz*, 278 S.W.3d at 22 (citing *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000)).

[138] *Id.*

[139] *Id.* (quoting *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002)).

or invalid on any other ground. TCEQ can only consider the applicability, and Texas law is clear that both ordinances are and remain presumptively valid until proved otherwise.[140]

Whether the City or County's ordinances are invalid, is likewise not a question for this Court. First, while Pintail argues about the validity of those ordinances, Pintail has not sought declaratory relief in this action. Second, under Tex. Civ. Prac. & Rem. Code §37.006, "when declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties."

Even if Pintail had requested declaratory relief, neither the City nor County are parties to this action. If an adjudication of the City and County's ordinances were to proceed, the City and County are truly indispensable parties. It is fundamental error to proceed on adjudicating the validity of the ordinances without their presence, and the court would have to dismiss that cause of action.[141]

Defendants did not act arbitrarily or capriciously in refusing to declare the City's and County's ordinances invalid because of non-existent statutory requirements. Indeed, doing so would have exceeded their authority. Furthermore, when Pintail's second application was returned, the Defendants did not act in violation of a constitutional or statutory provision, did not act in excess of their

[140] *TSP Dev. Ltd.,* 16 S.W.3d at 153.
[141] *See Vondy v. Commissioners Ct.,* 620 S.W.2d 104, 106 (Tex. 1981) and Tex. R. Civ. P. 39(b).

statutory authority, did not implement unlawful procedure, and had substantial evidence to support their decision.

E. Issue 4 – Defendants did not act arbitrarily or capriciously in returning Pintail's second landfill application because its decision was not based on any policy revisions, and its decision did not constitute rulemaking (Responsive to Pintail's Issues 4, 5, 6, and 7).

In Pintail's final four issues, Pintail argues that the Executive Director 1) changed "longstanding" policies without going through the rule making process and 2) that the Executive Director's revised policies violate Section 363.112. Both of these arguments fail because they completely lack foundation.

In the first instance, Pintail failed to identify any official document containing what they contend is the Executor Director's policy. As discussed above, there is no rule or statute that requires a local government to include a metes and bounds description.

The only document Pintail relies on to support its claim of Executive Director policy, is an unverified transcript of an alleged Travis County Commissioners meeting.[142] The administrative record does not contain a video or audio recording of the alleged meeting, and the link listed on the "transcript" itself does not even work. The "transcript" was not prepared by a certified court reporter, and there was no authentication by whoever performed the transcription that it was a true and accurate transcript of the proceeding that allegedly took place. In fact,

[142] Referred to above as the "infamous Travis County Commissioners Court Meeting."

the last page of the "transcript" states "This Closed Caption log is not an official record the [sic] Commissioners Court Meeting and cannot be relied on for official purposes." Thus, this transcript is unreliable and lacks probative value. An additional problem with the statements Pintail relies on within the "transcript" is the fact that Pintail has failed to cite to any authority supporting the premise that a staff attorney's statements to Travis County about a Travis County ordinance could somehow be binding on the Executive Director or TCEQ.

The existence of an identifiable rule or policy is fundamental to Pintail's ability to challenge a "change to the long standing interpretation." Because Pintail cannot pinpoint the alleged "long standing interpretation" outside of a questionable transcript from an alleged Travis County Commissioners Court meeting, Pintail's Issues 4-7 fail.

However, even if Pintail had identified TCEQ policy to include the requirement of a metes and bounds description in local siting ordinances, a "long-standing interpretation" that is not properly promulgated under mandatory APA procedures is invalid.[143] It is completely inconsistent to argue that this "long-standing interpretation" carries the weight and authority of a rule when the rule-making process was not followed, and then argue a change to the "long-standing interpretation" must follow the rule-making process.

[143] *See El Paso Hosp. Dist. v. Texas Health & Human Servs. Comm'n,* 247 S.W.3d 709, 714 (Tex. 2008).

Under Section 2001.003 of the Texas Government Code, a "rule" is a "state agency statement of general applicability that: i) implements, interprets, or prescribes law or policy; or ii) describes the procedure or practice requirements of a state agency; … and does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures." Additionally, the Texas Supreme Court has held that "[n]ot every statement by an administrative agency is a rule for which the APA prescribes procedures for adoption and judicial review…. [T]he APA applies only to statements of generally applicability that implement, interpret or prescribe law or policy."[144]

When the transcript is read in context, it is apparent the staff attorney was asked to attend the meeting to offer suggestions to the Travis County Commissioners Court related to changes they were considering to their existing siting ordinance. These comments were NOT made at a TCEQ meeting, or at least Pintail failed to point to any evidence that would suggest it was. It is also interesting to note that if Pintail is accurate on its interpretation of policy, then Travis County has completely disregarded that policy when its current siting ordinance does not contain a metes and bounds description. [145]

[144] *Texas Education Agency v. Leeper*, 893 S.W.2d 432, 443 (Tex. 1994).
[145] App. 15 – Travis County siting ordinance, also available at https://www.traviscountytx.gov/images/commissioners_court/Doc/county-code/chapter-62.pdf

It's illogical for the agency to pronounce policy at a third party meeting considering a particular ordinance. The entire concept of rule-making is to provide an open process with public knowledge and participation. If the agency were allowed to proclaim policies at random meetings, neither the public nor industry would have a reliable way to determine what all policies existed. In essence, to determine applicable policies, the public would have to attend every single meeting of a city council, commissioners court, or other governmental body who requested a TCEQ representative, along with every public meeting on a solid waste application, in order to determine what policies existed and any changes to those policies.

This position is completely contrary to the Administrative Procedures Act, which requires agencies, such as TCEQ, to adopt rules of practice stating the nature and requirements of all available formal and informal procedures, and to make all rules and other written statements of policy or interpretation that are prepared, adopted, or used by the agency in discharge of its functions available for public inspection.[146]

Because there was no policy or long standing interpretation requiring a metes and bounds description in local siting ordinances, there could not have been

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(last visited 11/30/2017). CALH asks the Court to take judicial notice of Travis County's current siting ordinance.

[146] Tex. Gov't Code 2001.004.

a revision to that policy or interpretation. Furthermore, the TCEQ and Executive Director's conduct did not violate or conflict with the plain language of §363.112 or §364.012.

For all these reasons, the Executive Director and TCEQ did not act arbitrarily or capriciously in returning Pintail's second landfill application because its decision was not based on any policy revisions, and its decision did not constitute rulemaking, or otherwise violate any statute. Furthermore, when Pintail's second application was returned, the Defendants did not act in violation of a constitutional or statutory provision, did not act in excess of their statutory authority, did not implement unlawful procedure, and had substantial evidence to support their decision.

PRAYER

For the foregoing reasons, CALH respectfully requests that the relief requested by Plaintiff Pintail Landfill, LLC be DENIED, that the decision of the TCEQ and Executive Director related to Pintail's second application be affirmed, and such other and further relief to which CALH may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of TEX. R. APP. P. 9.4(i)(2)(B) because it contains 13,230 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel and parties of record as set forth below on this the 1st day of December, 2017, to wit:

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