23RD JUDICIAL DISTRICT COURT
PARISH OF ST. JAMES
STATE OF LOUISIANA

BEVERLY ALEXANDER, et al. *Petitioners,* vs. ST. JAMES PARISH, *Defendant.*	NUMBER: 41903 DIV "B"

REPLY BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

I. Introduction

The Parish actually suggests to this Court that Petitioners "enjoy the luxury of not having to deal with [the] realities" of the Parish's land use decisions and the need for tax revenue in St. James. Parish Br. at 17. Unfortunately, Petitioners do not, in fact, have that "luxury," as they deal every day with the "realities" of the Parish's land use decisions and the impacts these decisions have on their health and lives and those of their family members and neighbors. What makes this statement all the more astonishing is the *fact* that the Parish's land use decisions have landed the Fifth District of St. James Parish in the 95th to 100th percentile nationwide for cancer risk *and* respiratory hazards from exposure to toxic air pollution, according to data maintained by the U.S. Environmental Protection Agency.

The Parish and Koch also downplay the scale and potential impacts of the proposed Project, casting it as a minor optimization project. *See* Parish Br. at 12; Koch Br. at 6-9. In fact, it would entail a 25% expansion of the Facility's production capacity paired with a *75%* increase in its permitted emissions. In the face of these substantial increases, the Parish accuses *Petitioners* of trivializing parish land use decisions.

The Parish's brief, minimizing and downplaying Petitioners' concerns and the Project's impacts as it does, is exhibit A for why the Petitioners had to bring this case to the judiciary. The Council, as the *elected* holder of the Parish's police powers, cannot hand over or shirk its responsibilities when they are not convenient. Having decided some time ago to impose mandatory considerations upon itself, such as those set out in § 82-25(h), when a large industrial project is proposed, the Council must follow its own rules. Having also decided that a use not "specifically listed as allowable" in a land use category must meet mandatory factors that

increase the burden for approval, the Council must follow those rules as well, as set out in § 82-25(e). And when it does not follow these rules, this Court must act.

The record is clear that the Council followed neither rule. It did not make the findings required by paragraph (e) nor did it consider the factors outlined in paragraph (h). The Parish's position is that because it "slot[ted]" the Koch application under paragraph (f), the Council did not need to follow either rule. *See* Parish Br. at 8. An obvious fundamental flaw exists in the Parish's position as to each of these rules. As to the (e) factors, the flaw is that the Parish ignores the plain language of the Ordinance and pretends that "specifically listed" does not mean exactly what it says. As to the factors for consideration in paragraph (h), the Parish admits those factors were "mandated" for the Planning Commission under paragraph (f) of the Ordinance, but ignores that the same provision mandates them for the Council on appeal. *See* Parish Br. at 15.

The Parish cannot escape mandatory considerations and procedures with post hoc attempts to skirt around the clear terms of the Ordinance. Any action taken in violation of these rules is null and void *ab initio.* Further, this Court cannot accept the Parish's position that the Council had no standard to apply on appeal, as this would render the Ordinance unconstitutional. This Court must interpret the Ordinance to require the Council to apply the (h) factors on appeal.

II. The Parish cannot contort a clear and unambiguous ordinance to accommodate its procedural violation of it: Ordinance 82-25(e) says what it means and means what it says.

It is the most basic requirement of judicial interpretation in Louisiana that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La. Civ. Code Ann. art. 9. This rule applies equally to local ordinances. *Pernici v. City of Shreveport,* 54,474, p. 15 (La. App. 2 Cir. 9/21/22), 348 So.3d 878, 886, *writ denied*, 2022-01578 (La. 12/20/22), 352 So.3d 84. When the law or ordinance at issue is clear and unequivocal, a court "has nothing to do with its policy or impolicy"; it is the duty of the Court "to expound and administer the law as it is written." *State v. Maestri,* 5 So.2d 499, 504 (La. 1941).

A. The Parish and Koch Ask this Court to Ignore the Plain Text of the Ordinance.

The Parish and Koch Methanol urge an interpretation of a key provision of the Land Use Ordinance that is the exact opposite of what it says. Moreover, their interpretation would defeat one of the purposes expressed in the Parish's Code of Ordinances, and state and federal law more

generally—to protect wetlands. The Parish's approach would actually afford sensitive wetlands *less* scrutiny under the Land Use Ordinance than non-wetland areas.

Section 82-25(e) clearly states, in relevant part, that: "Uses **not specifically listed as allowable** in a use category in subsection (c) of this section are prohibited unless the planning commission considers the use in accordance with subsections (g), (h) and (i), and the parish council approves the use." (emphasis added).

Subsection (c), in turn, does not "specifically list" any allowable uses for wetlands. Rather, subsection (c) warns that wetlands "should remain unoccupied" except for "unique situations requiring a location in the water, subject to any permits required [… .]" 82-25(c). In fact, the Ordinance specifies that Wetlands are "Shown for information *only*[.]" *Id.* (emphasis added). This concern for wetlands protection is consistent with longstanding federal and state law, *see, e.g.* 40 C.F.R. Part 230 (detailing guidelines under 404(b) of the Clean Water Act); La. Admin. Code tit. 43, pt. I, § 723 (Louisiana regulations for Coastal Use Permits), and echoed in the policy and procedures set out in the Parish's own Code of Ordinances. *See, e.g.,* Sec. 18-163 *et seq*. Other land use categories in subsection (c) reveal what "specifically listed" means: for example, 12 uses are specifically listed as allowable under the land use category "Commercial"; 11 under "Industrial"; 7 under "Agriculture"; and 7 under "Recreation." Pipelines are specifically listed as allowable under the land use category "Industrial," and they are not listed as allowable under the land use category "Wetlands."

The Parish, followed by Koch, turns the clear and unambiguous language of subsection (e) on its head in asserting that because there are no uses that are "specifically listed" as allowed for wetlands, all uses are allowed as long as the Planning Commission deems it as a "unique situation"—based on no criteria contained in the Ordinance but rather its own unbridled discretion. But subsection (e) says exactly the opposite: uses "not specifically listed as allowable… are prohibited," which then triggers a heightened scrutiny to be applied before the Parish can approve a use.

The language of the Ordinance could not be clearer: Koch's pipeline is not specifically listed as an allowable use in Wetlands and, thus, the provisions of §82-25(e) were triggered.

B. The Parish and Koch's Interpretation of the Ordinance Would Lead to An Absurd Result That is Contrary to the Purpose of the Law.

Even if there were some way in which subsection (e) could be "susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the

law." La. Civ. Code art. 10. As discussed above, the clear purpose of this ordinance is to protect wetlands against development as much as possible—because subsection (c) tells us "they should remain unoccupied." Despite this clear language, the Parish and Koch suggest the Parish can ignore the procedural requirements set out in subsection (e), which the Parish acknowledges are the "most demanding"—ironically only in areas that are particularly sensitive: wetlands. Parish Br. at 7; Koch Br. at 22.

The upshot of their position would mean, for example, that land designated as "Agriculture" would get more scrutiny from the Parish if a company seeks to run a natural gas pipeline through it, than wetlands would, because although subsection (c) does not specifically list pipelines as allowable under either land use category, the land use category "Agriculture" does contain a specific list of other allowed uses. That interpretation flies in the face of both the letter and spirit of the text, and the long-standing policy and law requiring that wetlands have *more* protection, not less, than other non-wetland areas. It is the "function" of the courts to "interpret the laws so as to give them the meaning which the lawmaker obviously intended them to have" and not "give them absurd or ridiculous meanings." *State ex rel. Womack v. Jones,* 201 La. 637; 10 So.2d 213 (1942). The Parish and Koch ask this Court to give Sec. 82-25(e) just such a meaning.

Koch additionally contorts the plain language of subsection (c) in suggesting that the Parish can bypass the requirements of subsection (e) because the Coastal Zone Resource Management Program ("CZMP") is responsible for permitting projects in wetlands. Koch Br. at 23. This argument ignores the fact that the Parish has a Land Use Ordinance it must follow irrespective of the role other agencies play. It is the Parish—not the CZMP, or the Department of Environmental Quality, nor the Army Corps of Engineers, or any other agency—that is responsible for land use decisions in the Parish. Koch's approach would render any of the Parish's procedures that are subject to permitting decisions of other agencies superfluous—including both subsections (e) and (f), which is the second-tier of scrutiny for projects requiring federal and state permits. The Court may not allow such interpretations as it is "bound to give effect to all parts of a statute and cannot give a statute an interpretation that makes any part *superfluous or meaningless*, if that result can be avoided." *Langlois v. E. Baton Rouge Par. Sch. Bd.,* 1999-2007, p. 5 (La. 5/16/00), 761 So.2d 504, 507 (emphasis added); *Louisiana Workers'*

Comp. Corp. v. Landry, 2011-1973 (La. App. 1 Cir. 5/2/12), 92 So.3d 1018, 1023, *writ denied*, 2012-1179 (La. 9/14/12), 99 So.3d 34.

The Ordinance plainly recognized that other agencies would evaluate these projects under state and federal laws, yet it still flagged these projects for more stringent Parish review. No other agency has the authority, responsibility, or ability to determine the overall character and concentration of development in the Parish, and how land should be used. Nor is any other agency as directly accountable to its residents for decisions around land use—an aspect of the democratic process the Parish appears to lament in its brief. Parish Br. at 17.

The plain text, and meaning, of Sec. 82-25(c) and (e) could not be clearer. Because the Parish violated the letter, spirit, and purpose of the Land Use Ordinance in failing to follow its own mandated procedure that the Council must make affirmative findings under (e), the approval is null and void.[1]

III. Even if construed as an allowable use project, the Ordinance still requires the Council to make the approval decision on appeal and apply the (h) factors, neither of which it did.

While the Parish's violation of subsection (e) requires the Court to rule for Petitioners as a matter of law, even if the Court agrees with the Parish's interpretation of the wetlands provision, the Parish's action still fails because it did not fulfill the obligations of paragraph (f).

A. Under 82-25(f), because an appeal was brought, the Council had a mandatory approval role that it did not meet.

In the alternative, if the Court finds that (c) could be construed as "specifically list[ing]" Industrial use as an allowable use in Wetlands—a conclusion that Petitioners vehemently contest—then (f) of the Ordinance would have been triggered (i.e., a Tier II Project). But even those procedures were not followed here. All parties agree that where (f) is triggered, the Planning Commission is the first body to consider whether a project complies with the four factors under (h). That suffices where there is no appeal of a decision. But where there is an appeal, as there was here, the Ordinance is clear that the Council is to be the final arbiter, or approver, of the permitting decision. Ordinance 82-25(f) ("the [listed] uses shall not be issued a building permit until approved by the planning commission (or by the parish council on appeal).").

[1] The Planning Commission did not make the mandatory (e) findings either.

No party has disputed this plain language, nor could they. And given that the Parish has admitted that the Council did not *approve* the Koch application—characterizing its decision as having merely "denied the appeal"—the Parish has conceded that it did not follow the (f) procedures, i.e., the law. Parish Ans. ¶¶ 11, 17, 21 ("The Parish admits #21, except its characterization as approving Koch Methanol's land use application. That approval was rendered by the planning commission. The council merely denied the appeal."). Thus, even if the Parish and Koch were correct about the wetlands provision, the Parish still violated mandatory procedure under (f) and, as a result, its decision must be vacated. *See Oakville Cmty. Action Grp. v. Plaquemines Par. Council*, 2008-1286 (La. App. 4 Cir. 2/18/09), 7 So. 3d 25, 29, *writ denied*, 2009-0621 (La. 5/1/09), 6 So.3d 813; *Folsom Rd. Civic Ass'n v. Par. of St. Tammany Through St. Tammany Par. Council*, 425 So.2d 1318, 1320 (La. App. 1 Cir. 1983) (while a "parish may have the discretion to approve or disapprove the plan itself," it has "no discretion in following the requirements of its own ordinance").

B. Because the Council had a mandatory approval role, it had to apply the considerations in 82-25(h), and it is clear the Council did not apply them.

The Council's erroneous interpretation of its exclusive role to decide whether to approve an (f) project on appeal resulted in consequential omissions and arbitrary and capricious behavior. Specifically, the Council did not apply the (h) factors in its review of the Koch project on appeal, factors that were mandatory under the Ordinance.

Koch's argument acknowledges that the Council was obligated to consider the (h) factors on appeal. Koch Br. at 20 (subheading 4, arguing that "the Council Considered the 82-25 (h) Factors Prior to Voting on the Appeal."). For its part, despite asserting that the Parish is in the "best position" to understand its own ordinance, the Parish did not take an affirmative position on what standard—if any—the Council applied when reviewing this project on appeal. Parish Br. at 9. Indeed, the Parish set up the entire framework for reviewing this case in a way that avoided any discussion of the Council's obligations on appeal, inaccurately framing the issue Petitioners brought as "whether the decision of the ***planning commission*** had a rational basis, [ ] as to . . . the balancing of the approval considerations stated in Sec. 82-25(h) . . . ." Parish Br. at 4 (emphasis added). Petitioners' challenge, however, focuses on the ***Council's*** failure to apply the (h) factors (because under these facts the Council was the only entity authorized to approve the application). *See* Petitioners' Br. at 16.

Regardless, the Parish's position concedes Petitioners' argument: because the Parish describes the Project as an (f) "Tier II" project, and because it describes the (h) factors as "mandated" for the Planning Commission, the Parish admits, at minimum, that the (h) factors must be considered when a project falls under (f). Parish Br. at 6, 15. When one adds that the plain language of (f) hands the responsibility for approval to the Council when a project is appealed, what the Parish is trying so hard not to say becomes clear: the Council was obligated to consider the (h) factors when Petitioners appealed to it. In fact, why identify "the parish council on appeal" at all, as the ordinance does in (f), if there is no scenario in which the Council would consider the (h) factors? In order to conclude that the Council had no such duty, this Court would have to assume that "or by the parish council on appeal" has no meaning—a conclusion that is contrary to statutory construction under Louisiana law. *Louisiana Workers' Comp. Corp.*, 92 So.3d at 1023 (courts shall "not give a statute an interpretation that makes any part superfluous or meaningless, if that result can be avoided.").

And it is equally clear the Council did not apply the (h) factors. Most notably, the Parish does not try to argue that it did apply the (h) factors, which makes sense given that its position is that it did not need to approve the project on appeal.[2] Nor does the Parish attempt to argue that the Council in any way considered the Commission's conclusions regarding the (h)(3) factors. Because the Council *must* apply the (h) factors on appeal, this admission establishes a clear failure to follow a mandatory procedure. Such a failure to follow proper, required procedure renders the Parish's action unlawful and ultra vires. *Oakville Cmty. Action Grp.*, 7 So. 3d at 29; *Folsom Rd. Civic Ass'n*, 425 So.2d at 1320. Such a failure is also the very definition of arbitrary and capricious. *See Kaltenbaugh v. Bd. of Supervisors*, 2018-1085, p. 12 (La. App. 4 Cir. 10/23/19), 282 So.3d 1133, 1142, *writ denied sub nom. Kaltenbaugh v. Bd. of Supervisors, S. Univ.*, 2019-01871 (La. 1/28/20), 291 So. 3d 1061 (holding that where the Southern University of New Orleans did not follow its own binding procedures, its decision was arbitrary and capricious, and not entitled to deference). Indeed, the entire purpose of establishing procedures at all is to avoid "unbridled or ungoverned discretion" and "caprice or arbitrary action" of municipal bodies. *Gaudet v. Econ. Super Mkt., Inc.*, 112 So.2d 720, 722 (La. 1959).

[2] In light of these admissions, Koch's attempt to fit the Council's statements into the (h) framework is an irrelevant post-hoc rationalization. Koch Br. at 20-22.

It is in this context that the cause of the Councilmembers' random statements at the end of the hearing becomes clear. The Council was not applying *any* standard to the appeal. Having jettisoned the (h) factors as not its responsibility, the Council was left with nothing to guide its decision. It is for exactly this reason that courts insist that local bodies be guided by standards. *See, e.g., Moretco, Inc. v. Plaquemines Parish Council*, 2012-0430, p.3 (La. App. 4 Cir 3/6/13), 112 So.3d 287, 299 ("The fundamental requirement for any zoning ordinance is that it 'must establish a standard to operate uniformly and govern its administration and enforcement in *all* cases.'") (quoting *McCauley v. Albert E. Briede & Son*, 90 So.2d 78 (La. 1956)). Further, ordinances that are devoid of a standard upon which an elected body exercises its police power are unconstitutional. *See Morton v. Jefferson Par. Council*, 419 So.2d 431, 434 (La. 1982) ("[A] zoning ordinance which contains no standard for the uniform exercise of the power to grant or deny applications for permits is unconstitutional."). If this Court accepts that no standard applies to the Council on appeal, it would be reading these ordinances in a way that is unconstitutional. The canon of constitutional doubt requires this Court to resolve this question in favor of the statute's constitutionality, thereby finding that the statute has a standard of review for the Council on appeal, contained in paragraph (h). *See, e.g. Ancor v. Belden Concrete Products,* 256 So. 2d 122, 125 (La. 1971).

IV. Petitioners met their burden to demonstrate arbitrary and capricious decision-making and the Parish's failure to follow mandatory procedures.

Defendants argue that this Court must uphold the Parish's decision to grant Koch Methanol's permit because, in their view, the Council's *result* was sufficiently connected to public health, safety, or general welfare. Parish Br. at 4-5; Koch Br. at 10-11. Defendants' argument fails for two reasons: 1) Defendants' focus on the result ignores the established legal precedent that requires that governing bodies follow their own procedures. *See Oakville Cmty. Action Grp. v. Plaquemines Par. Council*, 2008-1286 (La. App. 4 Cir. 2/18/09), 7 So. 3d 25, 29, *writ denied*, 2009-0621 (La. 5/1/09), 6 So.3d 813 (holding that a governing body does not have the authority to make a permitting decision without following the mandated procedures);[3]

[3] In its brief, Koch criticized Petitioners' use of this case, arguing that *Oakville* is not relevant because the provision involved was based on a specific requirement of the Louisiana Administrative Code providing that "the permitting body shall prepare a short and clear statement explaining the basis for its decision." Koch Br. at 14. This criticism misses the point. It is not the nature of what the provision required, but rather, that where a Parish Council is required to follow unambiguous, binding legal procedures, regardless of what they are, the Council does not have the discretion to ignore them. ("No ambiguity exists in the law . . . the Council is **required** to prepare a statement explaining the basis for its decision on all applications. We find nothing that relieves the Council of this responsibility. Because the parties agree

Kaltenbaugh, 282 So.3d at 1145 (university's failure to follow its own binding procedures rendered its decision arbitrary and capricious)[4]; and 2) the Council's *result* was arbitrary and capricious on the ground that it was not consistent with or supported by substantial competent evidence.

Where plaintiffs allege that a decision was arbitrary and capricious, courts consider whether that decision was supported by and consistent with substantial competent evidence, and also whether the competent evidence before the Council was given proper weight. *Lake Terrace Prop. Owners Ass'n v. City of New Orleans,* 567 So.2d 69, 74-75 (La. 1990). Courts can also consider the process the Council followed, and whether it is consistent with the "objective guidelines." *Morton v. Jefferson Par. Council*, 419 So.2d 431, 435 (La. 1982). This standard of review imposes a limitation on the Council's police power so that decisions by the Council are not made with "unbridled or ungoverned discretion" or "caprice or arbitrary action." *Gaudet v. Econ. Super Mkt., Inc.*, 112 So.2d 720, 722 (La. 1959). If the Court finds that the decision was arbitrary or capricious based on any one of these findings, the Court has the discretion to vacate the Council's decision. *K.G.T. Holdings, LLC v. Par. of Jefferson*, 14-872 (La. App. 5 Cir. 3/25/15), 169 So. 3d 628, 630, 635, *writ denied*, 2015-0810 (La. 6/19/15), 172 So. 3d 652.

A. The Record demonstrates that the Parish's decision was procedurally improper and arbitrary and capricious.

Courts must necessarily use the record to determine whether a local governing body's action was arbitrary or capricious. *See Herman v. City of New Orleans*, 2014-0891, p. 6-7 (La. App. 4 Cir. 1/21/15), 158 So.3d 911, 916, *writ denied*, 2015-0354 (La. 4/24/15), 169 So.3d 363 (court reviewed record, which included meeting minutes and depositions of councilmembers that reflected that the Council conducted a "thorough analysis" of a proposed project before it voted to approve it, in determining council had followed its own procedures); s*ee also K.G.T. Holdings, LLC* 169 So. 3d at 635 ("The *record* does not provide a factual support for [the Parish's] argument on appeal that the Council denied the Developers' request based on concerns

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that a decision document was not prepared, it is undisputed that the Council did not follow the law, and, thus, did not have the authority to issue the coastal use permit to Industrial."). *Oakville*, 7 So.3d at 29-30.

[4] Again, Koch summarily concludes, without any support, that *Kaltenbaugh* is "of no import." Koch Br. at 14, n.25. Koch's suggestion is without merit. *Kaltenbaugh* held that "[b]ecause SUNO did not follow its own binding procedures, its decision was arbitrary and capricious, and not entitled to deference." *Kaltenbaugh*, 282 So.3d at 1145. That this case was held with respect to a university's board of supervisors does not render this case irrelevant. Like *Kaltenbaugh*, the present case involves a decision-making authority's ruling under its "own binding procedures." Thus, the principle that when that authority does not follow its own binding procedures, the decision is arbitrary and capricious and is not entitled to deference, clearly applies.

for the general welfare of the public relating to the lot size and the quality of life objections raised by residents…." (emphasis added)); *see also Oakville Cmty. Action Grp.,* 7 So. 3d at 26 ("After reviewing the *record* and applicable law, we reverse the judgment of the trial court and remand the matter for further proceedings." (emphasis added)).

The caselaw establishes that the record is the appropriate tool to assess decisions like the Koch Methanol land use permit application. If the Council fails to memorialize its procedure and reasoning in the record, it opens itself up to an arbitrary and capricious challenge based on what it *did* put in the record. Defendants urge the Court to ignore the applicable caselaw on this subject and suggest that Petitioners are placing an additional burden on the Council. Koch Br. at 2 ("[Petitioners] instead create – apparently from thin air – a requirement that the Council memorialize a "thorough analysis" of their rationale "on the record."); Parish Br. at 15 ("Neither the planning commission nor the parish council are legally obliged to explain every jot and tittle of their reasoning."). Such criticisms misunderstand the role and purpose of the record in general and Petitioners' arguments in this matter, in particular. Petitioners do not suggest that every "jot and tittle of their reasoning" must be memorialized. Nor does the arbitrary and capricious standard of review impose an extra-legal requirement on the Council. Rather, the caselaw referenced by Petitioners stands for the proposition that if the Parish seeks to overcome an arbitrary and capricious challenge, the *record* must support its position. Put differently, this Court must vacate the Council's decision if the record demonstrates that the Council either 1) did not follow its own procedures; 2) reached a result that is either arbitrary, i.e., acts in a way that "implies a disregard of evidence or the proper weight thereof"; or 3) capricious, i.e., "announced [its decision] with no substantial evidence to support it, or . . . contrary to substantiated competent evidence." *Kaltenbaugh v. Bd. of Supervisors*, 282 So.3d at 1145 (La. 1/28/20); *Lake Terrace Prop. Owners,* 567 So.2d at 74-75.

The *record* here is riddled with evidence demonstrating that the Parish's decision was arbitrary and capricious. First, as Petitioners have set forth, subsection (e) applied to Koch's application, and the Planning Commission should have made a recommendation to the Council and the Council should have fully reviewed and considered the mandatory factors, consistent with the most demanding Tier III level of scrutiny. As set forth above, the *record* is clear that this did not happen. And, even if the Court accepted the Parish's own argument that subsection (f) applied, the Parish admits that the (h) factors apply to (f) projects. Thus, under this heightened

Tier II scrutiny, the Council was required, on appeal, to apply the (h) factors. The *record* is also clear that this did not happen, as discussed *supra*. Because it did not, the Council's decision was arbitrary and capricious and must be reversed.

The Defendants also ask this Court to credit the Council with rationales and conclusions, which, as discussed more below, are either not supported by, or are even contradicted by, the record, even though the Council did not apply any standard at all when it sustained the Planning Commission's decision. They ask, in effect, this Court to step in and make the considerations and findings that the Council failed to, despite its own position, and case law, that this Court cannot substitute its judgment for that of the Parish. Parish Br. at 4,17; and *see, e.g.*, *Par. of Jefferson v. Davis,* 97-1200, p. 8 (La.App. 5 Cir. 6/30/98); 716 So.2d 428, 433, *writ denied,* 98-2634 (La. 12/11/98); 730 So.2d 460. This Court must decline the invitation.

B. In the absence of Parish Council consideration, the Parish cannot now rely on the Planning Commission's purported conclusions on the environmental impacts of the proposal and the benefit/cost analysis.

Perhaps recognizing the precarious nature of their argument that the Council need not have considered the (h) factors at all, both the Parish and Koch emphasize the *Commission's* consideration of those factors, going so far as to import the text of the Commission's resolution into their briefing. Parish Br. at 15; Koch Br. at 13. But whether the Commission properly met its duty under the ordinance in the first instance provides no guidance for how the Council should have treated Petitioners' materials and Koch's substantially supplemented application on appeal.[5] Indeed, Koch seems to suggest that the appeal was meaningless, stating that the Council was not obligated to hold a hearing on it and that there were no "restrictions put upon the Council's consideration of the appeal." Koch Br. at 14. Such a reading of the ordinance renders the Council's appellate role superfluous and would result in the Council having no standard to apply to appeals of land use decisions.

That the Planning Commission wrote in its resolution the project's "benefits outweigh the relatively modest physical and environmental impacts," did not absolve the Council of its duty to consider the same. But what is among the most damning evidence in this record that the decision

[5] Koch misconstrues Petitioners' emphasis on its supplemented application. Koch Br. at 14, fn 23. Petitioners did not suggest that it was improper for the Council to consider additional evidence presented by Koch in its revised application. Rather, Petitioners argue that this is evidence that the Council had a distinct and affirmative duty to consider this new information, in addition to Petitioners' own materials, because these materials were never before the Planning Commission. Indeed, Koch's supplemented application and Petitioners' appeal materials underscore the unique and important reviewing role that the Council must play where an appeal is taken from a Planning Commission decision.

was arbitrary and capricious is that the Planning Commission did not have much of the evidence of the project's environmental impacts before it when it reached that conclusion. It was *only* through Petitioners' appeal and Koch's resulting supplemental application that the full scope of the project's environmental impacts entered the record. Petitioners' appeal carefully delineated the environmental impacts of the project for the Council including, among other points, evidence of disproportionate impact substantiated by EJScreen evidence, R.83; evidence that Koch conceived of this as an "automation" project, which casts doubt on jobs promises, R.372-374; evidence that approval of this project would put the Parish close to "non-attainment" status under the NAAQS for NOx, R.374-375; evidence of the toxicity of certain heavy metals newly included in the permit R. 79-80; evidence of the Facility's history of violations of its air permit. R. 81-82; 373; and the lack of emergency evacuation routes in the event of an accident. R. 83-84. In turn, Koch also provided new information including (1) an argument as to why the proposed ethane pipeline is a "unique situation requiring location in wetlands," R. 198, (2) the quantities of hazardous substances on site that were omitted from its first application to the Planning Commission, R. 233-236, and (3) the Environmental Assessment Statement submitted in support of its air permit to the LDEQ. R. 237-371. Each of these is relevant to the (h)(3) factors. None was addressed by the Council. Nor were they considered by the Planning Commission, as they were introduced into the record *after* the Commission made its finding that the benefits of the Project outweighed the environmental impacts.

In its answer to the Petition in this matter, the Parish made clear more than once that the Parish Council merely sustained the Planning Commission's approval of Koch's application. Parish Ans. at 1; ¶ 11. In its brief, however, the Parish attempts to assert, post-hoc, the missing (h)(3) considerations. For instance, the Parish suggests that the project is "remote . . . from populated areas," Parish Br. at 7, 13, and that it has "minimal adverse impacts." Parish Br. at 7. But at no point did the Council itself make such an assertion. Nor could it have—because even if that inference is proper, which it is not, the record lacks evidence that there are no residents near the project site or that the project will have minimal adverse impacts. Indeed, Koch's application admits that there are residents within .36 miles of the facility and there was substantial evidence of adverse impacts before the Council. R. 11; 26. These residents and the impacts they will face are erased in the Parish's narrative.

As Petitioners have extensively detailed in their appeal, petition, and opening brief, this Project is not the minor optimization project, with 25% expansion of the Facility's production capacity and 75% increase in its permitted emissions Petitioners' Br. at 6. One of these increases will indisputably put the Parish very near the limits for NO_2 in the air. The project will require substantial construction within the Facility footprint and beyond, disrupting critical wetlands resources. Petitioners' Br. at 8.[6] The Planning Commission's review of Koch's initial application did not and could not have grappled with these critical facts because it did not have them when it approved the application. It was therefore up to the Council to consider them on appeal—no amount of after-the-fact editorializing can correct that it did not.

C. The Defendants post hoc application of the Ordinance introduces irrelevant, erroneous, or subjective information and is inadmissible.

Perhaps the most dangerous—and patently inappropriate—aspect of substituting counsels' post hoc reasoning for an analysis that the responsible body neglected to make is that the parties can bring in erroneous, irrelevant, or subjective considerations and claim, as Koch does, that these "could have been" the Council's conclusion. Koch Br. at 11.[7] This Court should reject these arguments and conclusions and avoid supplying the absent Council considerations.

In one example, Koch fabricates the public benefit of job retention when it asserts that the proposed project will "ensure the retention of the existing 114 direct jobs." Koch Br. at 10. However, there is *no* evidence in the record that job security would be impacted if the project does not move forward. Indeed, to the contrary, Petitioners introduced evidence to the Council, and into the actual record, that Koch's project may even lead to the *loss* of current jobs, given that Koch described its project on its website as an "automation" project. R. 373. Notably, Koch did not speak to this evidence.

Koch also suggested that "both mobile air monitoring and fence line monitoring will serve as a check on emissions." Koch Br. at 19. Koch conveniently left out the fact that previous

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[6] Koch expends significant effort suggesting Petitioners overstated the issue of the pipeline's length, but does not dispute that the pipeline is actually 3000 feet long, and not 1000 feet long as represented to the Parish. Koch Br. at 4.

[7] Koch attempts to support its ability to substitute its analysis for the Council's absent one by emphasizing a single word ("could") taken out of context from a single case—the *Toups* case—where the court noted that a conclusion of the Shreveport City Council was a logical assumption from the evidence presented to it ("The Council could logically assume that these factors . . . could increase the likelihood of traffic accidents in the immediate area."). *Toups v. City of Shreveport*, 2010-1559, p. 6 (La. 3/15/11), 60 So.3d 1215, 1219. Nothing about this opinion suggests that a party can do the Council's job for it. In fact, in *Toups* it was apparent that the Council had done its job and articulated reasons for its decision. *See id.* at p. 3, 60 So.3d at 1217 (noting district court's conclusion that Council's decision was "articuably" consistent with health, safety, and welfare of the community).

mobile air monitoring missions that it trumpeted to the Parish failed to monitor for nitrogen dioxide (NO_2)—the very pollutant that is most at issue from this project with respect to a violation of the ambient air standards in St. James Parish. R. 61. Additionally, the anticipated fenceline monitoring will detect only volatile organic compounds (VOCs) or methanol, and there is no indication as to whether the public would be given access to the results of this monitoring. If not, the information is essentially useless. Moreover, the Project would expand the Facility's production capacity by 25%, increasing permitted emissions by 75%. R. 21. This is significant because the parish is approaching nonattainment for NO_2, and the potential NO_2 emissions from Koch's project were significant enough to require further analysis in the form of air modelling, which demonstrated that Koch's project would cause the Parish to come very near the 1-hour ambient air concentration limits. R. 62, 67, 260-262; *see also* Koch Br. at 5-6.

The Parish and Koch represent that emissions in St. James Parish have decreased since 2015 (though the Council did not mention this). Parish Br. at 10; Koch Br. at 8. However, this allegation is merely a red herring because the relevant emissions at issue are the ones attributed specifically to this facility, which Koch admits is already considered a major source of air pollution under the Clean Air Act.[8] While parish-wide emissions levels are significant, Petitioners challenge *this particular* Project's increase in emissions—which remains undisputed. Koch asserts that criteria pollutant emissions have decreased parish-wide by 30%, but fails to acknowledge that this Project will increase the facility's criteria emissions output by a full 75%. Koch Br. at 8; R. 181-182; 94; 260-62. Petitioners also identify toxic pollutant emissions that will now be permitted as a result of this Project, but Koch contends that these emissions have "pre-existed the proposed projects at the facility" and were not included in prior permits because LDEQ has only recently issued guidance requiring their speciation. Koch Br. at 7; R. 97-95. This revelation makes consideration of these toxic pollutants even more important for the Council to analyze, because these emissions and their associated environmental and health impacts had not been previously disclosed to the Parish in previous land use decisions. Additionally, the Project would increase permitted emissions of particulate matter (PM10 and PM 2.5) and nitrogen oxides (NOx) by about 50%, and carbon monoxide (CO) and VOCs are estimated to double. R. 181-182; 94.

[8] Memorandum in Support of Koch's Motion to Supplement Record at p. 3, filed Feb. 9, 2024.

Even considering the purported decreases in *Parish*-wide emissions, this tells the Council nothing about the trends in emissions in the overburdened areas such as the Fifth District, where Koch will expand. This was one of the points of focus for Petitioners' appeal, one that the Council ignored.[9] Nor does the claim that Koch's project will not violate any ambient air standard address Petitioners' concern: what it will do to the air quality in the Fifth District and the area near its facility.[10]

Because this Project's emissions increases are not contested, the Parish seeks to justify this increase by referencing the remote nature of the area. Parish Br. at 13. In its brief, the Parish suggests that Petitioners raise emissions concerns "without acknowledging an important component of air quality: people." Parish Br. at 13. Instead, it is the Parish discounting this important consideration, at least with respect to the people of the Fifth District, because Petitioners' EJScreen evidence demonstrated that the people of the Fifth District are subject to disproportionate health risks from air pollution. Further, the Koch facility immediately abuts an area designated as Residential Growth. R. 8; 198. Notably, there is also a neighborhood on Barras Street to the southeast of the site and, according to Koch's application, there is a residential property within .36 miles of the production center of its site. R. 11; 26. These residences and surrounding communities will be especially vulnerable to this Project's increase in permitted emissions, and their potential health and environmental impacts should not be marginalized.

V. The Council, not the Planning Commission, is the elected body; it owes the public a duty to exercise its police powers in accordance with the law and reviewable standards.

Finally, the Parish Council is an *elected* body, entrusted with police power duties of preserving public health, safety, and the general welfare of its local parishioners. This is what sets the Council apart from every other authority the Parish seeks to hide behind. Carrying out these duties, along with the additional duties and procedures the Council chose to impose on itself when it wrote its land use ordinance, is the baseline responsibility of the St. James Parish

[9] Koch and the Parish's depiction of the Parish's emissions going down over time conveniently ignore the whopping emissions that the permitted Formosa facility would add, given that the figures Koch provided in the DEQ table from ERIC and TRI data represent actual emissions, not permitted emissions. R. 71. To get some idea of what Formosa would add, consider that Formosa is permitted to emit 802.95 tpy of toxic air pollutants, equivalent to 1.6 million lbs per year. That's exactly equivalent to the entire amount of reported TRI emissions (i.e. on-site air releases) in St. James Parish in 2015 (1.6 million), as reported by EPA. *See* EPA's TRI Explorer, available here.

[10] Further, Petitioners demonstrated that, with the exception of ozone, there are no criteria pollutant monitors in St. James Parish, and the location of the closest monitors for the criteria pollutants range anywhere from 7 to almost 20 miles away from the Koch site. R. 94.

Council. Yet the Parish wants to have its cake and eat it too—i.e., reap the benefits of the power conferred to it under the Louisiana Constitution to arbitrate over land use permitting decisions without bearing the responsibility to execute this power in a manner that is consistent with the provisions of its own ordinance and in a way that is based on substantiated evidence in the record. It was the Parish, not Petitioners, who wrote those ordinances. Petitioners merely ask the Parish to follow what it wrote.

At each turn, both the Parish and Koch attempt to justify why the Parish Council did not have to execute the critical duties it gave to itself. *See Morton*, 419 So.2d 431, 434 (La. 1982). Instead, the Parish, followed by Koch, defers its responsibility to other bodies: the Commission (Parish Br. at 6), LDEQ (Koch Br. at 18; Parish Br. at 13), CZMP (Koch Br. at 17), LDNR (Koch Br. at 22) and even on Petitioners themselves. *See* R. 563 ("Why don't y'all buy the property so that [industry] can't locate?"); *see also* Parish Br. at 16 (explaining that if Petitioners want their viewpoints to be represented, that their only recourse is to "get [themselves] appointed to the planning commission" or to be personally elected to Parish Council).

The Parish, however, cannot avoid accountability for its decisions and failure to follow its own rules governing land use, by pointing to other agencies who have no authority over land use in the Parish, or by blaming residents for not being able to better protect themselves against the Parish's decisions.

VI. CONCLUSION

No amount of artful wordsmithing or post hoc argumentation can obscure the clear conclusion this Court must draw: the Parish Council did not follow its own procedures when approving Koch's land use application, and the resultant decision must be vacated. To find otherwise would open the door to the Council's unaccountable, standardless exercise of its police power authority over critical land use decisions at Petitioners'—and all Parish residents'—expense. Petitioners respectfully ask that this Court vacate the Parish's land use approval.

Respectfully submitted this 18th day of March, 2024, by:

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Certificate of Service

I hereby certify that I have, on this 18th day of March, 2024, served a copy of the foregoing to counsel for the defendant by email, as agreed to by counsel.

_/s/ Lisa Jordan_____
Lisa Jordan