TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-13-00467-CV

Wimberley Springs Partners, Ltd. and Hays Trinity Groundwater Conservation District, Appellants

v.

Wimberley Valley Watershed Association, Johanna L. Smith, H.K. Acord, Janet Acord, James R. McMeans and David H. Glenn, Appellees

FROM THE DISTRICT COURT OF HAYS COUNTY, 207TH JUDICIAL DISTRICT NO. 11-1086, HONORABLE DWIGHT E. PESCHEL, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Hays Trinity Groundwater Conservation District (Hays Trinity) and Wimberley Springs Partners, Ltd. (WSP) appeal a final judgment of the district court that reversed a Hays Trinity order granting a water-well operating permit to WSP. The same Hays Trinity order had denied as untimely requests for a contested-case hearing that appellees had made,[1] and that ruling has been the chief focus of the ensuing litigation. For the reasons explained below, we will reverse the district court's judgment and render judgment affirming Hays Trinity's order granting WSP's permit.

[1] Appellees, who alleged they were area property owners adversely affected by the permit, consist of individuals Johanna L. Smith, H.K. Acord, Janet Acord, James R. McMeans, and David H. Glenn; and the Wimberley Valley Watershed Association, a non-profit organization.

BACKGROUND

Hays Trinity is a groundwater-conservation district created under the Texas Constitution and Chapter 36 of the Texas Water Code,[2] and which exercises jurisdiction (as its name suggests) within Hays County.[3] Consequently, when appellant WSP sought to refurbish an existing golf course located in western Hays County, it filed an application for a water-well permit with Hays Trinity pursuant to the district's administrative rules requiring that all non-exempt wells be permitted for operation.[4] Hays Trinity staff reviewed WSP's application and recommended that the permit be granted, whereupon Hays Trinity issued public notice that it would consider WSP's permit at a February 21, 2011 board meeting. To comply with the notice requirements in Chapter 36 and Hays Trinity's rules, WSP sent notices of the application and hearing to adjacent landowners and published the same notices in local newspapers.[5]

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[2] *See* Tex. Spec. Dist. Code § 8843.002; *see also id.* §§ 8843.001–.154 (Hays Trinity Groundwater Conservation District's enabling statute); *see generally* Tex. Const. art XVI, § 59(a) ("The conservation and development of all of the natural resources of this State . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto."), (b) authorizing creating of conservation districts); Tex. Water Code §§ 36.001–.457 (providing for creation and administration of groundwater-conservation districts, including delegating power and duty to "make and enforce rules, including limiting groundwater production" and, with certain exceptions, to "require a permit for the drilling, equipping, operating, or completing of wells").

[3] *See* Tex. Spec. Dist. Code § 8843.004.

[4] *See* Hays Trinity Groundwater Conservation District Rules, Rule 3.2 (2007). Subsequent citations to these rules will be in the form of "Hays Trinity GCD Rule __."

[5] *See* Tex. Water Code § 36.404; Hays Trinity GCD Rules 3.2, 5.4.

At the February 21 meeting, WSP presented details of its application, and nineteen members of the public—including at least one of the appellees—provided testimony regarding WSP's permit application. Although Hays Trinity's rules provided for the filing of "protests" or requests for contested-case hearing in connection with permit applications, as we will elaborate below, no such filings or requests were made prior to or during the hearing. At the conclusion of the hearing, the board voted to approve WSP's application.[6]

Beginning February 28, 2011 (roughly one week after the board vote to issue WSP's permit), for the first time, Hays Trinity began receiving requests for a contested-case hearing on WSP's permit from appellees and other individuals. After receiving the hearing requests, Hays Trinity issued public notice that it would conduct, at its next regularly scheduled board meeting, a pre-hearing conference to consider the requests for a contested-case hearing on WSP's application.[7] In response, WSP filed a motion asking Hays Trinity to deny the hearing requests as untimely filed, asserting that Hays Trinity's then-current rules authorized Hays Trinity's board to deem as untimely filed any hearing requests the board received after already voting to grant a permit. Hays Trinity's board voted to continue its pre-hearing conference and hold a separate hearing on the timeliness issue raised by WSP's motion.

After considering appellees' response to WSP's motion and WSP's reply, as well as oral arguments by the parties' counsel at its April 7, 2011 meeting, Hays Trinity's board voted to deny the hearing requests as untimely filed and also voted to affirm its grant of WSP's permit

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[6] WSP's permit was officially approved and issued on March 7, 2011, in Order No. 146.

[7] *See* Hays Trinity GCD Rule 5.5G (requiring Hays Trinity's board to hold pre-hearing conference if contested-case hearing is timely filed).

application. In an April 12 order (Order No. 148) formally adopting its ruling on WSP's motion, Hays Trinity's board determined, as relevant here, that:

> [T]he District Rules allow any interested person to file a formal protest at the public hearing, but only allow the applicant an additional 10-day period after board action to file a protest or a request for a contested hearing, and then only if the Board votes to issue the permit with conditions[.]

With regard to the requests for contested-case hearing on WSP's permit application, the board found that:

> [B]eginning one week after the public hearing, formal decision, and issuance of a permit for substantially less annual production than used historically and after the expiration of the deadline to file a request for a contested hearing, the District received 11 proposed protests and requests for contested case hearings from various individuals and from the Wimberley Valley Watershed Association, none of which included an explanation for the late filing or a request for an extension of the deadline.

In turn, the board, in the same order, denied "all protests and requests for a contested case hearing as untimely filed" and affirmed the issuance of WSP's permit.

After exhausting their remaining administrative remedies, the appellees filed suit for judicial review of Hays Trinity's order in district court, seeking to have Hays Trinity's order reversed and remanded for a contested-case hearing on WSP's permit application. WSP intervened in support of Hays Trinity's order, and both WSP and Hays Trinity filed summary-judgment motions. The district court denied the motions and ultimately signed the final judgment at issue here. That order reversed and remanded Order No. 148, holding that it "was arbitrary, capricious

and an abuse of discretion" for Hays Trinity to deny appellees' contested-case hearing on WSP's application and grant WSP's permit without first conducting a contested-case hearing on the permit.

ANALYSIS

In separate but overlapping issues, WSP and Hays Trinity assert generally that the district court erred in reversing Order No. 148 because Hays Trinity acted within its discretion and not arbitrarily or capriciously in denying appellees' hearing requests as untimely. More specifically, WSP and Hays Trinity principally contend that Hays Trinity's interpretation of the applicable deadline was reasonable and consistent with the text of its own rules, such that the district court should have deferred to Hays Trinity's interpretation and affirmed its order. In response, appellees maintain that the district court's judgment was correct because Hays Trinity essentially announced a new deadline after the deadline had passed. That lack of prior notice, appellees add, deprived them of their due-process and equal-protection rights.

Standard of review

We review Hays Trinity's order under the "substantial evidence" standard codified in the Administrative Procedure Act (APA).[8] This standard requires that we reverse or remand a case for further proceedings "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" are:

[8] *See* Tex. Water Code § 36.253; *see also* Tex. Gov't Code § 2001.174 (codifying "substantial evidence" standard of review).

(A) in violation of a constitutional or statutory provision;
(B) in excess of the agency's statutory authority;
(C) made through unlawful procedure;
(D) affected by other error of law;
(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[9]

Essentially, this is a rational-basis test to determine, as a matter of law, whether an agency's order finds reasonable support in the record.[10] "The test is not whether the agency made the correct conclusion in our view, but whether some reasonable basis exists in the record for the agency's action."[11]

Both WSP and Hays Trinity emphasize Subsection (E) of Section 2001.174—the aspect of "substantial evidence" review that is concerned with the existence of a reasonable factual or evidentiary basis to support Hays Trinity's order—and seeks to invoke the principles of deference that would apply to our review of such issues. But there are no factual disputes underlying this appeal; instead, the parties' competing contentions turn ultimately on construction of Hays Trinity's administrative rules regarding the deadline, if any, by which appellees had to request a contested-case hearing. That issue, even when presented in the context of "substantial evidence" review under Section 2001.174, presents a question of law that we review de novo under traditional principles of

[9] Tex. Gov't Code § 2001.174(2).

[10] *See Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452–53 (Tex. 1984).

[11] *Slay v. Texas Comm'n on Envtl. Quality*, 351 S.W.3d 532, 549 (Tex. App.—Austin 2011, pet. denied).

statutory construction.[12] Our primary objective in construction of rules (or statutes) is to ascertain and give effect to the drafters' intent.[13] We determine that intent from the plain meaning of the words chosen when it is possible to do so, using any definitions provided.[14] We consider the rules as a whole rather than their isolated provisions.[15] We presume that the rules' language was chosen with care, with each word included (or omitted) purposefully.[16] Undefined terms are typically given their ordinary meaning, but if a different or more precise definition is apparent from the terms' use in context, we apply that meaning.[17] If the text of the rule is unambiguous, we adopt the interpretation supported by its plain language unless such an interpretation would lead to absurd results that the drafters could not possibly have intended.[18] However, if the text is ambiguous—i.e.,

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[12] *See, e.g.*, *Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011) (noting that Utility Code typically requires court to review Railroad Commission orders under substantial-evidence standard of APA Section 2001.174(2) but that when "gravamen" of dispute "is a governmental agency's construction of a statute it is charged with administering . . . [t]he construction of a statute is a question of law we review de novo"); *see also TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011) (holding that administrative rules are interpreted under principles of statutory construction); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008) ("Statutory construction is a legal question we review de novo.").

[13] *See TGS-NOPEC*, 340 S.W.3d at 439 (citing Tex. Gov't Code § 312.005; *Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care*, 145 S.W.3d 170, 176 (Tex. 2004)).

[14] *See id.* (citing Tex. Gov't Code § 311.011(b)).

[15] *See id.* (citing *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004)).

[16] *See id.* (citing *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008)).

[17] *Id*. (citing *In re Hall*, 286 S.W.3d 925, 928–29 (Tex. 2009)).

[18] *See id.* (citing *Mega Child Care*, 145 S.W.3d at 177).

there is more than one reasonable interpretation of it—we may be required to defer to an authoritative construction by the agency charged with the provision's enforcement that is reasonable and not inconsistent with the text of the provision.[19] Such deference is particularly appropriate where the statutes and rules at issue concern a matter within the core expertise of the agency.[20]

Hays Trinity's interpretation of its own rules

Neither the Water Code nor Hays Trinity's enabling statute establish deadlines regarding contested-case-hearing requests. The Water Code does, however, empower districts to adopt rules governing procedural matters like contested-case-hearing deadlines.[21] Whether Hays Trinity's rules provide a deadline for requesting such a hearing, and when one suffices as "timely filed," turns on Rules 3.2 and 5.5 of Hays Trinity's rules. Rule 3.2 provides that for all operating-permit applications filed with the district:

> The Board shall schedule a hearing, which may be held at a regular Board meeting, where the Board shall consider the application and any evidence presented at the hearing. Any interested person may provide oral or written testimony at the hearing, *or may file a formal protest* against the proposed action.

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[19] *See Texas Citizens*, 336 S.W.3d at 628–30; *see also TGS–NOPEC*, 340 S.W.3d at 439 ("If there is vagueness, ambiguity, or room for policy determinations in a statute or regulation, . . . we normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule.").

[20] *See Zimmer US, Inc. v. Combs*, 368 S.W.3d 579, 586 (Tex. App.—Austin 2012, no pet.) (deferring to Comptroller's reasonable interpretation of ambiguous tax statute); *cf. Rylander v. Fisher Controls Int'l, Inc.*, 45 S.W.3d 291, 302 (Tex. App.—Austin 2001, no pet.) (declining to defer to agency's interpretation on issue outside agency's expertise).

[21] *See* Tex. Water Code § 36.415(b)(1); *see also id.* § 36.418(a) (district "may adopt rules establishing procedures for contested hearings consistent with [the APA]").

Following the hearing, the Board may:

1) issue the permit;
2) issue the permit with conditions;
3) deny the application; or
4) send the application to a contested case hearing.

If the Board votes to issue the permit with conditions, *the applicant* may reject the permit by filing a request for a contested case hearing within 10 days after receiving notice of the Board action.[22]

Pointing to the above-emphasized language, WSP maintains that Rule 3.2 provides any interested person, Hays Trinity, and the applicant with the opportunity to protest or request a contested-case hearing before Hays Trinity makes a decision to issue a permit, and further gives applicants whose permit conditions were changed at the hearing, but not others, ten days to challenge those conditions. WSP further asserts that, consistent with Rule 3.2, Rule 5.5 allows Hays Trinity's board to grant or deny an application at the same public meeting at which it first considers the application:

F. The following individuals may request a contested case hearing:

(1) The applicant; or

(2) A person who

(a) has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest that is within the District's regulatory authority that is not merely an interest common to members of the public; and

(b) will be directly affected by the Board's action on the application.

G. The Board, on its own motion, may set the application for a contested case hearing. The Board shall set the application for contested case hearing if the applicant timely files a written request for contested case hearing. If a

[22] Hays Trinity GCD Rule 3.2 (emphases and formatting added).

> contested case hearing request is timely filed by an individual other than the applicant, as authorized by this Rule, the Board shall schedule a pre-hearing conference at its next regularly scheduled Board meeting. The Board shall determine at the pre·hearing conference if a contested case hearing will be held under Rule 5.6. If no request for contested case hearing is timely filed, and the Board determines there is no reason to conduct a contested case hearing on the application, the Board may, *at the same meeting*, grant or deny the application and issue a written order of their decision. If the Board determines a contested case hearing is required, the Board shall declare the application contested and may:
> 1) appoint a Hearings Examiner to conduct the hearing; and
> 2) approve a temporary permit to authorize groundwater withdrawals while the hearing is being conducted.[23]

Hays Trinity observes that because its board can vote on an application at a board meeting held or resumed immediately after the hearing, the deadline to file a contested-case hearing request can be reasonably construed to be at the hearing on the application. Appellees disagree, asserting that Hays Trinity's rules simply omit any deadline for a non-applicant to request a contested-case hearing.

Although a precise deadline may not be stated explicitly, a careful reading of these rules bears out Hays Trinity's interpretation that a request for a contested-case hearing by a non-applicant must be made as of the date of the hearing on the application. First, Rule 3.2 provides that "any interested person" may testify or file a formal protest, while also specifying that the board may decide the application following the hearing, without limitation as to how soon after the hearing.[24] The board's express power to decide the application once the hearing is conducted is at odds with appellees' notion that non-applicants have another ten days thereafter to request a contested-case hearing (which is itself a hearing regarding whether to grant the applications). And the proviso

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[23] *Id.* Rule 5.5F, G (emphasis added).

[24] *See id.* Rule 3.2.

allowing an applicant to request a contested-case hearing only if the permit is issued with conditions likewise supports this reading. A permit with conditions is the only one of the four options that has the effect of changing the terms of the permit as presented before the hearing. Rule 5.5G adds further support to Hays Trinity's interpretation because, as noted, its text contemplates that any requests for contested-case hearing would be filed before or at the permit-application hearing: "If no request for contest case hearing is timely filed, and the Board determines that there is no reason to conduct a contested case hearing on the application, the Board may, *at the same hearing* [i.e., the permit-application hearing] grant or deny the application and issue a written order of [its] decision."[25] In the very least, Hays Trinity's interpretation of its own rules is entitled to deference as a reasonable construction of ambiguous text that is not inconsistent with the text.[26]

Appellees also contend that because Hays Trinity's rules do not explicitly mandate that an interested person file a request at a permit hearing or that the board *must* take action on a permit at the board meeting immediately following a permit hearing, the rules lack a deadline to file a contested-case hearing request.[27] We disagree. Hays Trinity's rules allow its board to vote to grant

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[25] *Id.* Rule 5.5G (emphasis added).

[26] *See TGS–NOPEC*, 340 S.W.3d at 439 ("If there is vagueness, ambiguity, or room for policy determinations in a statute or regulation, . . . we normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule.").

[27] *See* Hays Trinity GCD Rule 3.2 (any interested person "*may* file a formal protest against the proposed action" and "[f]ollowing the hearing," the board "*may*" take action on a permit application, including issuing the permit or sending the application to a contested-case hearing) (emphases added).

a permit at its board meeting immediately after a permit hearing, and its board may properly determine that requests are not timely if not filed before or at the hearing.[28]

Appellees argue that because Rule 3.2 does not specifically spell out, in so many words, a deadline for interested persons, the ten-day provision for an applicant whose permit has been granted with conditions must also apply to interested persons and that Hays Trinity should apply uniform deadlines where its rules are silent.[29] We agree with Hays Trinity that the ten-day extension only applies to an applicant whose permit is granted with conditions. First, as previously determined, Hays Trinity's rules are not silent as to the deadline for filing a contested-case hearing request: because its board may vote to grant a permit at a board meeting immediately following the permit hearing, the board may reject as untimely requests filed after the permit hearing. Second, applying the ten-day provision to non-applicants who wish to file a contested-case hearing request would require us to read words into the rule.[30] Finally, any merit appellees' argument might have if the ten-day provision were read in isolation is refuted once the provision is read in conjunction with Rule 3.2 and Rule 5.5G—allowing the Hays Trinity's board to grant a permit at the board

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[28] *See Chocolate Bayou Water Co. & Sand Supply v. Texas Nat. Res. Conservation Comm'n*, 124 S.W.3d 844, 854 (Tex. App.—Austin 2003, pet. denied) (concluding that agency did not abuse discretion when it refused to grant extension after contesting party did not timely request hearing and agency not required to grant extension).

[29] *See* Hays Trinity GCD Rule 3.2 ("If the Board votes to issue the permit with conditions, the applicant may reject the permit by filing a request for a contested case hearing within ten days after receiving notice of the board action.").

[30] *See Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995) ("[C]ourts should not insert words in a statute except to give effect to clear legislative intent."); *7-Eleven, Inc. v. Combs*, 311 S.W.3d 676, 685–86 (Tex. App.—Austin 2010, pet. denied) ("[W]e will not read into an act a provision that is not there . . . .") (quoting *Williams*, 150 S.W.3d at 573).

meeting immediately following a hearing on a permit if no requests for a contested-case hearing are filed prior to the board taking action.[31]

Appellees argue that setting the deadline to file a contested-case hearing request at or before the permit hearing is illogical because an interested person would have no need to file a request until after Hays Trinity's board votes to grant an application. Hays Trinity counters that requiring an interested person to file a hearing request prior to the permit hearing allows its board to be apprised of any issues before taking action on the permit and that allowing an applicant to file a request post-hearing allows her to decide whether to protest unforeseen conditions. We would add that interested persons have notice that the board may both consider and approve the permit at the conclusion of the hearing. Accordingly, Hays Trinity's interpretation is not unreasonable.

Appellees also contend that the rules fail to provide a deadline to file a request for a contested-case hearing because Rule 3.2 only provides for filing a "formal protest," not a contested-case hearing request.[32] We disagree. Even if the term "formal protest" is ambiguous, the rules define "Contested Case Hearing" as a "permit hearing requested as authorized by Rule 5.5.L [sic], which is noticed and conducted according to the procedures of Rule 5.6."[33] A "contested case" is

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[31] *See generally Southwest Pharmacy Sols., Inc. v. Texas Health & Human Servs. Comm'n*, 408 S.W.3d 549, 562 (Tex. App.—Austin 2013, pet. denied) (rejecting interpretation of provision where proffered construction depended on reading provisions in isolation).

[32] Hays Trinity GCD Rule 3.2 (emphasis added).

[33] *Id.* Rule 2 (Definitions). Hays Trinity's rules also define "Party in a Contested Case Hearing" as "applicant or other person defined under Rule 5.5.L [sic]." *Id.* In its summary-judgment pleadings, Hays Trinity cited to the rules in effect prior to 2007, and previous rule 5.5L provided that both an interested person and an applicant whose application was granted with conditions had ten days after Hays Trinity's decision to file a request for a contested-case hearing. Appellees note that the version of the rules applicable to this case lack a "Rule 5.5L," but the references would generally

"a proceeding, including a rate making or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing."[34] And similarly, "formal" is "[p]ertaining to or following established procedural rules, customs, and practices," and "protest" is a "formal statement or action expressing dissent or disapproval."[35] In short, the Department's reading of filing of a formal protest to encompass a contested-case hearing request does not run afoul of statutory definitions or the ordinary meaning of the relevant words, nor is it unreasonable. In such circumstances, we defer to Hays Trinity's interpretation of its own rules.[36]

Constitutional challenges

Premised on their view that the rules do not provide a deadline to file a contested-case hearing request, or at least do not do so with sufficient clarity, appellees maintain that Hays Trinity denied them due process by not informing them of a filing deadline, by retroactively announcing and applying a new interpretation of the deadline to submit requests, and violated their right to equal protection by allowing a different deadline for applicants to file a request. We disagree.

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correspond to the substance of Rule 5.5F.

[34] Tex. Gov't Code § 2001.003(1); *see also Contested Hearing*, *Black's Law Dictionary* (10th ed. 2014) (defining "contested hearing" as a hearing "in which at least one of the parties has objections regarding one or more matters before the court").

[35] *Formal*, *Black's Law Dictionary*; *Protest*, *id.*

[36] *See Public Util. Comm'n v. Gulf States Utils.*, 809 S.W.2d 201, 207 (Tex. 1991); *Mont Belvieu Caverns, LLC v. Texas Comm'n on Envtl. Quality*, 382 S.W.3d 472, 491–92 (Tex. App.—Austin 2012, no pet.).

Due process

In asserting their due-process claims, appellees invoke both the federal and state constitutions, but we construe the two provisions the same in the absence of any demonstrated reason to do otherwise.[37] Due-process concerns arise "when the state or its agents deprive a person of a protected liberty or property interest."[38] Consequently, when analyzing appellees' constitutional challenges, we must determine if they have a constitutionally protected interest at stake, and if so, what process is due to sufficiently protect that interest.[39] Here, we will assume without deciding that appellees have a constitutionally protected interest and focus solely on whether Hays Trinity's rules have afforded them due process. What process is due is measured by a flexible standard that depends on the practical requirements of the circumstances."[40] "Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner."[41] An

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[37] *See* U.S. Const. amend. XIV; Tex. Const. art. I, § 19; *Texas Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 658 (Tex. 2004) ("Texas's due course of law clause and the federal due process clause are textually different, but we generally construe the due course clause in the same way as its federal counterpart."); *see also Granek v. Texas State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 772 (Tex. App.—Austin 2005, no pet.) (due-process protections of federal and Texas constitutions apply to agency proceedings).

[38] *McMaster v. Public Util. Comm'n*, No. 03-11-00571-CV, 2012 Tex. App. LEXIS 7502, at *24 (Tex. App.—Austin Aug. 31, 2012, no pet.) (mem. op.).

[39] *University of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

[40] *Id.* at 930.

[41] *Id.*

agency order may be arbitrary and capricious if a denial of due process has prejudiced the litigant's rights.[42]

Appellees assert that Hays Trinity's rules violate their due-process rights because they do not provide notice of a deadline. We take this to be an assertion that the rules are unconstitutionally vague. A rule is unconstitutionally vague only if it (1) does not give fair notice of what conduct may be punished, and (2) invites arbitrary and discriminatory enforcement by its lack of guidance for those charged with its enforcement.[43] "To survive a vagueness challenge, a statute need not spell out with perfect precision what conduct it forbids."[44] Due process is satisfied if the prohibition is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with."[45] Laws must give fair notice to those to whom the statute is directed.[46] When persons of common intelligence are compelled to guess at a law's meaning and applicability, due process is violated and the law is invalid.[47] A law, however, is not

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[42] *Charter Med.-Dall.*, 665 S.W.2d at 454; *see also Oncor Elec. Delivery Co. v. Public Util. Comm'n*, 406 S.W.3d 253, 270 (Tex. App.—Austin 2013, no pet.) (agency's decision is arbitrary when its final order denies parties due process of law) (citing *Lewis v. Metropolitan Sav. & Loan Ass'n*, 550 S.W.2d 11, 16 (Tex. 1977)).

[43] *See Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998).

[44] *Benton*, 980 S.W.2d at 437 ("'Words inevitably contain germs of uncertainty [. . . .]'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973))).

[45] *Id.* (citing *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973)).

[46] *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)).

[47] *Vista Healthcare, Inc. v. Texas Mut. Ins. Co.*, 324 S.W.3d 264, 273 (Tex. App.—Austin 2010, pet. denied); *see also Texas Liquor Control Bd. v. Attic Club, Inc.*, 457 S.W.2d 41, 45 (Tex.

unconstitutionally vague merely because it does not define words or phrases.[48] And, the existence of a dispute as to a law's meaning does not necessarily render the law unconstitutionally vague.[49]

As discussed, Rule 5.5 allows the Hays Trinity board to vote "at the same meeting" on a permit, and Rule 3.2 allows Hays Trinity to grant a permit after a hearing. Considering those two rules together, the rules allow the board to deem as untimely a request for a contested-case hearing that is made after Hays Trinity voted on an application. As such, an ordinary interested person exercising common sense could understand that she needed to file her request before Hays Trinity voted on the application—i.e., an ordinary person could understand that if she did not file her contested-case hearing request before or at the hearing on a permit application, she risks having Hays Trinity reject her request as untimely filed if it votes immediately after the hearing to approve the application.[50]

Appellees also contend that Hays Trinity's rules fail to give notice of the right of an affected person to request a deadline. When applying the fair-notice test, courts allow statutes

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1970) ("Due process is violated only when a required course of conduct is stated in terms so vague that men of common intelligence must guess at what is required.").

[48] *See Vista Healthcare*, 324 S.W.3d at 273; *Rooms*, 7 S.W.3d at 845.

[49] *See Vista Healthcare*, 324 S.W.3d at 273.

[50] *See Benton*, 980 S.W.2d at 437. *United Copper Indus., Inc. v. Grissom*, on which appellees rely, is distinguishable. In determining the "quite narrow" issue of whether the agency had provided meaningful opportunity to offer "competent evidence" in support of Grissom's request for a contested-case hearing and a chance to refute the proof offered by United Copper, we noted that "the confusing nature of the Commission's notices and the language used in the Commission's own rule governing hearing requests" and that the rule did not reference any evidentiary requirement; nor did the agency notify Grissom that he needed to offer evidence. 17 S.W.3d 797, 802, 805 (Tex. App.—Austin 2000, pet. dism'd as moot). Again, that is not the situation here.

imposing economic regulation greater leeway than they allow penal statutes.[51] Courts recognize the myriad of factual situations that may arise and allow statutes to be worded with flexibility, provided the public has fair notice of what is required or prohibited.[52] In the case of civil or regulatory statutes, no more than a reasonable degree of certainty is required.[53] We conclude the rules provide a reasonable degree of certainty for how interested persons file contested-case hearing requests.[54]

Appellees also complain that Hays Trinity failed to provide notice of the deadline before or at the permit hearing. We disagree. As part of the permitting process, a permit applicant must provide public notice of the application "to all adjacent landowners within one-quarter mile of the well location"[55] and in a local newspaper. The record here demonstrates that Hays Trinity produced a notice of the hearing on WSP's application and that WSP sent notice to landowners who lived adjacent to WSP's property and published the notice in local newspapers. In addition to giving specifics regarding the application and the date, time, and location of the Hays Trinity's board meeting,[56] the notices for WSP's application explained that Hays Trinity's rules could be consulted

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[51] *Vista Healthcare*, 324 S.W.3d at 273 (citing *Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex. 1980)).

[52] *Id.*

[53] *Id.*

[54] *See* Hays Trinity GCD Rule 5.6 ("Permit Actions Requiring a Contested Case Hearing") (detailing notice and procedure for applications set for contested-case hearings).

[55] *Id.* Rule 3.2 (purpose of rule is "to provide notice to landowners who may be affected by the proposed permit").

[56] *See* Tex. Water Code § 36.404(a)–(b) (listing information to be included in notice); *see also Chocolate Bayou*, 124 S.W.3d at 853 (providing public with notice of application "affords individuals who may be affected by the grant or denial of the permit a meaningful opportunity to

for "further information about how to participate in the District's decision" and that the rules were "available from the District office."[57] Thus, because the rules provide notice regarding the appropriate deadlines, this directive to consult the rules to learn how to participate in Hays Trinity's decision constitutes notice of the deadlines.[58] Relatedly, appellees were provided a meaningful opportunity to be heard at Hays Trinity's board meeting—in fact, the record reflects that numerous citizens, including at least one of the appellees, spoke at that hearing. And although appellees complain that Hays Trinity failed to apprise them in the notices or otherwise of a specific deadline to file their contested-case hearing requests, appellees do not cite to any authority requiring Hays Trinity to provide the exact date of the deadline. Not until 2015 were groundwater conservation districts required to "establish the deadline" to request a contested-case hearing.[59]

Appellees next argue that Hays Trinity's untimeliness ruling here represents an after-the-fact change of a "long-standing" interpretation by Hays Trinity's board that interested persons had ten days post-hearing to file a hearing request and that Hays Trinity failed to give notice to appellees of this new post-hearing policy its board "developed" after the hearing on WSP's

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voice their concerns and participate in the permitting process by requesting a contested-case hearing on the permit application").

[57] The notices also invited the public "to comment on this application by sending comments" to Hays Trinity.

[58] *Than*, 901 S.W.2d at 930.

[59] *See* Tex. Water Code § 36.415(b)(3); *see also Edwards Aquifer Auth. v. Peavy Ranch*, 199 S.W.3d 312, 315 (Tex. App.—Austin 2006, no pet.) (due process did not require "individualized notice" before filing deadline could be applied to property interest); *Collins v. Texas Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 884–85 (Tex. App.—Austin 2002, no pet.) (overruling due-process claim because agency provided all process due in denying contested-case hearing).

application. But as Hays Trinity observes, there is no evidence of a previous interpretation of the rules regarding the deadline to file hearing requests or that its board ever announced a different interpretation of the rules, including allowing requests to be filed after the hearing.[60] Appellees do not present any evidence to support their claim of a "long-standing" policy that Hays Trinity had previously considered post-hearing requests to be timely filed.[61] Consequently, we cannot conclude that Hays Trinity, before the February 21, 2011 hearing, interpreted the rules as allowing requests to be filed ten days after a hearing.

Appellees rely on *Oncor Electric Delivery Co. LLC v. Public Utility Commission* to support their assertion that Hays Trinity's failure to give them proper notice deprived appellees of due process, but that reliance is misplaced. In *Oncor*, the evidence showed that the Commission had imposed a new requirement on Oncor "without notice or an explanation for its departure from existing precedent."[62] Instead, the record here is similar to the one in *Entergy Texas*, in which we

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[60] In their summary-judgment briefing, appellees provided Hays Trinity court with three affidavits, two of which were from former Hays Trinity board members. While the former board members stated that they understood the rules to allow for filing of requests after a permit hearing, neither of the affidavits provided evidence that Hays Trinity's board had actually interpreted or applied the rules on this issue or had considered requests timely that had been filed after a permit hearing.

[61] The record shows that the previous rules, from 2005, provided ten days post-hearing for interested persons to file contested-case hearing requests. Hays Trinity deleted this provision in 2007.

[62] *Oncor*, 406 S.W.3d at 265–67 (evidence showed that Commission had never previously required utility to obtain Commission's prior authorization to seek recovery of earlier expenses in later proceeding and had applied new policy for first time in proceeding against Oncor).

distinguished our holding in *Oncor* and found the agency had not changed its policy.[63] Accordingly, appellees' reliance on *Madden* also is unavailing.[64] In *Madden*, the chiropractic board implemented a new standard but failed to tell Madden about the change until after his contested-case hearing and used this new definition as the basis for not allowing him to take the chiropractic licensing exam.[65] Here, in contrast, the record does not show Hays Trinity's board reinterpreted the rules regarding the filing deadline for contested-case hearing requests.

Appellees contend that the evidence of a long-standing, official interpretation of the hearing-request deadline can be found in actions taken by Hays Trinity's General Manager Rick Broun. Specifically, appellees point to a March 3, 2011 email between Broun and appellee David H. Glenn, in which Broun tells Glenn to "email me your letter or swing by our office as today is the tenth and last day to be part of the pre-hearing conference"; and also to the agenda for a March 28 pre-hearing conference, in which Broun states that the hearing requests "provided to the District's office within the ten-day deadline of March 3, 2011" would be heard by the Hays Trinity's board, and that the board would "determine if a contested case hearing will be held." But as Hays Trinity notes, informal interpretations by an employee do not constitute official Hays Trinity action and that

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[63] *Entergy Tex., Inc. v. Public Util. Comm'n*, No. 03-14-00706-CV, 2016 Tex. App. LEXIS 2983, at *13–15 (Tex. App.—Austin Mar. 24, 2016, no pet.) (mem. op.) ("We cannot agree with Entergy that the Commission 'changed its policy' or engaged in ad hoc rulemaking with respect to the disallowance of costs to litigate the financially based incentive-compensation issue because Entergy has not established that the Commission had such established policy or, in this docket, created a new rule of general applicability.").

[64] *See Madden v. Texas Bd. of Chiropractic Exam'rs*, 663 S.W.2d 622 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

[65] *Id.* at 625–27 (noting that board denied Madden due process because he was unable to present evidence regarding those new-created elements).

the order at issue here constitutes the only official Hays Trinity interpretation of the rules. There is no indication that Hays Trinity's board delegated authority to the General Manager to make policy statements on behalf of Hays Trinity,[66] or that his representations in the email or agenda item reflected or constituted official Hays Trinity policy.[67] Further, we have long held that "a unit of government cannot be estopped by the unauthorized or negligent acts of its officials or agents."[68] Even if an agency employee provides incorrect information, the agency is not liable and could not be estopped.[69] And to the extent the appellees are making a reliance argument, the record does not show that Hays Trinity conveyed incorrect deadline information before the February 21 board meeting.[70]

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[66] *See* Tex. Water Code §§ 36.056(a) (board "may employ or contract with a person to perform such services as general manager for the district as the board may . . . specify," and "may delegate to the general manager full authority to manage and operate the affairs of the district subject only to orders of the board"), .057(a) (board "responsible for the management of all the affairs of the district"); Hays Trinity GCD Board Bylaws, 2.1 (board "sets policy and makes the final decision on all matters not delegated to the General Manager" and board's responsibilities include "adoption and enforcement of reasonable rules, policies, [and] orders").

[67] *Cf. Teladoc, Inc. v. Texas Med. Bd.*, 453 S.W.3d 606, 614–15 (Tex. App.—Austin 2014, pet. granted) (board did not dispute that letter it issued was state agency statement that purported to speak for board, "conveying its official position" and did not contend "that the writer, the agency's general counsel, was acting with anything less than the Board's full authority").

[68] *S&H Marketing Grp., Inc. v. Sharp*, 951 S.W.2d 265, 266–67 (Tex. App.—Austin 1997, no writ) (Comptroller employee gave S&H erroneous information).

[69] *Id.* at 267 (citing *City of San Angelo v. Deutsch*, 91 S.W.2d 308 (Tex. 1936)); *see also City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 773–74 (Tex. 2006) (non-municipality immune from estoppel claim).

[70] *See Brinkley v. Texas Lottery Comm'n*, 986 S.W.2d 764, 769, n.9 (Tex. App.—Austin 1999, no pet.) (in determining letter was not agency rule, noting that letter did not have legal effect on private persons and "did not purport to express a final opinion" about agency policy).

Equal protection

Appellees argue that Hays Trinity's rules violate their equal-protection rights under the United States and Texas Constitutions.[71] Specifically, appellees assert that the rules' establishment of different deadlines for affected persons and for an applicant whose permit has been issued with condition is an "irrational discrimination" against affected persons. We disagree.

The equal-protection clause of the Fourteenth Amendment forbids a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[72] The Supreme Court has recognized, however, that "most laws differentiate in some fashion between classes of persons"; therefore, unless a classification "jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic," the law will be upheld as long as it is rationally related to a legitimate state interest.[73] "This rational-basis review requires us to answer two questions: '(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?'"[74]

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[71] Similar to due-process claims, "'the federal analytical approach applies to equal protection challenges under the Texas Constitution,' so resolution of the federal equal protection claim will also resolve the State equal protection claim." *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 638 (Tex. 2008) (quoting *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 266 (Tex. 2002)).

[72] U.S. Const. amend. XIV, § 1.

[73] *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *First Am. Title*, 258 S.W.3d at 638–39 (*Nordlinger*, 505 U.S. at 10).

[74] *First Am. Title*, 258 S.W.3d at 639 (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981)).

Appellees do not explain what "fundamental" right or inherently-suspect characteristic the rules jeopardize. Further, Hays Trinity offers that the two deadlines promote more meaningful and efficient hearings on permit applications because its board can better analyze a permit application if contested-case hearing requests are filed prior to, or at, the permit hearing and an applicant whose permit is granted with conditions has an opportunity after the hearing to request a contested-case hearing on conditions that she could not have foreseen prior to the permit hearing. The rules achieve the objectives of groundwater regulation in a way that is rationally-related to a legitimate state purpose. We conclude that the different deadlines do not violate equal protection.

CONCLUSION

For the foregoing reasons, we conclude that Hays Trinity's order was not arbitrary or capricious or otherwise subject to reversal. This holding makes it unnecessary for us to address a remaining issue raised by Hays Trinity, in which it complains of the district court's admitting of certain affidavits into evidence.[75] We, therefore, reverse the district court's judgment and render judgment affirming Hays Trinity's order.

Bob Pemberton, Justice

Before Chief Justice Rose and Justice Pemberton;

Former Chief Justice Jones not participating

[75] *See* Tex. R. App. P. 47.1.

Reversed and Rendered

Filed: May 19, 2017