TEXAS MUNICIPAL LEAGUE
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President **Holly Gray-McPherson**, Mayor Pro Tem, Roanoke
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Virginia K. Hoelscher
Chair, Opinion Committee
Office of the Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2948
Via E-Mail: opinion.committee@texasattorneygeneral.gov

Re: Local Government Recommendations and TCEQ Permits (RQ-0185-KP)

Dear Ms. Hoelscher:

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, an affiliate of TML, is an organization of more than 400 attorneys who represent Texas cities and city officials in the performance of their duties. TML and the Texas City Attorneys Association advocate for the interests common to all Texas cities and ask that you consider the following when issuing your opinion.

All concrete-crushing facilities are regulated by the Texas Commission on Environmental Quality (TCEQ) pursuant to the Texas Clean Air Act (codified in chapter 382 of subtitle C of the Texas Health and Safety Code and referred to here as "TCAA"). The first question in this request asks the extent to which Section 382.112 of the TCAA requires the TCEQ to consider a local government recommendation in deciding whether to issue such a facility a permit. Section 382.112 provides as follows:

> A local government may make recommendations to the commission concerning a rule, determination, variance, or order of the commission that affects an area in the local government's territorial jurisdiction. *The commission shall give maximum consideration to a local government's recommendations*.

TEX. HEALTH & SAFETY CODE § 382.112 (emphasis added).

The plain language of the statute mandates that, so long as the permit is for a facility that affects an area in the city's jurisdiction, TCEQ must give "maximum consideration" to the city's recommendation. *See id.* § 382.003(8) (defining "local government" to mean "a health district established under Chapter 121, a county, or a municipality"); TEX. GOV'T CODE § 311.016(2) (providing that unless the context or express language of the statute provides otherwise, the term "shall" imposes a duty). Thus, the TCEQ has a statutory duty to give the utmost deference to a city's recommendation.

Both historical and current discussions of the TCAA acknowledge the TCEQ's duty to give heightened deference to local recommendations under Section 382.112. The author of a law review article written in 1969, only four years after the 1965 enactment of the TCAA, discusses the joint role of the state and localities under the TCAA and concludes that "[s]ince the [Texas Air Control] Board is required to give 'maximum consideration' to local government recommendations concerning regulations, local authority to protect itself from particular pollution problems seems adequately safeguarded." G. Todd Norvell & Alexander W. Bell, *Air Pollution Control in Texas*, 47 Tex. L. Rev 1086, 1120 (1969). And in the recent case of *Southern Crushed Concrete, LLC, v. City of Houston*, the petitioner recognized the TCEQ's duty to show the utmost deference to city recommendations in its Brief on the Merits:

> **The legislature gives cities a special thumb on the scale, entitling their advice and wishes to "maximum consideration.**" TCAA § 382.112. The legislature has withdrawn cities' authority to command a result, replacing it with the right to *recommend* a result and **receive particular deference**. . . . Indeed, by giving the cities **something better than most participants in agency proceedings get—the "maximum consideration of section 382.112**—the legislature necessarily excluded cities from having the stronger power of prohibition.

Brief for Petitioner at 23, 398 S.W.3d 676 (Tex. 2013) (No. 11–0270), 2012 WL 3191719 (bolded emphasis added).

From a policy perspective, it makes sense that the legislature would require the TCEQ to give heightened deference to local recommendations. First, and perhaps most importantly, Section 382.112, Texas Health and Safety Code, acknowledges a fundamental tenet of Texas state government—that citizens and their local governments are in the best position to make decisions affecting their community. *See, e.g.*, TEX. COMM'N ON ENVTL. QUALITY, STRATEGIC PLAN: FISCAL YEARS 2015-2019, 3 (July 2014) (providing that it is the philosophy of Texas state government that "[d]ecisions affecting individual Texans, in most instances, are best made by those individuals, their families, *and the local government closest to their communities*.") (emphasis added), *available at* https://www.tceq.texas.gov/publications/sfr/strategic-plan/strategic-plan.

Second, Section 382.112 recognizes and fosters an undeniable truth about air pollution; local governments have an important role in solving the problem. One federal court commenting on the TCAA soon after its enactment explained:

> The Clean Air Act recognizes that the problem of air pollution varies among the different areas of the state. *See* Tex. Civ. Stat. Ann., art. 4477-5 § 6(B) (1967). Thus the State has achieved a measure of decentralization in the administration of the Clean Air Act by relying upon local enforcement.

Harris Cty. v. Ideal Cement Co., 290 F. Supp. 956, 960 (S.D. Tex. Sept. 17, 1968). As a result, it is essential that TCEQ give local recommendations maximum consideration in making state-level air control rules, determinations, variances, and orders.

Third, the TCEQ's focus under the TCAA over concrete-crushing operations is limited to air quality issues. Cities have a much broader perspective. Cities are concerned about these facilities not only because of their impact on air quality, but their effect on property values, road and highway safety, aesthetics, noise, and a host of other local conditions. Requiring TCEQ to give significant deference to a city recommendation guarantees that all local impacts are considered when TCEQ acts.

The requestors' second question asks whether the answer to Question 1 would be different if the ordinance on which the local government's recommendation is based is an air pollution ordinance adopted in accordance with Section 382.113(a). Section 382.113, entitled "Authority of Municipalities," provides as follows:

> (a) Subject to Section 381.002, a municipality has the powers and rights as are otherwise vested by law in the municipality to:
> (1) abate a nuisance; and
> (2) enact and enforce an ordinance for the control and abatement of air pollution, or any other ordinance, not inconsistent with this chapter or the commission's rules or orders.
>
> (b) An ordinance enacted by a municipality must be consistent with this chapter and the commission's rules and orders and may not make unlawful a condition or act approved or authorized under this chapter or the commission's rules or orders.

TEX. HEALTH & SAFETY CODE § 382.113.

TCEQ's own permit highlights the import of a Section 382.112 recommendation that is based on a local ordinance adopted pursuant to the TCAA. Information about obtaining an air quality standard permit for permanent rock and concrete crushers is available on the TCEQ website, here: https://www.tceq.texas.gov/permitting/air/newsourcereview/mechanical/permcrush.html. The "Air Standard Permit Form PI-1S" instructions explain that the following statement must accompany the signature of the applicant:

> I further state that to the best of my knowledge and belief, **the project for which application is made will not in any way violate** any provision of the Texas Water Code (TWC), Chapter 7; the Texas Health and Safety Code, Chapter 382, the Texas Clean Air Act (TCAA) the air quality rules of the Texas Commission on Environmental Quality; or **any local governmental ordinance or resolution enacted pursuant to the TCAA**.

See TEX. COMM'N ON ENVTL. QUALITY, REGISTRATIONS FOR AIR STANDARD PERMIT FORM PI-1S INSTRUCTIONS (August 2017), at 12, *available at* https://www.tceq.texas.gov/assets/public/permitting/air/Forms/NewSourceReview/10370.pdf (emphasis added). If an applicant refuses to sign because the project would not comply with a local air pollution ordinance enacted pursuant to Section 382.113(a)(2) of the TCAA, TCEQ presumably would not issue the permit.

All that said, we note that the Section 382.112 mandate to defer to a city's recommendation is not limited to ordinances adopted pursuant to the TCAA. Instead, the Section 382.112 mandate applies regardless of the legal authority for the underlying the recommendation.

The requestors' third, and final, question asks whether the TCAA precludes the TCEQ from considering a local government's zoning, land use, and other ordinances in determining whether to issue a permit, and the extent to which those ordinances may be considered. Rather than preclude, the TCAA authorizes the TCEQ to consider local ordinances when issuing a permit. The TCAA provides that its purpose is "to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property." TEX. HEALTH & SAFETY CODE § 382.002(a). To carry out this mission, TCEQ "may issue orders and make determinations as necessary to carry out the purposes of the" TCAA. *Id.* § 382.023(a). And in issuing those orders and making those determinations the TCEQ is required to consider "the facts and circumstances bearing on the reasonableness of emissions." *Id.* § 382.024. Moreover, the TCEQ's rules make clear that other regulations, including local regulations, apply to TCEQ-regulated sites. *See* 30 TAC §§ 106.4, 106.491.

TML and TCAA respectfully request that your office consider these comments when issuing your opinion. Please contact me if I may be of assistance.

Sincerely,

/s/
Scott Houston
Deputy Executive Director & General Counsel