Cause No. D-1-GN-16-006192

PINTAIL LANDFILL, LLC Plaintiff, v. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, AND IN HIS OFFICIAL CAPACITY, RICHARD A. HYDE, P.E. AS TCEQ EXECUTIVE DIRECTOR, Defendants, CITIZENS AGAINST THE LANDFILL IN HEMPSTEAD Defendant-Intervenors	§ § § § § § § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 250TH JUDICIAL DISTRICT

DEFENDANT TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S RESPONSE BRIEF

KEN PAXTON
Attorney General of Texas

JEFFERY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney Gen.

JAMES E. DAVIS
Deputy Attorney General for Civil Lit.

PRISCILLA M. HUBENAK
Chief, Environmental Protection Div.

CYNTHIA WOELK
State Bar No. 21836525
cynthia.woelk@oag.texas.gov
DANIEL C. WISEMAN
State Bar No. 24042178
AMY DAVIS
State Bar No. 24082897.
NANCY ELIZABETH OLINGER
State Bar No. 15254230
Assistant Attorneys General

Office of the Attorney General
Environmental Protection Division
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0911

ATTORNEYS FOR DEFENDANT
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

December 1, 2017

IDENTITY OF PARTIES AND COUNSEL

Parties	Name and Address of Counsel
Pintail Landfill, LLC	John A. Riley jriley@kelleydrye.com Paul C. Sarahan psarahan@kelleydrye.com Allison L. Lowry alowry@kelleydrye.com KELLEY DRYE/JACKSON GILMORE & DOBBS, LLP 1115 San Jacinto Blvd. Suite 275 Austin, Texas 78701-4061 Tel: (512) 391-1720 Fax: (512) 355-1720
Texas Commission on Environmental Quality and Richard A. Hyde, P.E., in his Official Capacity as TCEQ Executive Director	Cynthia Woelk Daniel C. Wiseman Amy Davis Nancy Elizabeth Olinger Office of the Attorney General Environmental Protection Division P.O. Box 12548, MC-066 Austin, Texas 78711-2548 Tel: (512) 463-2012 Fax: (512) 320-0911

Citizens Against the Landfill in Hempstead	Michael L. Woodward mwoodward@hslawmail.com V. Blayre Peña bpena@hslawmail.com Wesley P. McGuffey wmcguffey@hslawmail.com HANCE SCARBOROUGH, LLP 400 W. 15th Street, Suite 950 Austin, Texas 78701 Tel: (512) 479-8888 Fax: (512) 482-6891

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Pages**

Statutes

Rules

STATEMENT OF THE CASE[1]

This is an appeal—ostensibly brought under Water Code section 5.351[2]—of the Texas Commission on Environmental Quality's decision to return Plaintiff Pintail Landfill, LLC's application for a landfill permit under the Texas Solid Waste Disposal Act, chapter 361 of the Texas Health and Safety Code.

ISSUES PRESENTED

1. Is the Commission's decision to return Pintail's application for a landfill permit supported by any valid legal basis?

    1a. Does the Commission have authority to invalidate local government ordinances?

    1b. To the extent it has authority to review their validity, was it error for the Commission to decline to invalidate these local government ordinances?

2. Was the Commission required to determine that this application for a landfill permit was "grandfathered" either by a prior, failed permit application or a registration for a transfer station?

3. Do Health and Safety Code sections 363.112 and 364.012 require local landfill-siting ordinances to include metes-and-bounds descriptions of the areas in which waste disposal is and is not prohibited? Did longstanding Commission policy require it?

---

[1] The Commission objects to Pintail's Statement of the Case, which is lengthy, argumentative, and "fact"-laden, contrary to Texas Rule of Appellate Procedure 38.1(d). *See* Travis Cty. Local R. 10.5 (requiring briefs to conform to appellate rules).

[2] The applicable waiver of sovereign immunity to hear a challenge to a landfill-permitting decision under the Solid Waste Disposal Act (Texas Health & Safety Code ch. 361) is not Water Code section 5.351 but Texas Health and Safety Code section 361.321.

LEGAL BACKGROUND AND STATEMENT OF FACTS

I. The Solid Waste Disposal Act

The Commission implements the Solid Waste Disposal Act, codified in chapter 361 of the Health and Safety Code (referred to herein as "the Act" or "chapter 361").[3] Chapter 361 governs activities related to the processing and disposal of municipal solid waste[4] in Texas. The Commission issues authorizations under the Act for activities and facilities ranging from animal crematoria to landfills.[5] Depending on the type of activity, the necessary chapter 361 authorization may be a permit, a registration, a permit by rule, or a notification. Different authorizations require different opportunities for public involvement. While the public must be formally notified and offered the opportunity to request a full contested-case hearing on an application for permit to construct and operate a new landfill,[6] for example, no public notice is required to

---

[3] Tex. Health & Safety Code §§ 361.001 *et seq*.

[4] Municipal solid waste, or MSW, is solid waste resulting from or incidental to municipal, community, commercial, institutional, or recreational activities, and includes garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste. Tex. Health & Safety Code § 361.003(20); 30 Tex. Admin. Code § 330.3(88).

[5] 30 Tex. Admin. Code §§ 330.7(e) (animal crematorium facilities authorized with permit by rule); 330.5(a)(1) (permit required for MSW landfill).

[6] *See* 30 Tex. Admin. Code §§ 55.1(a), .201(a).

obtain an authorization to operate a citizens' collection station.[7]

Relevant here, the Commission issues permits authorizing municipal solid waste landfills, such as the one Pintail proposed to build in this case. While the legislature has granted the Commission broad authority over such matters,[8] cities and counties also have been granted express, though limited, authority over the *siting* of municipal solid waste landfills.

II. Local governments' authority to prohibit the siting of MSW facilities

Sections 364.012 and 363.112 of the Texas Health and Safety Code[9] authorize local governments to designate where new landfills may and may not be built within their jurisdictions.[10] The two statutes differ slightly. For example, section 364.012 applies only to counties and only to the disposal of solid waste. Section 363.112 allows both counties and municipalities to prohibit the disposal and processing of solid waste within their respective jurisdictions. However, the

---

[7] 30 Tex. Admin. Code § 330.11(e).

[8] Tex. Health & Safety Code § 361.061.

[9] Copies of the two statutes are in Appendix A.

[10] Section 361.039 of the Health and Safety Code provides that chapter 361 "does not diminish or limit the authority of . . . a local government in performing the powers, functions, and duties vested in those governmental entities by other law." *See also* Tex. Health & Safety § 361.096(a) ("Except as specifically provided by this chapter, this subchapter [entitled "Permits"] does not limit the powers and duties of a local government or other political subdivision of the state as conferred by this or other law.").

provisions limiting this authority and referencing the Commission's permitting role—found in subsections 363.112(c) and (d) and 364.012(e) and (f)—are very similar.

Health and Safety Code section 363.112, applicable to both cities and counties, provides in relevant part:

> **§ 363.112. Prohibition of Processing or Disposal of Solid Waste in Certain Areas**
>
> (a) 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.
>
> . . . .
>
> (c) The governing body of a municipality or county may not prohibit the processing or disposal of municipal or industrial solid waste in an area of that municipality or county for which:
>
> (1) an application for a permit or other authorization under Chapter 361 has been filed with and is pending before the commission; or
>
> (2) a permit or other authorization under Chapter 361 has been issued by the commission.
>
> (d) 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 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.
>
> . . . .

Health and Safety Code section 364.012, addressing the siting authority of counties over solid waste disposal, provides in relevant part:

> **§ 364.012. Prohibiting Solid Waste Disposal in County**
>
> (a) The county may prohibit the disposal of municipal or industrial solid waste in the county if the disposal of the municipal or industrial solid waste is a threat to the public health, safety, and welfare.
>
> (b) To prohibit the disposal of municipal or industrial solid waste in a county, the commissioners court must adopt an ordinance in the general form prescribed for municipal ordinances specifically designating the area of the county in which municipal or industrial solid waste disposal is not prohibited.
>
> . . . .
>
> (e) The commissioners court of a county may not prohibit the processing or disposal of municipal or industrial solid waste in an area of that county for which:

(1) an application for a permit or other authorization under Chapter 361 has been filed with and is pending before the commission; or

(2) a permit or other authorization under Chapter 361 has been issued by the commission.

(f) 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, unless the county violated Subsection (e) in passing the ordinance. The commission by rule may specify the 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.

. . . .

Pursuant to this statutory authority, the City of Hempstead and Waller County adopted ordinances, described below, prohibiting the processing and/or disposal of solid waste in certain areas of their jurisdictions.

III. The relevant ordinances

A. City Ordinance No. 15-109

On September 8, 2015, the City of Hempstead passed Ordinance No. 15-109.[11] The City's ordinance limits the location of landfills in the City and its extraterritorial jurisdiction by prohibiting them within 5280 feet of certain features

[11] 1 AR 1, Attachment A at page A-120. A copy is in Appendix B.

such as residences, highway rights of way, and water wells used as a source for potable water.[12] Although Pintail disputes the validity of this ordinance, it is uncontested that it was adopted before Pintail filed its 2016 landfill application and that Pintail's proposed landfill site is within an area where landfills are ostensibly prohibited under the City's ordinance.

B. County Ordinance No. 2011-001

On August 26, 2011, Waller County passed Ordinance No. 2011-001.[13] The County's ordinance prohibits the disposal of municipal or solid waste in Waller County unless the disposal (1) occurs within a two mile radius of any privately-owned solid waste disposal site holding a current or previously valid permit as of the date of adoption of the ordinance, or (2) occurs at a publicly owned or operated facility within Waller County.[14] Again, although Pintail contests the validity of this ordinance, there is no dispute that it predates Pintail's 2016 landfill application or that it purports to prohibit landfills at Pintail's proposed site.

---

[12] Ordinance No. 15-109 at 6, amending Chapter 6, sec. 2 of the City of Hempstead Code of Ordinances.

[13] 1 AR 1, Attachment F at page A-56. A copy is in Appendix C.

[14] Waller County Ordinance No. 2011-001, § 2.

IV. Pintail's 2016 landfill permit application

On or shortly after June 30, 2016, Pintail filed[15] with the TCEQ Parts I and II[16] of an application for a permit to construct and operate a new municipal solid waste landfill to be located in Waller County, within the extraterritorial jurisdiction of the City of Hempstead.[17]

In response to the provision in the application form requiring the applicant to indicate whether any local ordinances prohibited the processing or disposal of solid waste at the proposed site, Pintail stated that there were none.[18] Instead, Pintail attached a memorandum from its attorneys arguing why the City and County ordinances that prohibited the landfill were invalid.[19]

The Commission's Executive Director deemed Pintail's application

---

[15] Pintail says it filed its application on July 6, 2016; the application was dated June 30, 2016. 1 AR 1. It is not important for purposes of this case whether the application was filed June 30 or July 6.

[16] An application for an MSW facility permit consists of four parts. Parts I and II of the application are generally referred to as the "land use" portion because they address whether the application is compatible with existing land uses in the area, while Parts III and IV deal with technical design and operational details. At the time Pintail filed its application, applicants were allowed to initially submit Parts I and II for a "land-use-only determination." *See generally* 30 Tex. Admin. Code §§ 330.57 *et seq.*

[17] 1 AR 1 – 2 AR 2 (2016 Application No. 2391 Parts I & II) (hereafter the "2016 Landfill Application").

[18] 1 AR 1 at page 8 of 10 (2016 Landfill Application).

[19] 1 AR 1 at pages A-1–A-11.

administratively complete[20] but stated his intention to review whether any local government's ordinances prohibited landfills at Pintail's proposed site:[21]

> This declaration does not constitute a determination on land use compatibility, including review of any local ordinance regarding siting of landfills. Rather, the Executive Director will review whether any local ordinance or order prohibits the processing or disposal of municipal solid waste in the proposed landfill area during the substantive technical review of the application.[22]

Later, during technical review,[23] the Executive Director returned the application to Pintail, stating in his December 1, 2016 letter:

> Since the City of Hempstead's and Waller County's ordinances prohibiting landfills in the proposed location were adopted before Pintail filed this application, the Commission "may not grant" Pintail's application. See Texas Health & Safety Code sections 363.112 and 364.012.[24]

Pintail filed a Motion to Overturn, asking the Commissioners to reverse the Executive Director's action.[25] The Commissioners allowed the Motion to

---

[20] 3 AR 5 (July 19, 2016 letter from TCEQ to Pintail declaring application administratively complete).

[21] Pintail's assertion that the Executive Director "agreed that Pintail would be allowed to submit a new MSW application" does not appear to have support in the record. Pintail's Initial Brief at 8. However, no prior approval is necessary to submit a landfill application.

[22] 3 AR 5 (Attachment 9 to Pintail's motion to overturn at page 1).

[23] *See* 30 Tex. Admin. Code § 281.19 (describing technical review).

[24] 3 AR 14 (notice to Pintail that the June 30, 2016 application was being returned).

[25] 3 AR 15 (Pintail's Motion to Overturn the Executive Director's Return of its MSW Landfill Application).

Overturn to be overruled by operation of law.[26]

In this suit for judicial review, Pintail challenges the agency's decision to return the application, contending that the City's Ordinance No. 15-109 and the County's Ordinance No. 2011-001 were invalid[27] and that the TCEQ was therefore required to continue processing its application.

Specifically, Pintail asserts, as it did below, the following grounds for invalidating the ordinances:

(1) Pintail had either pending applications or existing authorizations under chapter 361—a previous application for a landfill that was so deficient that its rejection was not appealed and a registration for a waste transfer station[28]—that it claims grandfathered the proposed landfill;

(2) the ordinances did not include an extra-statutory "metes and bounds" description;

(3) the City's ordinance failed to properly designate an area where a landfill is not prohibited, and

(4) the County's ordinance impermissibly treated publicly owned landfills differently from privately owned landfills.

---

[26] 4 AR 23 (February 28, 2017 letter from TCEQ's General Counsel).

[27] *See, e.g.*, Pintail's Initial Brief at 17, 18 (arguing ordinances did not "validly limit" agency's authority to issue permit).

[28] Pintail filed its transfer station registration application on August 1, 2011. 3 AR 15, Attachment 13 at page 6 of 7 (Pintail's Motion to Overturn the Executive Director's Return of its MSW Landfill Application). Without a contested-case hearing, the Commission issued that registration on July 23, 2013. *Id*. at page 1 of 7.

In addition, Pintail claims that the Commission—when it, in silence, declined to invalidate (or treat as invalid) these ordinances based on their lack of metes-and-bounds descriptions—both violated an alleged longstanding policy (supposedly articulated by an agency staff member during a 2005 Travis County Commissioners Court meeting) and promulgated an invalid rule.

Finally, Pintail claims that the Commission somehow articulated—in violation of the Administrative Procedure Act's rulemaking provisions and Health and Safety Code sections 363.112(c) and 364.012(e)—a new and invalid rule or policy regarding the types of chapter 361 authorizations that may serve to grandfather a subsequent landfill application.

SUMMARY OF ARGUMENT

If Pintail believed the ordinances that prohibited its proposed landfill were invalid, it should have gone to court. Not this Court, though, because this Court is not hearing a challenge to the validity of the ordinances but reviewing the Commission's decision to return Pintail's application. The only question for this Court is whether that decision may be supported by any valid legal basis. And there are many. As an initial matter, like most agencies, the Commission is not authorized to invalidate or ignore facially valid ordinances. As set out below, any expressly granted review authority the Commission has over local governments is

to determine whether a proposed landfill falls in or out of the ordinance's prohibited area.

It is not enough, then, for Pintail to point out in a memorandum to the TCEQ that the ordinances invalidly discriminate against privately owned facilities, that there is a side-agreement that prevents an otherwise applicable ordinance from applying in the city's extraterritorial jurisdiction, etc. If the Commission lacks the authority to invalidate or ignore ordinances, it did not err in declining to act *ultra vires*.

To the extent Health and Safety Code sections 362.112 and 364.012 could be read to imply some additional power on the agency, it may be that the Commission could also act to determine whether a local government violated the requirement that it grandfather existing and pending authorizations. But even if that were the case, it was reasonable for the Commission to review the ordinances, the types of authorization that Pintail identified as the grandfathers—a 2011 application for the same landfill permit that fared so poorly its return was not appealed and a 2013 transfer station registration—and find that these are not the types of authorizations that the legislature could have intended to nullify local governments' express power to control the location of landfills for its citizens.

Finally, according to Pintail, the Commission announced its official and

destined-to-be-longstanding policy regarding the need for metes-and-bounds descriptions in ordinances by sending an agency staff member to offer advice to the Travis County Commissioners Court in 2005. Two things can be said of the transcript of that Travis County meeting: (1) it contains no statement of official policy, and (2) it is a bad transcription.

On that slender reed rest Pintail's remaining points of error concerning changes in longstanding policy and promulgations of newly invalid rules. In short, the agency did not have a longstanding policy. It is entitled to handle such matters on a case-by-case basis in order to acquire sufficient expertise to make the decision possible. Nor is there a new policy. However, there is an evergreen policy that the agency must not exceed its authority by invalidating local government ordinances, which is a job for the courts.

Here, as explained in the standard of review section, the Commission's decision must be affirmed on any valid legal basis, and the plaintiff has the burden to show that it must be reversed. Pintail cannot do so, and the Commission respectfully requests that its decision be upheld.

STANDARD OF REVIEW

Pintail's incorrect citation to Texas Water Code section 5.351 notwithstanding, this suit for judicial review is authorized by Texas Health and

Safety Code section 361.321. This section provides that "[a] person affected by a ruling, order, decision, or other act of the commission may appeal the action by filing a petition in the district court of Travis County" and "the issue is whether the action is invalid, arbitrary, or unreasonable."[29] This standard incorporates the "substantial evidence" scope of review codified in the Administrative Procedure Act, Texas Government Code chapter 2001.[30]

In construing statutes, the plain meaning of the text is often the best expression of legislative intent. However, courts must also consider whether a different meaning "is apparent from the context, or . . . the plain meaning would lead to absurd or nonsensical results that the Legislature could not have intended."[31]

If there is "vagueness, ambiguity, or room for policy determinations in a statute or regulation, [courts] normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule."[32] Deference to the agency's construction "is particularly appropriate

---

[29] Tex. Health & Safety Code § 361.321(e).

[30] *Citizens Against the Landfill in Hempstead v. Tex. Comm'n on Envtl. Quality*, No. 03-14-00718-CV, 2016 WL 1566759, at *1 (Tex. App.—Austin April 13, 2016, no pet.) (mem. op.).

[31] *Id.* at *2 (*quoting City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008)).

[32] *Id.* (*citing TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011)).

when the statutes and rules at issue concern a matter within the agency's core expertise."[33]

In reviewing agency orders, courts are not bound by an agency's stated legal reasoning.[34] Instead, a reviewing court is bound to uphold an agency order on any valid legal basis supported by the record.[35]

---

[33] *Id.*

[34] *See Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984).

[35] *See, e.g.*, *Public Util. Comm'n v. Southwestern Bell Tel. Co.*, 960 S.W.2d 116, 121 (Tex. App.—Austin 1997, no pet.)

ARGUMENT

I. The Commission lacks authority to invalidate local government ordinances. (Responsive primarily to Pintail's Issue No. 1)

A. The statutes can be read to provide the Commission with some limited authority to consider municipal ordinances in connection with an application for a landfill permit.

The Executive Director returned Pintail's application because the City's and County's ordinances—both of which were adopted before Pintail filed its application on June 30, 2016—prohibited landfills at the proposed site. The Commission, without stating its reasoning, did not overturn the Executive Director's decision. Although maintaining that this was error due to the ordinances' alleged invalidity, Pintail cannot reasonably dispute that the ordinances, on their face, prohibit its proposed landfill. Instead, Pintail's complaint is that the agency was required to review and invalidate the ordinances.[36]

Although the Commission has not proffered any official interpretation or policy regarding its authority to review local governments' landfill-siting ordinances, no reasonable reading of Health and Safety Code sections 363.112 and

[36] 1 AR 1 (2016 Landfill Application). Pintail argues in its brief that the City's ordinance "does not validly limit the Commission's authority to issue a permit to Pintail at the proposed site." Pintail's Initial Brief at 17. It says the same about the County's ordinance. *Id.* at 18.

364.012 compelled the agency to exercise any authority it does have in Pintail's favor. Instead, the Commission's decision should be upheld under at least two reasonable interpretations of those statutes, both of which state the general rule that the Commission "may not grant" a landfill permit that is barred by ordinance.

First, under a strict reading of these statutes, the only authority expressly granted to the Commission is the power to determine whether the ordinance is applicable,[37] *i.e.*, whether the proposed landfill site lies within the area prohibited by the ordinance:

Tex. Health & Safety Code § 364.012

> (f) 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, unless the county violated Subsection (e) in passing the ordinance. *The commission by rule may specify the 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.*[38]

Tex. Health & Safety Code § 363.112

> (d) The commission may not grant an application for a permit

---

[37] *See TSP Development, Ltd. v. Tex. Natural Res. Conservation Comm'n*, 16 S.W.3d 148, 153 (Tex. App.—Austin 2000, no pet.) (relevant question for agency is "applicability not validity" of ordinance).

[38] Tex. Health & Safety Code § 364.012(f) (emphasis added).

> 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.*[39]

Alternatively, read as a whole, these subsections might arguably be interpreted to allow the Commission to make an additional inquiry into the ordinance's compliance with the "grandfathering" provisions in subsections (e) and (c).

Tex. Health & Safety Code § 364.012

> (f) 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, *unless the county violated Subsection (e) in passing the ordinance*. The commission by rule may specify the 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.[40]

---

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

[40] Tex. Health & Safety Code § 364.012(f) (emphasis added).

Tex. Health & Safety Code § 363.112

> (d) 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 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.[41]

Under this reading, the Commission could determine whether the local governing body complied with subsections (a) or (e) in order to know if "it may not grant" a permit the ordinance ostensibly bars. Therefore, the statutory language could also support a limited, two-step inquiry: 1) whether the proposed landfill site is in an area prohibited by ordinance, and 2) if so, whether an existing authorization or a pending application for an authorization[42] in that same area allows the agency to continue processing the application. While this second step empowers the Commission to consider Pintail's "grandfathering" argument, as explained below, that argument is itself without merit.

---

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

[42] As explained below, under the Commission's reasonable reading of subsection (c), the "permit or other authorization" for which an application has been filed and is pending or issued must relate to the same type of activity for which the permit under consideration is being sought.

B. Pintail reads the statutes to imply powers to invalidate ordinances that are more properly exercised by the courts.

Pintail attributes more authority to the Commission than the statutory language can support. Apparently it must investigate and decide all of the alleged defects asserted in Pintail's petition: whether the purported existence of side agreements regarding a city's extraterritorial jurisdiction precludes the application of an otherwise-valid ordinance, whether the governing body's distinction between public and private landfills is unconstitutional, and any other possible grounds that might render the ordinance invalid, including the existence of a garbled transcript of a TCEQ staff member's statements to the Travis County Commissioners Court.[43]

The Commission is a creature of statute and has only those powers expressly granted or necessarily implied.[44] Absent clear legislative intent, courts have been reluctant to find that agencies may invalidate laws and ordinances.[45] In

---

[43] Rather than struggling to demonstrate a conflict between the statutes and the ordinances, courts—and, presumably, agencies charged with reviewing them—must attempt to reconcile them while giving effect to the ordinance's intent. *See City of Bridge City v. State ex rel. City of Port Arthur*, 792 S.W.2d 217 (Tex. App.—Beaumont 1990, writ denied); *Nixon v. City of Houston*, 560 S.W.2d 447 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

[44] *See Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137–38 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

[45] *See, e.g.*, *Juliff Gardens, L.L.C. v. Tex. Comm'n on Envtl. Quality*, 131 S.W.3d 271, 278–79 (Tex. App.—Austin 2004, no pet.) (holding that, although permitting function is delegated to TCEQ under Solid Waste Disposal Act, courts have exclusive jurisdiction to hear

one of the rare instances where an agency's authority to overturn a local government's ordinance has been affirmed, it was on the basis of an express statutory grant of such authority:

> [The Public Utility Commission] has exclusive appellate jurisdiction to review an order or ordinance of a municipality exercising exclusive original jurisdiction under this subtitle [entitled "Commission Jurisdiction"].[46]

Nothing in Health and Safety Code sections 363.112 and 364.012 contains similar language, other than the permissive delegation of rule-making authority that is limited to the determination of whether a proposed site is located in a prohibited area. The only clear instruction to the Commission is a negative one: it "may not grant" a permit, unless the governing body violated the statute in enacting the ordinance. But it is not necessarily the case that the Commission may make even that determination—one typically reserved for the courts—and it in no way empowers the sweeping inquiry sought by Pintail.

It is well established that ordinances are properly challenged in court. According to the Texas Supreme Court, the proper construction of an ordinance is

---

challenge to constitutionality of statute in Act).

[46] Tex. Util. Code § 32.001(b); *see City of Allen v. Pub. Util. Comm'n*, 161 S.W.3d 195, 209 (Tex. App.—Austin 2005, no pet.) (upholding Public Utility Commission's order setting aside municipal ordinance as an exercise of an "enumerated" power and citing section 32.001(b)).

a question of law for the courts.[47] An ordinance, like agency orders and statutes, is presumed valid, and must be upheld if a reasonable construction will render it legal and carry out the legislative intent.[48] Adjudicating that the complained-of ordinances are invalid based on Pintail's legal memorandum would scarcely comply with these principles.

In fact, doing so could present a conflict with the statutory requirements for challenging ordinances. The UDJA expressly provides for challenges to the validity of municipal ordinances,[49] and mandates that "[i]n *any proceeding that involves the validity of a municipal ordinance* . . . , the municipality *must* be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard."[50]

Here, rather than suing the Commission, Pintail could have sought to

---

[47] *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex.1989).

[48] *See, e.g.*, *Rivera v. State*, 363 S.W.3d 660 (Tex. App. Houston [1st Dist.] 2011, no pet.); *City of Pharr v. Pena*, 853 S.W.2d 56 (Tex. App.—Corpus Christi 1993, writ denied).

[49] Tex. Civ. Prac. & Rem. Code § 37.004(a) (interested person "may have determined any question of construction or validity arising under the . . . ordinance . . . . and obtain a declaration of rights, status, or other legal relations thereunder.").

[50] Tex. Civ. Prac. & Rem. Code § 37.006(b). The Public Utility Commission's review of ordinances does not conflict with this provision, as the UDJA cannot be invoked when it would interfere with some other exclusive remedy, or some other entity's exclusive jurisdiction. *See MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 669 (Tex. 2009).

invalidate the ordinances by bringing Uniform Declaratory Judgments Act claims against the City and County in Waller County district court.[51]

In any event, even if Pintail were correct that the Commission has authority to invalidate the ordinances on its asserted bases, it properly exercised that authority in declining to invalidate them, given their presumption of validity and the deference due to such agency determinations.

C. The applicability of the County's ordinance

Pintail also argues that the TCEQ should have ignored the County's ordinance because it was inapplicable. Pintail's argument—that the City and the County had supposedly signed a settlement agreement that rendered the facially-applicable County ordinance inapplicable to the proposed landfill—does not appear to be supported by the record. If the City and County did sign such a settlement agreement, Pintail apparently did not present it to the Commission, and thus it is not part of the record on which the agency's decision was made.

II. Pintail's registration to operate a transfer station does not "grandfather" its landfill application.

(Responsive primarily to Pintail's Issue No. 2)

Pintail claims that its 2016 landfill permit application was "grandfathered,"

---

[51] *See* Tex. Civ. Prac. & Rem. Code §§ 15.015 ("An action against a county shall be brought in that county."); .0151 (providing for venue in county in which political subdivision is located).

citing to subsection 363.112(c) of the Health and Safety Code.[52] That subsection provides that the relevant local governing body may not prohibit the processing or disposal of municipal or industrial solid waste in an area of that [municipality or county] for which:

> (1) an application for a permit or other authorization under Chapter 361 has been filed with and is pending before the Commission; or
>
> (2) a permit or other authorization under Chapter 361 has been issued by the Commission.[53]

Pintail argues that there are two reasons why its 2016 landfill permit application should have been "grandfathered" under these provisions. First, Pintail notes that it had a transfer station registration under chapter 361 that had been issued prior to the adoption of the City ordinance and for which its application was pending prior to the adoption of the County ordinance. Thus, Pintail contends, the municipality and county were precluded from prohibiting its proposed landfill at the site of the transfer station authorization. Second, Pintail states that in 2015 it had a permit application pending for essentially this same

---

[52] It appears that Pintail might also be relying on subsection 364.012(e) of the Health and Safety Code. That subsection substantively mirrors subsection 363.112(c).

[53] Pintail contends that, due to a supposed agreement between the City and County that is not in the record, only the City's ordinance purports to prohibit its landfill, and thus only section 363.112 applies. With respect to the statutory language, which is essentially identical, it does not appear to matter.

landfill (though one that was ultimately returned due to its deficiencies, a decision from which Pintail could but did not seek judicial review).[54] Because that application was on file with the Commission and had yet to be rejected at the time the City adopted its ordinance, that previous application protects Pintail essentially forever from the effects of the ordinance—Pintail's "snapshot in time" theory.[55] Both of these arguments should be rejected.

Pintail's grandfathering arguments fail for several independent and sufficient reasons. First, as demonstrated above, the agency's order may be upheld on the basis that neither section 364.012 nor section 363.112 expressly authorizes the Commission to invalidate an ordinance, even if it is alleged that it does not properly grandfather existing and pending authorizations.

Second, even if the Commission had that authority, in order to give effect to the statute as a whole and avoid absurdities, the provisions regarding existing and pending authorizations should be read to refer to authorizations for the *same* type of activity as that for which the permit is sought.

Third, Pintail's so-called "snapshot in time" theory is an overly broad

---

[54] *See, e.g.*, Pintail's Initial Brief at 5-6 (where Pintail discusses this earlier application for a landfill at approximately the same site, which the TCEQ returned on October 5, 2015 due to deficiencies).

[55] Pintail's Initial Brief at 43.

reading of the relevant statutory provisions that has already been rejected by the Third Court of Appeals.[56]

Finally, even if Pintail is correct that its transfer-station registration "grandfathers" a landfill permit, the plain language of the statute limits the preclusive effect of that prior authorization to the "area" for which the authorization was obtained. And, although Pintail may have designated an enormous "site" in its transfer-station application, it is only authorized to process waste on a much-smaller area specified in the registration. Therefore, assuming *arguendo* that Pintail's transfer station registration "grandfathered" its proposed landfill, it would only be for the small portion of the proposed landfill site that was authorized for the transfer station.

A. The existing "permit or other authorization" must be for the same type of activity as the current application.

According to Pintail's reading of subsection 363.112(c), any of the numerous and varied authorizations for solid waste management activity that the Commission may issue pursuant to chapter 361 can serve as an irrevocable placeholder for a landfill. This reading is overly broad and does not further the purpose of the Solid Waste Disposal Act, which is to safeguard the environment

[56] *Tex. Comm'n on Envtl. Quality v. Kelsoe*, 286 S.W.3d 91, 95 n.6 (Tex. App.—Austin 2009, pet. denied).

and public health and welfare.[57]

Chapter 361 sets out a comprehensive regulatory scheme for controlling all aspects of solid waste and a key part of the Commission's regulation is the requirement that an authorization be obtained for a diverse range of solid waste management activities. For example, all of the following require Commission authorization: the processing or disposal of hazardous waste, municipal solid waste, grease and grit trap waste, scrap tires, recyclable materials; land management of sludge; material recovery operations; liquid waste processing, citizens collection stations; animal crematorium facilities and pet cemeteries.[58]

The types of authorizations—and the amount of process involved in the obtaining the authorization—are also varied. The authorizations issued by the Commission, ranged roughly by the amount of process involved, include permits

---

[57] Section 361.002 of the Solid Waste Disposal Act sets forth the legislature's policy and purpose:

> (a) It is this state's policy and the purpose of this chapter to safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste, including accounting for hazardous waste that is generated.
>
> (b) The storage, processing, and disposal of hazardous waste at municipal solid waste facilities pose a risk to public health and the environment, and in order to protect the environment and to provide measures for adequate protection of public health, it is in the public interest to require hazardous waste to be stored, processed, and disposed of only at permitted hazardous industrial solid waste facilities.

[58] *See* 30 Tex. Admin. Code §§ 330.7, .9, .11.

(highest level of process), registrations, permits by rule, and notifications (lowest level of process).[59] Even as between the processes to obtain a permit and registration there is a significant difference in the level of public involvement. Whereas many permitting actions—like Pintail's landfill application—are subject to public notice requirements and allow certain individuals to request a contested case, registrations—like the one Pintail obtained for its transfer station—do not.[60] Other authorizations, like permits by rule (which may be obtained simply by showing the Commission that the applicant meets the rule's criteria) and notifications (which, as suggested, are effective upon giving notice of the proposed activity to the Commission) provide even less process.

According to Pintail, *any* authorization that is issued pursuant to Chapter 361 for an activity in the same physical area as its proposed landfill would grandfather the landfill from the effects of the City's and County's ordinances. So, for example, a pet cemetery (where only a notification to the agency is required to obtain a chapter 361 authorization)[61] would grandfather the site for a future hazardous waste landfill. Public policy dictates that subsection 363.112(c)

---

[59] 30 Tex. Admin. Code § 330.7(a).

[60] *See* 30 Tex. Admin. Code § 312.13(b), (c).

[61] *Id.* § 330.11(e)(7).

should not be read so broadly. A sophisticated applicant could easily nullify the legislative grant of siting authority to local governments simply by filing a notification of its intent to bury pets in graves no shallower than two feet (as required by TCEQ rules) on a 1000-acre site.[62] And despite the lack of public participation in that process, this notification would bar a county commissioners court from prohibiting a landfill in an area where it would constitute a "threat to the public health, safety, and welfare."[63]

Although not as insignificant as a pet cemetery,[64] a transfer station like the one for which Pintail obtained a registration is a minor facility compared to its proposed landfill. A transfer station is merely a "facility used for transferring solid waste from collection vehicles to long-haul vehicles (one transportation unit to another transportation unit). It is not a storage facility such as one where individual residents can dispose of their wastes in bulk storage containers that are serviced by collection vehicles."[65] Pintail's proposed transfer station was deemed sufficiently minor as to qualify for a registration. Thus, while the public was

---

[62] *Id.*

[63] Tex. Health & Safety Code § 364.012(a).

[64] The Commission uses "significance" only in reference to public health concerns, not the special attachment between master and beast.

[65] 30 Tex. Admin. Code § 330.3(157).

notified and allowed to file comments, the Commission was not required to respond, and no contested case was available.

Subsection 363.112(c) must be read in a fashion that gives effect not only to itself, but also to the provisions granting limited authority to local governments to prohibit landfill siting and to the purpose of chapter 361 as a whole. The Commission's interpretation of this provision—that the prior "application or other permit or authorization" be for the same activity as the current application—is reasonable and accomplishes these statutory construction requirements.

B. Pintail's "snapshot-in-time" theory is meritless.

Pintail also contends that the ordinances cannot prohibit landfills at its proposed site because Pintail had an earlier landfill application for the same site on file with the Commission at the time of the ordinances' adoptions. It describes the ordinances as "taking a snapshot in time" as of the date they were adopted.[66]

The permit application that Pintail refers to in making this argument is the landfill application that it filed with the Commission on July 11, 2011, and that was returned to Pintail on October 5, 2015, because the Executive Director had determined that it was seriously deficient.[67] Pintail did not appeal this TCEQ

---

[66] Pintail's Initial Brief at 43.

[67] 3 AR 11, Attachment B (October 5, 2015 letter from Earl Lott to Ernest Kaufman). A copy is in Appendix D.

decision to return that landfill application.

The County and City adopted the ordinances in question on August 2, 2011 and September 8, 2015, respectively. Pintail is apparently arguing that, because the now-returned 2011 landfill permit application was still pending on the dates the ordinances were adopted, any future landfill applications filed by Pintail involving the same land must be forever grandfathered. This is a meritless argument, lacking support in law or policy. The 2011 landfill permit application was deficient, and once returned, was a nullity.

The Third Court of Appeals wrote about a similar situation in *Texas Commission on Environmental Quality v. Kelsoe.*[68] There, as it did with Pintail's July, 2011 application, the TCEQ had returned an applicant's (Kelsoe) landfill application because of serious deficiencies. After the landfill application was returned, the county passed an ordinance that would have barred the construction of Kelsoe's landfill at the location proposed in the returned application. Kelsoe filed a suit for judicial review of the TCEQ decision returning his application. The court held that the TCEQ decision to return the application was a final and appealable decision. The court's explanation of why Kelsoe was an "affected person" under the appeal provisions of the Water Code and the Health and Safety

[68] 286 S.W.3d 91, 95 n.6 (Tex. App.—Austin 2009, pet. denied).

Code, disposes of Pintail's "snapshot in time" argument.

> [W]hen Kelsoe's original application was submitted, the construction of solid-waste facilities was allowed in the area in which he sought to construct a facility. After his application was submitted, the county passed a new ordinance that barred the establishment of new landfills. After Kelsoe's application was rejected, he was no longer grandfathered under the old ordinances and thus could no longer apply to establish a new landfill in the area.[69]

C. The plain language of the statute only grandfathers the "area . . . for which . . . authorization . . . has been issued."

Pintail asserts that its having a transfer station registration prohibited the County and City from enacting the ordinances that prohibit landfills in the same area. However, the statute specifically refers to permits or "authorizations." The transfer station registration that Pintail relies on only "authorizes" the transfer of waste on a small portion of the site upon which Pintail has proposed to build its landfill. The registration[70] states, in pertinent part:

> The registrant is authorized to store and process waste, and to recycle

---

[69] *Id.*

[70] 3 AR 11, Attachment F, pages 1 and 4 of 7 (portions of MSW Registration No. 420359). A copy is in Appendix E.

Although the record contains portions of the registration and Pintail attached a portion of the registration to its petition, the registration application that is expressly incorporated into the registration is not in the record. In this brief, the Commission only cites to those portions of the registration that are in the record.

The transfer station registration is discussed in *Citizens Against the Landfill in Hempstead v. Texas Commission on Environmental Quality*, No. 03-14-00718-CV, 2016 WL 1566759, at *1 (Tex. App.—Austin April 13, 2016, no pet.) (mem. op.).

> recovered materials in accordance with the limitations, requirements, and other conditions set forth herein.[71]
>
> 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.[72]

Pintail attached to its registration application a diagram showing the layout of the transfer station facility.[73] This layout shows that the footprint of the transfer station facility is approximately 230 feet by 230 feet and that, within that perimeter, the enclosed building where all processing activities were authorized to take place is 100 feet by 100 feet in area.[74] Pintail's argument that the registration authorizing a transfer station on this small area exempts a proposed 405-acre landfill[75] from the ordinances is an abuse of the "grandfathering" provisions and should be rejected. This manipulation of a less-public authorization procedure (the transfer station registration) to avoid the effects of county and city ordinances

---

[71] *Id*. at page 1 of 7.

[72] *Id.* at page 4 of 7.

[73] 3 AR 11, Attachment H ("Transfer Station Layout Plan"). A copy is in Appendix F.

[74] *Id.*

[75] 1 AR 1 (2016 Landfill Application at page 8 of 10). A copy is in Appendix G.

is an additional reason why the relevant statutory provisions should be read more narrowly, as the Commission suggests.

III. Neither the Health and Safety Code nor Commission policy or rules required the local siting ordinances to include metes-and-bounds descriptions of the areas in which waste disposal is and is not prohibited. (Responsive primarily to Pintail's Issues Nos. 3-7)

Pintail argues that Health and Safety Code sections 363.112 and 364.012 require city and county siting ordinances to include metes-and-bounds descriptions of the areas in which waste disposal is and is not permitted.[76] Consequently, Pintail argues, the City's and County's ordinances—which lack metes-and bounds-descriptions—are invalid and cannot serve as a basis for upholding the Commission's decision. Based entirely on ambiguous (and poorly transcribed) statements of an agency staff member at a 2005 Travis County Commissioners Court meeting, Pintail relatedly contends that the metes-and-bounds requirement is also a longstanding agency policy or unpublished rule that the Commission disregarded in this case, thus violating Pintail's rights.[77]

---

[76] *See, e.g.*, Pintail's Initial Brief at 46 ("The County and City Ordinances fail to specifically designate any area . . . by metes and bounds . . . as required by Section 363.112(a).

It is not entirely clear whether Pintail invokes only section 363.112(b) for its argument on this point or whether Pintail relies on 364.012(b), as well. Neither includes the term "metes and bounds." Both require only specific designation of the areas where waste is not prohibited.

[77] *See, e.g.*, Pintail's Initial Brief at 48 ("[T]he Executive Director had long determined that, for his authority to process MSW landfill applications to be limited, a county or city was required to include in its ordinance a metes and bounds description of the areas within the city where MSW disposal could and could not occur.").

Moreover, according to Pintail, in declining to follow this supposed longstanding policy or rule, the Commission—through its silence on this point—invalidly promulgated a new rule.[78]

As set out below, these intertwined contentions lack merit.

A. Neither statute includes a metes-and-bounds requirement.

There is no requirement in Health and Safety Code sections 363.112 and 364.012 that an ordinance must have metes-and-bounds descriptions. These sections require only that an ordinance include a specific designation of the areas where waste disposal is not prohibited.[79] Consequently, it was not error for the Commission to decline to invalidate the ordinances—or treat them as invalid—due to their lack of metes-and-bounds descriptions.

B. Ambiguous, cherry-picked statements from a TCEQ staff member's informal discussion at a 2005 Travis County Commissioners Court meeting do not constitute a long-standing agency policy or rule.

As noted above, when the Executive Director returned Pintail's application, he provided the following explanation:

---

[78] *See, e.g.*, Pintail's Initial Brief at 48 ("Without any notice to the public or the ability for the public to provide comment, the Executive Director changed his long-standing interpretation . . . ."); *id*. at 51 (["T]he Executive Director revised his interpretation of what is required to 'specifically' designate' allowed MSW disposal and processing areas. He did so without going through APA rulemaking procedures . . . .").

[79] Tex. Health & Safety Code §§ 363.112(a); 364.012(b).

> Since the City of Hempstead's and Waller County's ordinances prohibiting landfills in the proposed location were adopted before Pintail filed this application, the Commission "may not grant" Pintail's application. See Texas Health & Safety Code sections 363.112 and 364.012.[80]

Pintail contends that this statement constitutes an invalid "rule" under the Administrative Procedure Act (APA)[81] and "established (again, without going through APA rulemaking) unprecedented policy or guidance" that violated a longstanding agency policy of requiring local siting ordinances to include metes-and-bounds descriptions.[82] Yet Pintail acknowledges that the Executive Director, in returning Pintail's application, did not state a specific interpretation of Health and Safety Code sections 363.112 and 364.012:

> The Executive Director's analysis with respect to his ability to process Pintail's 2016 Landfill Application *appears* to have been limited to whether either the County or City Ordinance, on its face, purports to prohibit the siting of the landfill at the Pintail Landfill Site.[83]

Nor did the Commission articulate any policy when it allowed Pintail's motion to overturn to be overruled by operation of law. Pintail has failed even to identify any policy or guidance that could be challenged as an invalid rule, or a reversal of

---

[80] 3 AR 14 (notice to Pintail that the June 30, 2016 application was being returned).

[81] Tex. Gov't Code §§ 2001.001 *et seq.*

[82] Pintail's Initial Brief at 19.

[83] Pintail's Initial Brief at 11 (emphasis added).

any prior policy.

Although the only "policy" it can reasonably identify here is the Executive Director's practice of returning inadequate permit applications, Pintail claims that an agency employee set out in 2005 a now-longstanding interpretation of (or unpublished rule concerning) Health and Safety Code sections 363.112 and 364.012 to the effect that a local ordinance is valid and effective to preclude the Commission from granting an application only if it specifically designates areas "using 'metes and bounds of where one can and can't have facilities.'"[84]

Pintail makes a puzzling interpretation of a few words uttered by a single Commission employee on one occasion twelve years ago.[85]

Actually, the transcript on which Pintail relies shows that the employee—who was speaking at a 2005 meeting of the Travis County Commissioners Court, which was apparently considering adoption of a landfill siting ordinance—encouraged Travis County to be as precise as possible in its ordinance by using a metes-and-bounds description to designate where landfills

---

[84] Pintail's Initial Brief at 31.

[85] *See, e.g*. Pintail's Initial Brief at 28–30; 36; 46–51. For example, Pintail argues that "[t]he Executive Director, as reflected in this transcript, has historically determined the siting-criteria approach taken by some local governments does not comply with the requirements of Section 363.112(a) and therefore does not preclude the Commission from processing a permit application and issuing a permit." *Id*. at 31.

may and may not be sited. The employee indicated that the agency had not had "any administration or court litigation regarding cities and counties that impose the type of site criteria, the idea of having a certain distance from a school or a church or a residence."[86] He said that the Commissioners had not indicated a preference but that the Executive Director was "looking to local governments that specifically [laid] out metes and bounds of where you can and can't have facilities."[87]

The employee seemed to say that the Executive Director would stop processing an application "in the front part of our permitting process" if the local government had adopted an ordinance with a metes-and-bounds description prohibiting or allowing the landfill at the proposed location. But if the local ordinance had a prohibition that didn't use metes-and-bounds description and instead had a "detailed set of siting criteria," the Executive Director would look at the ordinance later in the agency process to see if it prohibited a landfill in the proposed location.[88]

Pintail's strained interpretation of the long-ago remarks of a Commission

---

[86] 3 AR 15, Attachment 9 at page A-37. (Travis Cty. Commissioners Court Transcript).

[87] *Id.*

[88] *Id.*

staff member statement does not amount to an agency rule or policy. The informal remarks of an agency employee do not constitute official agency action or policy.[89] For an agency statement to be a rule, the statement must "bind the agency or otherwise represent its authoritative position in matters that impact personal rights."[90] In this case, the statements made by the Commission staff member did not constitute the Commission's authoritative position regarding sections 363.112 and 364.012 but instead provided guidance to Travis County in drafting its own ordinances so as to make them simpler for the Commission to administer: the agency can apply a metes-and-bounds description in the early-stage review for

---

[89] *Cf. Wimberley Springs Partners, LTD v. Wimberley Valley Watershed Ass'n*, No. 03-13-00467-CV, 2017 WL 2229876 at *9 (Tex. App.—Austin May 19, 2017, no pet.) (rejecting argument that evidence of agency's long-standing, official interpretation could be found in email correspondence sent by a water district's general manager).

[90] *Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 703 (Tex. App.—Austin 2011, no pet.).

Courts have held that policies that require specified results without any regard to individual circumstances are rules but that evaluative guidelines used by agencies in case-specific instances are not. *Compare Tex. State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 529-31, 535 (Tex. App.—Austin 2014, pet. granted) (holding that an agency policy dictating the suspension of a professional license regardless of other fact-specific factors was, in fact, a rule within the meaning of the APA) & *Combs v. Entm't Publ'ns, Inc.*, 292 S.W.3d 712, 721 (Tex. App.—Austin 2009, no pet.) ("[T]he Comptroller's statements in the March and April 2008 letters that the Comptroller will uniformly regard brochure-fundraising firms as the sellers and nonprofit entities as the sellers' agents, without regard to the individual factors considered under the Comptroller's previous guidelines, are 'generally applicable' statements for purposes of the APA.") *with Slay v. Tex. Comm'n on Envtl. Quality*, 351 S.W.3d 532, 546 (Tex. App.—Austin 2011, pet. denied) (agency's guidelines used to assess environmental violations for purposes of recommending penalty based on case-specific factors was not a rule within the meaning of the APA).

administrative completeness of an application while a more complicated description will be addressed later in the administrative review process.

Moreover, the staff member's statement—construed reasonably—is consistent with what happened here. Rather than refusing to declare Pintail's application administrative complete (as the staff member suggested the agency might do if an ordinance prohibiting a landfill included simpler-to-administer metes-and-bounds descriptions), the Commission found the application administratively complete[91] and stated its intention to review whether the ordinances applied:

> This declaration does not constitute a determination on land use compatibility, including review of any local ordinance regarding siting of landfills. Rather, the Executive Director will review whether any local ordinance or order prohibits the processing or disposal of municipal solid waste in the proposed landfill area during the substantive technical review of the application.[92]

Later, during technical review, the Executive Director returned the application because the City's and County's "ordinances prohibiting landfills in the proposed location were adopted before Pintail filed" its application.[93]

---

[91] 3 AR 5 (July 19, 2016 letter from TCEQ to Pintail declaring application administratively complete).

[92] *Id*. at page 1.

[93] 3 AR 14 (notice to Pintail that the June 30, 2016 application was being returned).

Thus Pintail did not demonstrate an impermissible departure from past policy, something courts in Texas have found when an agency imposes new requirements without notice or explanation to the affected party. For example, the Third Court of Appeals in *Oncor Electric Delivery Company v. Public Utility Commission* found a prior authorization requirement to be an improperly-imposed new policy because it was a departure from prior practice without notice to Oncor or explanation of the departure.[94]

In *Oncor*, the appellant and the Court itself cited several instances where the Public Utility Commission had allowed rate-case expenses from a previous docket to be recovered in a later case.[95] But the Public Utility Commission did not point out "any case in which it determined that a utility had not preserved its expenses because it lacked [the Public Utility Commission's] authorization"—a new requirement and a departure from prior practice.[96]

Pintail's metes-and-bounds argument fails for multiple reasons. It has not shown that the Health & Safety Code requires a metes-and-bounds description for a local siting ordinance to be effective. It has not demonstrated that a twelve-year-

---

[94] *Oncor Elec. Delivery Co. v. Pub. Util. Comm'n*, 406 S.W.3d 253, 264–69 (Tex. App.—Austin 2013, no pet.).

[95] *Id*.

[96] *Id*.

old comment from an agency employee was a longstanding policy, practice, or rule that the Commission was required to adhere to until it gave notice to Pintail. And even assuming *arguendo* the employee's remarks amounted to a policy, Pintail failed to show a departure from or revision of the "policy" expressed by the employee. Accordingly, the Commission's decision should be upheld.

PRAYER

For all these reasons, the Texas Commission on Environmental Quality requests that this Court affirm the agency's decision to return Pintail's application. The Commission prays for all other appropriate relief to which it may be entitled.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civ. Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

/s/ Cynthia Woelk
CYNTHIA WOELK
Assistant Attorney General
State Bar No. 21836525
Cynthia.Woelk@oag.texas.gov

DANIEL C. WISEMAN
Assistant Attorney General
State Bar. No. 24042178
Daniel.Wiseman@oag.texas.gov

AMY DAVIS
Assistant Attorney General
State Bar. No. 24082897
Amy.Davis@oag.texas.gov

NANCY ELIZABETH OLINGER
Assistant Attorney General
State Bar. No. 15254230
Nancy.Olinger@oag.texas.gov

Office of the Attorney General
Environmental Protection Division
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0911

ATTORNEYS FOR DEFENDANT
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this computer-generated document, excluding the contents listed in Texas Rule of Appellate Procedure 9.4(i)(1), contains approximately 9,524 words and therefore complies with the word count limits set forth in Texas Rule of Appellate Procedure 9.4(i)(2)(B). I relied on the word count of the computer program used to prepare the document.

/s/ Cynthia Woelk
CYNTHIA WOELK

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2017, a true and correct copy of Defendant *Texas Commission on Environmental Quality's Response Brief* was served on the following counsel, electronically through an electronic filing manager and by email:

Mr. John A. Riley
jriley@kelleydrye.com
Mr. Paul C. Sarahan
psarahan@kelleydrye.com
Ms. Allison L. Lowry
alowry@kelleydrye.com
KELLEY DRYE/JACKSON
GILMORE & DOBBS, LLP
1115 San Jacinto Blvd. Suite 275
Austin, Texas 78701-4061
Tel: (512) 391-1720
Fax: (512) 355-1720
Attorneys for Plaintiff,
Pintail Landfill, LLC

Michael L. Woodward
mwoodward@hslawmail.com
Ms. V. Blayre Peña
bpena@hslawmail.com
Wesley P. McGuffey
wmcguffey@hslawmail.com
HANCE SCARBOROUGH, LLP
400 W. 15th Street, Suite 950
Austin, Texas 78701
Tel: (512) 479-8888
Fax: (512) 482-6891
Attorneys for Intervenor,
Citizens Against the Landfill in Hempstead

/s/ Cynthia Woelk
CYNTHIA WOELK

INDEX TO APPENDIX