

**CAUSE NO. D-1-GN-17-006632**

**ENVIRONMENTAL PROTECTION IN  
THE INTEREST OF CALDWELL  
COUNTY, JAMES ABSHIER, BYRON  
FRIEDRICH and TJFA, L.P.,  
*Plaintiffs,***

**V.**

**TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
*Defendant,***

and,

**130 ENVIRONMENTAL PARK, LLC,**  
*Defendant/Intervenor*

**IN THE DISTRICT COURT OF**

**TRAVIS COUNTY, TEXAS**

## 200<sup>TH</sup> JUDICIAL DISTRICT

**AMICI CURIAE BRIEF OF THE CITY OF WACO, TEXAS,  
AND  
THE TEXAS LONE STAR CHAPTER OF THE  
SOLID WASTE ASSOCIATION OF NORTH AMERICA, INC.**

Respectfully submitted,

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AND

**TEXAS LONE STAR CHAPTER,  
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NORTH AMERICA, INC.**

**July 2, 2019**

TO THE HONORABLE COURT:

This amici brief is being submitted by the City of Waco, Texas (“Waco”) and the Texas Lone Star Chapter, Solid Waste Association of North America, Inc. (“TxSWANA”) (collectively “amici”). Waco and TxSWANA have no interest in the ultimate question in the above-referenced cause, of whether the TCEQ’s granting of the application of 130 Environmental Park, LLC (“130EP”) for a Municipal Solid Waste (“MSW”) Permit should ultimately be upheld or remanded. However, Waco and TxSWANA have an interest in ensuring that the rules associated with permitting and operating MSW landfills are interpreted reasonably and predictably. For this reason, Waco and TxSWANA urge the Honorable Court to clarify that Texas Health and Safety Code §§ 363.112 or 364.012 (collectively, “Siting Ordinance Statutes”) do not empower a county or municipality to prohibit the processing or disposal of municipal solid waste in an area for which an applicant has filed a Parts I/II application that is pending before the Texas Commission on Environmental Quality (“TCEQ”) prior to the adoption of a Siting Ordinance.

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## **INTEREST OF AMICI**

The Solid Waste Association of North America (“SWANA”) is an international organization comprising more than 10,000 individual members. The Texas Lone Star Chapter, Solid Waste Association of North America, Inc. (“TxSWANA”) is the Texas chapter of SWANA. TxSWANA currently has more than 550 individual members who represent public entities and municipalities, special districts, and private corporations that are interested in advancing the practice of environmentally and economically sound management of municipal solid waste in Texas.

TxSWANA fulfills this mission in several ways. It provides its members with updated training, leadership opportunities, an accessible network of solid waste professionals, safety initiatives, and community service opportunities and provides its members with the opportunity

to participate effectively in the public processes involved in shaping the solid waste management legislative and regulatory framework. One of the ways it does this is by enabling its members to join together to file amicus briefs in cases that impact the solid waste industry in Texas.

The City of Waco (“Waco”) is a municipality in the State of Texas that owns and operates an MSW landfill for the benefit of its citizens and the surrounding areas. That existing landfill is near capacity, and is expected to be filled to capacity within the next five to six years. Waco filed a Parts I/II application to site a new landfill that would straddle Limestone and McLennan Counties (the majority of which would be in Limestone County), prior to Limestone County passing a Siting Ordinance. If this Court finds that the filing of a Parts I/II application does not “grandfather” the application from a subsequently enacted Siting Ordinance, then (assuming *arguendo* that Limestone County’s Siting Ordinance is otherwise valid) Waco’s efforts to site a landfill could be set back such that Waco might not be able to permit a new landfill site before its existing landfill is filled to capacity.

Amici Curiae TxSWANA and Waco are responsible for the costs associated with the preparation of this brief.

## TABLE OF CONTENTS

IDENTITY OF AMICI AND THEIR COUNSEL .....	iii
INTEREST OF AMICI.....	iii
TABLE OF CONTENTS.....	v
INDEX OF AUTHORITIES.....	vi
SUMMARY OF ARGUMENT .....	1
ARGUMENT AND AUTHORITIES.....	2
A. <u>The Siting Ordinance Statutes are intended to require notice,</u> <u>not a complete application</u> .....	2
B. <u>Parts I/II are appropriate to grandfather applications from</u> <u>Siting Ordinances</u> .....	3
CONCLUSION AND PRAYER .....	5
CERTIFICATE OF COMPLIANCE .....	7
CERTIFICATE OF SERVICE .....	8

## INDEX OF AUTHORITIES

### State Statutes

Tex. Health & Safety Code § 363.112 .....1

TEX. HEALTH & SAFETY CODE § 364.012 .....1

### State Rules

30 TEX. ADMIN. CODE § 330.59(d)(2) .....2

30 TEX. ADMIN. CODE § 330.61(h) ..... 3

30 TEX. ADMIN. CODE § 330.63(e)(4).....4

### Legislative History

House Research Organization, Bill Analysis, Tex. S.B. 486,  
76th Leg., R.S. (1999).....2, 3

## **I. SUMMARY OF ARGUMENT**

The Siting Ordinance Statutes strike a delicate and important balance between the interest of counties and municipalities on the one hand to plan for solid waste disposal in their jurisdictions, and the necessity that the solid waste industry on the other be able to provide solid waste services, particularly landfill capacity, for the state. *See* TEX. HEALTH & SAFETY CODE §§ 363.112, 364.012. If counties could wholesale prohibit landfills in their jurisdiction, it would be politically expedient, and perhaps even inevitable, that virtually every county would do so, and it would become next to impossible for a new landfill to be sited in the state.

So, for those counties that want to be proactive in planning for solid waste in their jurisdictions, the Siting Ordinance Statutes set forth two important requirements. First, to exercise the ability to plan for solid waste and prohibit landfills in a part of the county, the Siting Ordinance Statutes require that counties establish areas where landfills *can* be sited. Second, the Siting Ordinance Statutes prevent counties from prohibiting landfills in areas where an application is already pending at the time the ordinance is adopted. Without this condition, counties could avoid the hard choices necessary to plan for solid waste capacity in their jurisdiction, and instead wait for an application to be filed, then react by prohibiting the landfill at hand. That is exactly what Caldwell County attempted to do in this case when it adopted its Siting Ordinance.

The intended effect of these requirements of the Siting Ordinance Statutes is to cause counties to be proactive, rather than reactive, in using the power to regulate landfill siting, and to base the decision of where to prohibit and allow landfills on technical merits of the area of the county rather than on resistance to a particular application.

## II. ARGUMENT AND AUTHORITIES

### A. The Siting Ordinance Statutes are intended to require notice, not a complete application.

Preparing a landfill application is an expensive and time-consuming process. Before preparing even a Parts I/II application, the applicant has to obtain the necessary property interest (usually a fee simple interest, but at a minimum, an option to purchase with an agreement by the property owner to sign the application). *See* 30 Tex. Admin. Code § 330.59(d)(2) (requiring the signature of the property owner). And before obtaining that property interest, the applicant must investigate the site enough to be comfortable that the site will be appropriate for a landfill. This investigation requires, at a minimum, a desktop review of the area geology and groundwater, the drainage, jurisdictional waters, the potential for endangered species habitat, a title review of applicable easements, area traffic capacities, and a study of the land uses in the area. Then, the permit engineer has to prepare the Parts I/II application, also time consuming and expensive.

The legislature was aware of this when it struck this balance and prevented counties from prohibiting a landfill after its application was submitted. *See* House Research Organization, Bill Analysis at 3, Tex. S.B. 486, 76th Leg., R.S. (1999), stating, on behalf of supporters of the bill:

SB 486 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 balance struck hinges, and continues to hinge, on preventing counties from prohibiting landfills once they have notice that a landfill is proposed at a site in the county, recognizing the reality that those in the area potentially impacted by a specific landfill would put pressure on the county government to prohibit the landfill if it could. The legislature was likewise cognizant of this reality. *See id.* at 4, stating, on behalf of supporters:

Requiring a landfill applicant to notify local governments before applying for a permit would encourage local governments to pass ordinances to prevent the siting for political reasons in almost every case. SB 486, in contrast, would encourage local governments to be prospective rather than reactive in their landfill policies and to pass ordinances based on the technical merits of actual sites and their impacts on public health and the environment, rather than in reaction to specific permits...Opposition to any identifiable site would, in almost every instance, make it politically impossible for a city council or commissioners court to approve the area for a landfill.

The legislature did not specify that the application be “complete,” nor did it specify that the application be “administratively complete.” This was not an oversight by the legislature; rather, the issue was documented in the bill analysis as one raised by opponents of the legislation, and the legislature declined to make any changes to the bill, or otherwise impose specific any requirements regarding the adequacy of the application. *See id.* at 5, stating, on behalf of other opponents:

The bill is unclear in stipulating that a city or county could not prohibit solid waste disposal or processing if an application was filed or pending. It should specify instead that an application be administratively complete. Otherwise, applicants could file token applications to prevent counties from enacting ordinances. The bill should set criteria by which the industry would have to abide to ensure a prima facie sufficient application, and it should establish sanctions for those who file superficial applications.<sup>1</sup>

**B. Parts I/II are appropriate to grandfather applications from Siting Ordinances.**

The purpose of a Parts I/II application is to evaluate the compatibility of the proposed landfill with surrounding land uses, including its compliance with local government requirements. Part II of the application requires information on “land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest.” 30 Tex. Admin. Code § 330.61(h). The specific information that the applicant must provide in Part II

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<sup>1</sup> Amendments to the bill were made in response to opponent comments related to the effective date, but no amendments were made related to the application requirements. *See id.* at 5-6 (in the “notes” section).

includes information on zoning. Whether the application complies with a Siting Ordinance would only be relevant to a Parts I/II application.

There is nothing in Parts III or IV that would impact a proposed landfill's compliance (or failure to comply) with a Siting Ordinance. However, Part III requires extensive, site specific data. For example, among the data required in Part III is a geology report that includes "the results of investigations of subsurface conditions" and "must describe all borings drilled on site to test soils and characterize groundwater." 30 Tex. Admin. Code § 330.63(e)(4). The drilling necessary to obtain the data required by Part III is extensive, requiring at least 29 borings for a small (250 acre) site. *Id.* Soil boring operations require heavy equipment and are obvious to even casual observers. Once undertaken, the public is quickly aware that the site is being evaluated for a landfill.<sup>2</sup> After the borings are taken, the data is used to develop the design in Part III; Part III cannot be completed until months after the boring operation is completed. Likewise, Part IV, the Site Operating Plan, is heavily dependent on the specific design of the landfill, and therefore, cannot be finalized without a completed Part III.

Therefore, the public will always know about a proposed landfill project long before a Part III can be prepared and submitted. The practical effect is that, if submittal of Parts III and IV is required to grandfather a site from a Siting Ordinance, then no site will be grandfathered from a Siting Ordinance, and the Siting Ordinance Statutes' provisions preventing counties from prohibiting landfills that have submitted an application are rendered meaningless.

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<sup>2</sup> Where the landfill is being developed by a municipality, subject to open records requests, the public will be aware of the landfill project even sooner.

### **III. CONCLUSION AND PRAYER**

The TCEQ's long history of recognizing that the filing of a Parts I/II application grandfather a site from a Siting Ordinance is well founded on not only the language of the statutes authorizing Siting Ordinances, but on the real-world practicalities of landfill development. The legislature enacted a delicate balance between ensuring that the statutes recognized counties' valid interest in comprehensive planning for solid waste in their counties, and ensuring that the statutes did not provide counties with a veto power over landfill applications under the guise of planning.

Applicants rely on this history in preparing their applications, and a reversal of this historical interpretation will have a real and detrimental impact on not only Parts I/II applications currently pending at the TCEQ that were submitted in advance of a Siting Ordinance, but on the ability of future applicants to permit landfills in the areas of the state with the greatest need for solid waste disposal capacity in the years to come.

The amici respectfully pray that this Honorable Court not find error in the TCEQ's application of its long-standing interpretation of the Siting Ordinance statutes (providing that the filing of a Parts I/II application is sufficient to grandfather a site from a Siting Ordinance), and, if finding an unrelated error and remanding the application to the TCEQ, that this Court would state the error so as to make clear that this Court found no error in the TCEQ's interpretation of the Siting Ordinances.

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**CERTIFICATE OF COMPLIANCE**

I, Jeffrey S. Reed, certify that this Brief of Amici Curiae Texas Lone Star Chapter, Solid Waste Association of North America, Inc. and the City of Waco, Texas contains a total of 2086 words excluding the parts exempted under TEX. R. APP. P. 9.4(i)(1), as verified by Microsoft Word 2016.

/s/ Jeffrey S. Reed

Jeffrey S. Reed

## CERTIFICATE OF SERVICE

I hereby certify that on this, the 2<sup>nd</sup> day of July, 2019, a true and correct copy of the foregoing Brief has been served on the following counsel of record via electronic transmission, first-class mail, or facsimile.

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