

**TCEQ DOCKET NO. 2017-0791-MSW**

<b>PETITION BY</b>	<b>§</b>	<b>BEFORE THE</b>
<b>PINTAIL LANDFILL, LLC FOR A</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>CONTESTED CASE HEARING ON</b>	<b>§</b>	
<b>REGULATORY TAKINGS</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**Executive Director’s Response to Pintail LLC’s Petition For A Contested Case  
Hearing on Regulatory Takings**

To the Honorable TCEQ Commissioners:

The Executive Director files this Response to Pintail Landfill LLC’s (“Pintail”) Petition for a contested case hearing on regulatory takings. For the reasons explained below, The Executive Director respectfully recommends that Pintail’s petition be denied.

**I. Timeline and History of Applications and Local Ordinances**

Pintail proposes to build a landfill located at 24644 Highway 6, within the extra territorial jurisdiction (“ETJ”) of the City of Hempstead, in Waller County, Texas. The proposed landfill has a long history at the TCEQ, which includes two landfill applications, two letters from the Executive Director returning the applications, and the adoption of ordinances by the City of Hempstead and Waller County prohibiting the construction of a landfill at the proposed site.

On July 22, 2011, Pintail filed a permit application for an MSW landfill – MSW Application No. 2377 (“original application”). On August 2, 2011, Pintail filed Transfer Station Registration Application No. 40259 (“Transfer Station Application”).

After Pintail submitted both applications, Waller County passed Ordinance 2011-001 (“2011 Ordinance”) on August 26, 2011, prohibiting the disposal of municipal 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.

On February 13, 2013, Waller County passed a second ordinance, Ordinance 2013-001 (“2013 Ordinance”) which amended the 2011 Ordinance and allowed disposal of solid waste at the proposed Pintail site. This ordinance was later voided as result of litigation between the City of Hempstead and Waller County.

On September 8, 2015, the City of Hempstead passed Ordinance 15-109 which allows the disposal and processing of waste within the city limits and the city’s ETJ only if those activities are located at least 5,280 feet away from residences, rights-of-way of highways, and public or private water wells where the water is being used as a source for portable water.

Approximately one month later, on October 5, 2015, the TCEQ returned Pintail’s Original Application after Pintail disclosed in formal filings that their landfill application, which was pending at the State Office of Administrative Hearings (“SOAH”), did not meet TCEQ rule requirements.

On July 05, 2016, Pintail filed a second permit application for an MSW landfill – MSW Application No. 2391. An applicant for an MSW landfill facility must indicate on

the application form if a local ordinance exists prohibiting the processing or disposal of solid waste at the proposed site. Pintail stated that no local ordinances prohibited their proposed MSW facility and attached a memo from their attorney explaining their reasoning.

On July 19, 2016, the Executive Director's MSW Staff declared the second application administratively complete and stated that the review of whether local ordinances applied would be conducted during the technical review period. MSW staff did conduct a thorough technical review of the Application while legal staff reviewed the ordinances and a public meeting was held at the request of a legislator.

On December 1, 2016, the Executive Director returned the application because Texas Health and Safety Code (THSC) Sections 363.112 and 364.012 prevent the TCEQ from granting Pintail's application.

On December 22, 2016, Pintail filed a Motion to Overturn the Executive Director's decision. That Motion was overruled by operation of law. Pintail subsequently filed a lawsuit in Travis County District court which is currently pending.

Pintail filed the current Petition for a contested case hearing on May 26, 2017.

## **II. Executive Director's Responses to Pintail's Petition For a Contested Case Hearing**

### **A. The Private Real Property Rights Preservation Act Does not Apply**

The Texas Private Real Property Right Preservation Act (Act) was enacted into law by the Texas Legislature in 1995. The Act represents the Texas legislature's acknowledgment of the importance of protecting private real property interests. The Attorney General's guidance document for the Act states that the purpose of this legislation is to ensure that governmental entities in Texas take a hard look at their

actions which impact private real property rights, and act according to the letter and spirit of the Act.<sup>1</sup>

In response to this legislation and in accordance with guidelines issued by the Attorney General, the TCEQ established certain procedures when promulgating rules which may impact private real property rights. For example, the agency completes a "Takings Impact Assessment" during rulemakings. However, the TCEQ does not perform this assessment when performing day to day agency business such as reviewing applications and issuing permits or other authorizations.

Indeed, section 2007.003 of the Act states that it applies only to the following governmental actions:

- (1) the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure;
- (2) an action that imposes a physical invasion or requires a dedication or exaction of private real property;
- (3) an action by a municipality that has effect in the extraterritorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality; and
- (4) enforcement of a governmental action listed in Subdivisions (1) through (3), whether the enforcement of the governmental action is accomplished through the use of permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.

In this case, the Executive Director did not take any of the actions listed above. The Executive Director returned Pintail's application in accordance with its statutory requirements in THSC Sections 363.112 and 364.012. These statutory provisions authorize cities and counties to pass ordinance prohibiting MSW activities in certain

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<sup>1</sup> Office of the Attorney General of Texas, Private Real Property Rights Preservation Act Guidelines, located at <https://www.texasattorneygeneral.gov/agency/private-real-property-rights-preservation-act-guidelines> (2017).

areas and also prohibit the Executive Director from granting an application for an MSW landfill in areas where these local city and county ordinances exist. The Executive Director's action did not constitute the issuance or adoption of a rule, regulatory requirement, resolution, policy or guideline or the enforcement thereof through the use of permitting. Rather, the Executive Director considered the facts and circumstances of the matter and made a decision which merely complied with state statutory requirements.

Pintail argues that 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." However, nowhere in the return letter or in any other correspondence did the Executive Director assert that any policy was being established nor could such be implied by his actions. Instead, as noted above, the Executive Director was implementing statutory requirements in THSC Sections 363.112 and 364.012. Pintail further argues that the Executive Director actions "deviates from prior policy" regarding the issue of local ordinances while citing to a transcript from a Travis County Commissioners meeting over ten years ago. As previously explained in Pintail's challenges to THE Executive Director's decision to return their second application, that testimony was given to the Travis County Commissioners Court as advice on how to proceed with *their* adoption of a local ordinance; however, there was no official agency policy issued or adopted at that meeting or any other meetings.

The Act does not apply to the actions the Executive Director took in returning Pintail's application. The Executive Director did not issue a rule, regulatory requirement, resolution, policy or guideline, nor was he enforcing such through permitting. Rather, the Executive Director followed State law. Therefore, the Executive

Director respectfully recommends that Pintail's Petition for a contested case hearing on regulatory takings be denied.

**B. The Executive Director's Action is Exempt for Public Health and Safety Reasons**

In the alternative, if the TCEQ is found to have taken a governmental action, its actions are exempt from a takings claim in accordance with Texas Government Code Section 2007.003(b)(13). When an agency takes an action that: **(1) is taken in response to a real and substantial threat to public health and safety; (2) is designed to significantly advance the health and safety purpose; and (3) does not impose a greater burden than is necessary to achieve the health and safety purpose** then its action will not be subject to a takings claim under Chapter 2007.

In this instance, Pintail claims that the TCEQ took two governmental actions. First, the TCEQ acted when it chose not to review the validity of the ordinance. Second, the TCEQ acted when it returned Pintails' application in accordance with THSC Sections 363.112 and 364.012 which prevent the TCEQ from granting permits for sites prohibited by a local ordinance.

First, the Texas Legislature has found that the improper management of solid wastes creates hazards to public health<sup>2</sup> and that these hazards are diminished when local governments can exercise control over solid waste.<sup>3</sup> As part of an effort to encourage cooperation among state and local governments and diminish the threat of

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<sup>2</sup> Texas Health and Safety Code § 363.003(2) ("It is the state's policy to safeguard the health, general welfare, and physical property of the people and to protect the environment by encouraging the reduction in solid waste generation and the proper management of solid waste, including disposal and processing to extract usable materials or energy.").

<sup>3</sup> *Id.* at § 363.003(10) ("the opportunity for resource recovery is diminished unless local governments can exercise control over solid waste and can enter long-term contracts to supply solid waste to resource recovery systems or to operate those systems").

a public health hazard<sup>4</sup>, the Legislature passed two statutes allowing municipalities and counties to pass ordinances designating areas where solid waste activities may occur.<sup>5</sup> Acknowledging the Legislature's intent and the threat posed by improper management of solid waste, the TCEQ responded to that threat by recognizing the statutory authority that the City of Hempstead and Waller County have in controlling areas where solid waste activities may occur.

Second, the Legislature found that when local governments can exercise control over solid waste the hazard posed by improper management diminishes.<sup>6</sup> The TCEQ agrees and took action that recognizes the City of Hempstead and Waller County's ability to determine their solid waste management needs and provide more economical, efficient, and safe means for the collection and disposal of solid waste.<sup>7</sup> Therefore, the TCEQ believes its actions significantly advanced the legislative purpose of diminishing public health hazards through the proper management of solid waste.

Lastly, the burden imposed by TCEQ's action is minimal. The TCEQ cannot invalidate city or county ordinances<sup>8</sup> so Pintail would still need to invalidate the ordinances in the appropriate jurisdiction. Even if Pintail's application had not been returned and a permit had been issued, Pintail would not have been able to build and

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<sup>4</sup> *Id.* at § 363.002 (“Encouraging a cooperative effort among general, state, and local governments and private enterprise, to accomplish the purposes of this chapter, will further that policy.”).

<sup>5</sup> *Id.* at §§ 363.112 and 364.012.

<sup>6</sup> *Id.* at § 363.003(10) (“The opportunity for resource recovery is diminished unless local governments can exercise control over solid waste . . .”).

<sup>7</sup> *See Id.* at § 363.003(7) (“combining two or more small, inefficient operations in local, regional, or countywide systems may provide a more economical, efficient, and safe means for the collection and disposal of solid waste and will offer greater opportunities for future resource recovery”), *accord Id.* at § 363.003(10) (“the opportunity for resource recovery is diminished unless local governments can exercise control over solid waste . . .”) and (11) (“the control of solid waste collection and disposal should continue to be the responsibility of local governments and public agencies . . .”).

<sup>8</sup> Texas Health and Safety Code §§ 363.112(d) and 364.012(f) (preventing the Commission from *granting* an application, but not empowering the Commission to invalidate city and county ordinances).

operate a landfill at the proposed location so long as the ordinances remained in effect. Furthermore, the TCEQ's recognition of the ordinances and returning the application as required by the statute does not impose increased monetary costs, technical requirements, or other burdens on the applicant and therefore achieves a health and safety purpose with a minimal burden on the applicant's resources.

Accordingly, the TCEQ believes its actions in this instance should be considered exempt from a takings action in accordance with Texas Government Code Section 2007.003(b)(13) and respectfully requests the Commission deny Pintail's request for a contest case hearing on takings.

C. The Executive Director's Actions Are Not a "Takings"

The TCEQ's governmental actions are not a "takings." Pintail brings its action under Texas Government Code Chapter 2007 which allows a person to file a contested case hearing for a takings claim with a government agency when that agency's actions result in a takings.<sup>9</sup> A governmental action must meet two prongs to be considered a takings under Chapter 2007:

- (1) the action must affect an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner **that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action;** and
- (2) the action must be **the producing cause of a reduction of at least 25 percent in the market value** of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.<sup>10</sup>

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<sup>9</sup> Texas Government Code § 2007.022.

<sup>10</sup> *Id.* at § 2007.002(5)(B).

For the TCEQ's actions to be considered a taking, the actions must restrict or limit Pintails right to its property that would otherwise exist in the absence of the governmental action. Pintail claims that the TCEQ's actions restrict or limit Pintail's right to use the property as a landfill which resulted in a 25% reduction in their property value. Pintail's claims are deficient in two regards:

First, Pintail's use of the property as a landfill would still be prohibited by the city and county ordinances in effect regardless of whether the application remained pending or if the permit was ultimately issued. The issuance of a Municipal Solid Waste Permit does not exempt Pintail from complying with local government ordinances. TCEQ rules explicitly state that granting a permit does not authorize any infringement of federal, state, or local laws or regulations outside the scope of the authority under which a permit is issued.<sup>11</sup> The legislature empowered the TCEQ with the powers and duties to manage municipal solid waste, including the authority to issue permits.<sup>12</sup> However, state law provides that the TCEQ's authority to manage municipal solid waste does not diminish or limit the authority of a local government in performing the powers, functions, and duties vested in it by other laws.<sup>13</sup> In this instance, the legislature authorized municipalities and counties to restrict areas where activities involving solid waste may occur when it passed THSC Sections 363.112 and 364.012.<sup>14</sup> Therefore, even if TCEQ's actions<sup>14</sup> are reversed and the permit remains pending, the city and county ordinances would still prohibit the use of their property as a landfill.

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<sup>11</sup> 30 Tex. Admin. Code § 330.67(a).

<sup>12</sup> Texas Health and Safety Code Chapter 361, Subchapter B (Powers and Duties of Commission) and Subchapter C (Permits).

<sup>13</sup> Texas Health and Safety Code § 361.039.

<sup>14</sup> Texas Health and Safety Code §§ 363.112 and 364.012.

Second, the appropriate actions to challenge, if any, should be the City and County's actions in passing the ordinances, not the TCEQ's compliance with its statutory requirements. The legislature empowered Cities and Counties to limit the areas in which municipal solid waste activities may occur.<sup>15</sup> If the City of Hempstead and Waller County's actions passing their ordinances were reversed, then THSC Sections 363.112 and 364.012 would no longer prevent the TCEQ from granting Pintail's application. Therefore, TCEQ's actions are not the producing cause of Pintail's allegedly restricted or limited use of their property and the claimed reduction in property value.

The Executive Director respectfully requests the Commission deny Pintail's petition for contested case hearing on regulatory takings because the TCEQ's actions do not meet the definition of a taking giving rise to their claim.

#### D. Conclusion

For the reasons explained in this Response, the TCEQ's decision to return Pintail's application should not be considered the issuance or adoption of an ordinance, rule, regulatory requirement, policy guideline, or similar measure nor subsequent enforcement of such and the petition should be denied. In the alternative, if the TCEQ's actions are considered governmental actions, those actions should be considered exempt because they were taken to advance the public health and safety by diminishing the threat posed by improper management of solid waste and the petition should be denied. Finally, even if the commission finds that the TCEQ took governmental actions which were not exempt, the petition should be denied because these actions do not meet the definition of takings; the actions that affect Pintail's

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<sup>15</sup> Texas Health and Safety Code §§ 363.112 and 364.012.

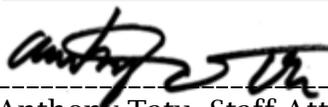
property rights and are the producing cause of their claimed market value reduction are the City and County's passing of ordinances, not the TCEQ's actions. Therefore, the Executive Director respectfully recommends that Pintail's Petition for a Contested Case hearing on regulatory takings be denied.

Respectfully submitted,

Texas Commission on Environmental Quality

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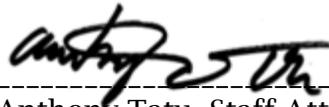
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REPRESENTING THE EXECUTIVE DIRECTOR OF  
THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of August, 2017, a true and correct copy of the foregoing document has been sent via facsimile and first class mail to the persons on the attached Mailing List.

A handwritten signature in black ink, appearing to read "Anthony Tatu", is written over a horizontal line.

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