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November 11, 2021

Carly Latiolais, Clerk of the Court
Ninth Court of Appeals
1085 Pearl St., Suite 330
Beaumont, TX 77701-3552

RE: *City of Port Arthur and Alberto Elefano v. Kirk C. Thomas,* Cause No. 09-21-00111-CV; Texas Municipal League Letter of *Amici Curiae* in Support of the City of Port Arthur

To the Honorable Court:

The Texas Municipal League (TML) is a non-profit association of over 1,100 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of over 400 attorneys who represent Texas cities and city officials in the performance of their duties. Believing that the issue before this Court is of great significance to all Texas cities, TML and TCAA respectfully submit this letter of *amici curiae* in the above-referenced cause.[1]

Of primary interest to cities is the question in this case regarding the scope of Section 81.0523 of the Texas Natural Resources Code (Section 81.0523). Section 81.0523(c) largely preempts local regulation of below-ground oil and gas activity, while also expressly authorizing a city to enact, amend, or enforce an ordinance or other measure that meets the four following criteria: (1) the regulation regulates only above-ground activity related to an oil and gas operation, including a regulation governing fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements; (2) the regulation is commercially reasonable; (3) the regulation does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and (4) the regulation or other measure is not otherwise preempted by state or federal law.

In the present case, the primary issue is whether or not the City of Port Arthur's long-standing heavy truck ordinances are "commercially reasonable." The statute assists with that inquiry, defining "commercially reasonable" as a "condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and

[1] The author of this letter is a salaried employee of TML who has received no fee for the preparation of the letter.

not an individualized assessment of an actual operator's capacity to act." TEX. NAT. RES. CODE § 81.0523(a)(1).

In construing the meaning of a statute, a court may consider, among other things, the circumstances in which the statute was enacted and the legislative history of the statute. *See* TEX. GOV'T CODE § 311.023; *see also Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (citing section 311.023 and considering the circumstances of the statute's enactment and legislative history, among other things, to construe an ambiguous or unambiguous state statute). When considering the circumstances behind the enactment of Section 81.0523 along with the legislature's stated intent for the statute, it is readily apparent that the legislature intended for cities to continue to adopt and enforce traffic ordinances exactly like the one in Port Arthur.

Section 81.0523 was adopted as a legislative response to a ban on fracking imposed in the City of Denton. In 2014, the Denton city council refused to adopt a voter-petitioned fracking ban ordinance, and the question on the adoption of the ordinance was put to the voters pursuant to the city charter. Nearly 59 percent of Denton voters voted in favor of the ordinance and it was enacted. When the Texas Legislature convened for its next regular session in 2015, House Bill 40 (H.B. 40), authored by Texas State Representative Drew Darby, was adopted primarily in response to the citizen-initiated fracking ban ordinance adopted in the City of Denton. The statute effectively preempted *some* city ordinance provisions regulating oil and gas operations within the city limits, like the City of Denton fracking ban ordinance, while preserving and codifying other types of city regulation of above-ground oil and gas operation. H.B. 40 was so closely associated with the City of Denton initiative election, that the legislation was commonly referred to in media reports as the "Denton Fracking Bill."[2]

With a city ordinance that expressly banned all fracking in the city limits top of mind, the legislature's goal with H.B. 40 was to strike a balance between preempting local regulation that directly bans or effectively prohibits oil and gas operations, and allowing other city regulations that might impact oil and gas operation without actually prohibiting operation by reasonably prudent operators. This balancing act was mentioned specifically by Representative Darby on the floor of the House during the deliberation of H.B. 40:

> "So members, I think this strikes a—it's a balance. I think we've tried to use a rifle shot to accommodate the needs of this growing state and the needs to develop our oil and gas resources and yet protect the citizens of this great state. I really tried to protect the members of this body by taking changes that addressed the concerns of your cities, your mayors, your city council folks, the folks back home. Every one of us has cities back home that we have to answer to. Every one of us have mayors that we work with every day and city councilpersons. And so I tried to strike a balance in this bill, and I think this bill does this. You can be proud of this bill that we have set in statute protections for the cities. Once and for all, we have established a statutory framework that cities can regulate above-ground oil and gas activities. It's never been in statute. It's never been in statute that cities could regulate reasonable setback lines, noise, traffic, health, safety, fire. It's never been in statute. This bill does that. It protects your cities."

[2] *See e.g.*, Jim Malewitz, *Texas House Approves "Denton Fracking Bill"*, TEXAS TRIBUNE, April 17, 2015, available at https://www.texastribune.org/2015/04/17/texas-house-drill-denton-fracking-bill/.

H.J. of Tex. (52nd Day Supplement), 84th Leg., R.S. S40 (2015). [3]

According to the bill author, the legislative intent behind H.B. 40 was to narrowly preempt, via a "rifle shot" bill, city ordinances that outright ban oil and gas operations, like the one passed by the voters in Denton. Beyond that, and relevant to this case, the legislation served another purpose: to protect city authority to regulate above-ground oil and gas activity through regulations like traffic ordinances.

Based on the bill author's statement, along with the plain language of the statute, we know there was a general intent to protect commercially reasonable traffic ordinances. But what about ordinances like those codified in Sec. 106-7 and 106-8 of the Port Arthur Code of Ordinances? Port Arthur's ordinances, like many others adopted by Texas cities, authorize the city to designate "truck routes" for commercial traffic on which heavy trucks may operate. In addition, in order to accommodate some truck traffic that cannot be totally confined to designated truck routes, the city's ordinance allows for truck operators to apply for a permit to operate on non-truck route streets with the payment of a surety performance bond to the city to help defray the costs for road repairs, if necessary.

One line of questioning on the House floor during the H.B. 40 debate centered on the exact type of truck traffic regulations at issue in this case:

> "REP. CHRIS TURNER: Similarly, provisions relating to truck traffic, road issues, road bonds to deal with damage and repair issues, those are considered "commercially reasonable"? That falls under the above-ground regulation?
>
> REP. DREW DARBY: I believe those ordinances would stand the test of H.B. 40."

H.J. of Tex. (52nd Day Supplement), 84th Leg., R.S. S10 (2015).

The House membership voted to reduce the above verbal exchange to writing and place it in the House Journal for the purposes of legislative intent, along with the rest of the dialogue on the bill. In doing so, the legislature demonstrated its intent to protect the exact regulations that Port Arthur seeks to enforce in passing Section 81.0523.

An additional reason why the bill author's statement as to the reasonableness of a hypothetical city ordinance on truck routes and road bonds is relevant to the specific fact pattern before the Court is because the test for what is a "commercially reasonable" ordinance was intended to be an objective standard. The statute requires the court's inquiry into what is "commercially reasonable" to be "based on the objective standard of a reasonably prudent operator and not an individualized assessment of an actual operator's capacity to act." TEX. NAT. RES. CODE § 81.0523(a)(1). As appellants point out in their brief, the "reasonably prudent operator" standard in Section 81.0523(a)(1) was used to limit the statute from having an overly broad effect on city ordinances. *See* Appellants' Br. at 33-34. This Court need not perform an individualized assessment of appellee's capacity to act under the ordinance. In other words, the term "commercially reasonable" was not designed to be a moving target.

[3] Available at https://journals.house.texas.gov/HJRNL/84R/PDF/84RDAY52SUPPLEMENT.PDF.

According to Representative Darby, this language was chosen specifically to allow local officials to have a meaningful role in adopting and enforcing above-ground regulations that might impact oil and gas operation. When discussing how the language in the bill was modified to address the concerns of city officials, Representative Darby said the following about the statutory definition of "commercially reasonable":

> "These include tightening the definition of "commercially reasonable" to make it an objective standard that is not tied to one operator's individual capacity but rather the reasonably prudent operator standard which is well established in Texas law and case law. It is an objective standard, not a subjective one, that binds both the operator and the city. By design this was intended to allow for—in fact, encourages—operators and cities sitting down together to plan and coordinate the orderly development of minerals and their community."

H.J. of Tex. (52nd Day Supplement), 84th Leg., R.S. S1 (2015).

The City of Port Arthur's ordinances not only allow for appellee to coordinate his operations with the city, they are predicated on it happening. A reasonably prudent operator would cooperate with the city to either comply with the truck route ordinance, or apply for a permit and post a performance bond to mitigate any degradation of neighborhood streets. The appellee did not submit a completed application to the city for a truck permit, thus closing off the city's ability to effectively work with the appellee to reach some form of compromise for the good of the surrounding community. *See* Appellants' Br. at 20. Instead of cooperating with the city and his neighbors and seeking a permit, the appellee filed the lawsuit that is the subject of this appeal.

A reasonably prudent operator would not have, as appellee did in this case, built a driveway connecting to a residential neighborhood street without informing the city, with the knowledge that a "no trucks" sign had been posted on that neighborhood street for years, and then commence heavy truck traffic along the street to facilitate a land farming operation. The record reveals reports of upwards of 60 truck trips through the residential neighborhood street per day, including at night and in the early morning hours. *See* Appellants' Br. at 15. The appellee's neighbors reported that the truck activity was endangering neighborhood children, preventing them from safely riding their bicycles down residential streets, disturbing the peace of the neighborhood through noise and dust, and damaging the roadway. *Id*.

Operating large trucks through residential neighborhoods in the manner described in the record does not lend itself to a conclusion that appellee was acting in a reasonably prudent manner. Because the city ordinance allowed for a conversation that the appellee was unwilling to have and the city ordinance fits squarely within the type of above-ground traffic regulation that is not just contemplated but encouraged by the legislature under Section 81.0523(c), the appellee should not be found to have acted in a reasonably prudent manner.

When the Texas Legislature passed H.B. 40 in 2015, it established a regulatory structure now codified in Section 81.0523 that allows for cities to continue to impose reasonable traffic regulations to protect residents living in close proximity to oil and gas operations. The City of Port Arthur is doing exactly that. The Court should reverse the trial court's decision in recognition of the legislature's intent to preserve city authority to protect the quality of life for residents and help facilitate commerce in a way that accounts for the realities of living in a city.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this letter has been served via e-mail upon the below named individuals on November 10, 2021:

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