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Gem Seal of Texas, Inc.,

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Petitioner,

BEFORE THE TEXAS CHIEF CLERK'S OFFICE

v.

COMMISSION ON

City of Austin

ENVIRONMENTAL QUALITY

Respondent.

RESPONDENT CITY OF AUSTIN'S ORIGINAL ANSWER

TO: THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

COMES NOW the City of Austin, Respondent herein, and pursuant to the provisions of 30 T.A.C. §86.56 files this Original Answer in response to the Petition for Review of City of Austin Ordinance No. 2005117-070, filed by Gem Seal of Texas, Inc., and for such would show the Commission as follows:

I.

Jurisdiction

Respondent City would show that the document attached to Petitioner's pleading as Exhibit A on its face is shown to be a draft and is neither signed nor dated. Further, it does not contain all the provisions effectuating the legislative action complained of. Respondent City passed Ordinance No. 20051117-070 on November 17, 2005, and amended the effective date provisions to correct a typographical error in it by Ordinance No. 20051201-016. Attached hereto are true and correct copies of Ordinance No. 20051117-070 and Ordinance No. 20051201-016.

Petitioner has failed to timely invoke the jurisdiction of the Commission.

Specifically, 30 T.A.C. §86.55 requires that the petition for appeal *shall* (emphasis supplied) contain a copy of the applicable ordinance complained of. Further, 30 T.A.C. §86.54 makes the filing of a petition a prerequisite to appeal under Texas Water Code §26.177. Because Petitioner clearly failed to meet the mandated jurisdictional prerequisites, the Commission is without authority to consider the instant appeal, and Respondent City of Austin is entitled to dismissal.

II.

Respondent City does not dispute those allegations of the petition regarding the identity of the parties. Further, Respondent City admits that Petitioner Gem Seal is a ‘person affected’ by the ban as that term is used by Water Code §26.177, but is without sufficient information as to the issue of whether they are ‘adversely’ affected thereby. Similarly, Respondent City does not dispute that the persons listed in paragraph 11 of the Petition are manufacturers, distributors, retailers and applicators of coal tar-containing sealants, and are therefore ‘persons affected’ by the City’s ban, but is without sufficient information as to whether they are ‘adversely’ affected thereby.

Respondent would show the Commission that the ban on use of coal tar-containing sealant effectuated by Respondent City of Austin is a valid, reasonable, efficient and effective means to control and abate a significant source of water pollution within its planning jurisdiction.

III.

Facts

Beginning in the mid 1990s, the City of Austin began monitoring levels of polycyclic aromatic hydrocarbons (hereafter “PAH”) in and around certain waterways within the City. Data from the monitoring efforts was shared with interested agencies, including Texas Commission on

Environmental Quality (hereafter "TCEQ", or the "Commission") and the Environmental Protection Agency. Later this data was also provided to the Texas Department of Health and the Agency for Toxic Substances and Disease Registry. In addition, the City participated in a cooperative monitoring program with United States Geological Survey (USGS) staff, sampling sediment, water and soil from Barton Springs Pool, creeks during storms, and runoff from parking lots.

Elevated levels of PAHs were detected in the Austin creek sediments including Barton Springs Pool and Barton Creek. The Commission's 2004 Draft Texas Water Quality Inventory includes several of these creeks as having sediment contaminant concerns based on the elevated PAHs. PAHs are pollutants, toxic and potentially carcinogenic. In the summer of 2002, sampling efforts were begun to evaluate, in particular, coal tar-containing sealants as a possible source of the elevated levels of PAHs. Coal tar-containing sealants are used as surface finishes for parking lots and driveways. City staff collected data from around the City and compared sample results of run-off samples between those from parking lots with coal tar-containing sealant to those without.

The City's data evaluation confirmed that the elevated levels of PAHs were attributable to the coal tar-containing sealants. In response, the Commission conducted its own evaluation, and in May, 2003, issued a report with their findings. The TCEQ report echoed the findings of City staff, calling the correlation between the higher stream sediment PAHs and the high PAH level of coal tar-containing pavement sealant "remarkable". (see "Barton Springs Pool and Barton Creek Area Investigation, May 29, 2003, p. 8).

The City continued to test their conclusion that use of coal tar-containing sealants was a significant source of elevated levels of PAHs. The City and USGS's studies were subjected to

scientific peer review and published in a national journal; this technically rigorous evaluation continued to confirm the link.

Petitioner's challenge to the City's Ordinance based on the alleged lack of evidence of imminent risk to human health or life is without any legal significance whatsoever. By express statute, it is the policy of the State of Texas to maintain the quality of water consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life. Water Code, §26.003. Water pollution control and abatement programs are authorized as a means of effectuating this goal. The City enacted its Ordinance banning the use of coal tar-containing sealant because reliable scientific evidence indicates that coal tar-containing sealants are significantly toxic to aquatic organisms. Degradation of local aquatic communities was demonstrated by decline of diversity, abundance and sensitive species.

Petitioner would also show the Commission that alternatives to the ban on coal tar-containing sealants were considered, but were deemed ineffective, impractical and cost prohibitive. Specifically, due to the proliferation of parking lots and driveways where the sealants are used, the costs for run-off controls for those innumerable sources of PAH would likely be in the millions of dollars.

Finally, the City has determined that any alleged alternate risks associated with the ban of coal tar-containing sealants did not justify foregoing the ban. Because the levels of PAHs in coal tar-containing sealants were two orders of magnitude higher than in asphalt sealants, and because data for the same dilutions showed coal tar-containing sealants were much more toxic than asphalt sealants, the decision to address the coal tar-containing sealants was a scientifically sound one.

For all of the above-stated reasons, the City's well-considered legislation should be upheld by the Commission.

IV.

Prayer

WHEREFORE, PREMISES CONSIDERED, Respondent City of Austin requests that the Honorable Commission:

1. Dismiss this appeal for Petitioner's failure to timely invoke the Commission's jurisdiction;
2. Deny the relief sought by Petitioner and affirm the action of the City in Ordinance No. 20051117-070 and Ordinance No. 20051201-016; and
3. Grant such other relief to which they may show themselves justly entitled.

RESPECTFULLY SUBMITTED,

DAVID ALLAN SMITH
CITY ATTORNEY



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ATTORNEYS FOR CITY OF AUSTIN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Respondent City of Austin's Original*

Answer was served on the following on this 6th day of February, 2006.

LaDonna Castañuela
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(Via Facsimile (512) 239-3311)

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W. Stephen Benesh
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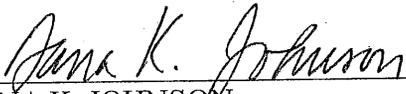
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Derek Seal
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(Via Facsimile (512) 239-5533)

Glenn Shankle
Executive Director
Texas Commission on Environmental Quality
12100 Park 35 Circle
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(Via Facsimile (512) 239-3900)



DANA K. JOHNSON

CHIEF CLERKS OFFICE
2006 FEB - 7 PM 4:36
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ORDINANCE NO. 20051117-070

AN ORDINANCE AMENDING THE CITY CODE TO ADD A NEW CHAPTER 6-6 RELATING TO COAL TAR PAVEMENT PRODUCTS, CREATING OFFENSES, AND PROVIDING PENALTIES.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Title 6 of the City Code is amended to add a new Chapter 6-6 to read:

CHAPTER 6-6. COAL TAR PAVEMENT PRODUCTS.

§ 6-6-1 DEFINITIONS.

In this chapter:

- (1) **COAL TAR PAVEMENT PRODUCT** means a material that contains coal tar and is for use on an asphalt or concrete surface, including a driveway or parking area.
- (2) **DIRECTOR** means the director of the Watershed Protection and Development Review Department.

§ 6-6-2 USE OF COAL TAR PAVEMENT PRODUCTS PROHIBITED.

- (A) Except as provided in Section 6-6-4 (*Exemptions*), a person may not use a coal tar pavement product within the City's planning jurisdiction.
- (B) A person who owns property on which a coal tar pavement product is used is presumed to have used a coal tar pavement product in violation of this section.

§ 6-6-3 SALE OF COAL TAR PAVEMENT PRODUCTS RESTRICTED.

Except as provided in Section 6-6-4 (*Exemptions*), a person may not sell a coal tar pavement product within the City's planning jurisdiction, unless:

- (1) the sale is to a person who intends to use the coal tar pavement product outside the City's planning jurisdiction; and
- (2) the seller requires the purchaser to complete and sign a form provided by the director that includes:
 - (a) the name, address, and phone number of the purchaser;

- (b) the date of the purchase;
 - (c) the quantity of coal tar pavement product purchased;
 - (d) a statement that the coal tar pavement product will not be used within the City's planning jurisdiction; and
 - (e) an affirmation by the purchaser that the information on the form is correct; and
- (3) the seller retains the completed form for a period of not less than three years and allows the director to inspect or copy the form upon request.

§ 6-6-4 EXEMPTIONS.

The director may exempt a person from a requirement of this chapter if the director determines that:

- (1) the person is researching the effect of a coal tar pavement product on the environment or is developing an alternative technology, and the use of a coal tar pavement product is required for the research or development; or
- (2) a viable alternative to a coal tar pavement product is not available for the intended use.

§ 6-6-5 OFFENSE; PENALTY.

(A) A person who violates this chapter commits a Class C misdemeanor punishable by:

- (1) a fine not to exceed \$500; or
- (2) if the person acts with criminal negligence, a fine not to exceed \$2,000.

(B) Each day that a violation occurs or continues is a separate offense.

(C) Proof of a higher degree of culpability than criminal negligence constitutes proof of criminal negligence.

PART 2. This ordinance takes effect on November 28, 2005.

PASSED AND APPROVED

November 17, 2005

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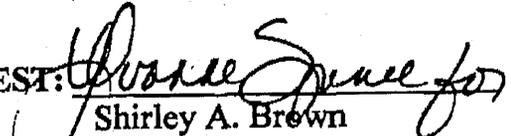


Will Wynn
Mayor

APPROVED:


David Allan Smith
City Attorney

ATTEST:


Shirley A. Brown
City Clerk

ORDINANCE NO. 20051201-016

**AN ORDINANCE AMENDING ORDINANCE NO. 20051117-070 TO CORRECT
A TYPOGRAPHICAL ERROR RELATED TO THE EFFECTIVE DATE.**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Part 2 of Ordinance No. 20051117-070 is amended to read:

This ordinance takes effect on January 1, 2006.

PART 2. This ordinance takes effect on December 12, 2005.

PASSED AND APPROVED

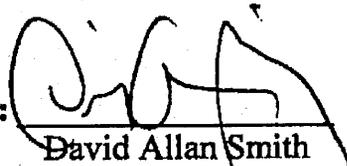
December 1, 2005

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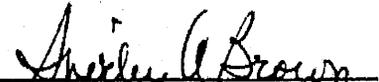


Will Wynn
Mayor

APPROVED:


David Allan Smith
City Attorney

ATTEST:


Shirley A. Brown
City Clerk



LAW DEPARTMENT FAX TRANSMISSION COVER
David Allan Smith, City Attorney

FROM: Dana K. Johnson
City of Austin Law Department
City Hall, 301 W. 2nd Street
Austin, Texas 78701

DATE SENT: February 6, 2006

PLEASE DELIVER THIS FAX TRANSMISSION TO:

NAME	FAX NUMBER
LaDonna Castañuela, Chief Clerk, TCEQ	(512) 239-3311
Eric Groten/W. Stephen Benesh	(512) 479-3949
Derek Seal, General Counsel, TCEQ	(512) 239-5533
Glenn Shankle, Executive Director, TCEQ	(512) 239-3900

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REMARKS: **TCEQ Docket No. 2006-0056-MIS; *Gem Seal of Texas, Inc. v. City of Austin*, before the Texas Commission on Environmental Quality**

THE CITY OF AUSTIN LAW DEPARTMENT'S FAX NUMBER IS: (512) 974-6490

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