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APPLICATION BY BEXAR
METROPOLITAN WATER
DISTRICT FOR AUTHORITY
TO INCREASE IMPACT FEES

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

BEXAR METROPOLITAN WATER DISTRICT'S
RESPONSE TO REQUESTS FOR HEARING

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

COMES NOW the Bexar Metropolitan Water District ("District"), applicant, and files this Response to Requests for Hearing in the above-referenced matter. The District would respectfully show the following:

I. INTRODUCTION.

The District would welcome a hearing on the proposed impact fee and requests that any such hearing be held on an expedited basis. The District is confident that a hearing would confirm that its application is fair to the District's customers and crucial to the District's continued ability to meet the needs of a dynamic and rapidly developing service area.

In the application at issue, the District seeks the Commission's approval for authority to levy an impact fee in an amount up to \$2,376 per equivalent dwelling unit for new connections for water service in the District's service areas. The purpose of the proposed impact fee is to generate revenue to recover the costs of capital improvements and facility expansions made necessary by and attributable to new development in the District's service area. The existing District impact fee has been in place for approximately 10 years, while costs for infrastructure development have increased steadily since that time. The need for an increase in the impact fee is long overdue in the District.

Notice of the application was published on September 3 and September 10, 2006, in the *San Antonio Express-News*, a newspaper of general circulation in Bexar, Medina, Atascosa, and Comal Counties, in which the proposed impact fee would be levied. Notice was mailed by first-class mail on September 11, 2006 in accordance with notice requirements established by the Commission. The Chief Clerk received a number of timely filed Requests for Hearing on the application.

II. APPLICABLE LEGAL STANDARDS.

In order to make a proper request for hearing, the person filing the request must be an “affected person.” 30 Tex. Admin. Code § 55.256. An affected person is one who has a particularized interest related to a legal right, duty, privilege, power, or economic interest that would be affected by imposition of the proposed impact fee, as opposed to an interest common to members of the general public. *Id.* § 55.256(a). If a person does not have a personal stake in the controversy at issue, then he or she is not an “affected person” under the rules and the person lacks standing to request a hearing. Tex. Water Code § 5.115(a); *see Elizondo v. Texas Natural Resource Conservation Commission*, 974 S.W.2d 928, 932 (Tex. App.—Austin 1998, no pet.).

III. PENDING REQUESTS FOR HEARING.

It appears to the District that certain of the pending Requests for Hearing facially meet the criteria established by the Commission’s rules, *i.e.*, they have been filed by parties claiming to be affected persons with a justiciable interest in the proceeding.

It further appears, however, that some of the Requests for Hearing that have been filed do not meet those criteria. The proposed impact fee would be assessed on new development. 30 Tex. Admin. Code § 293.171(1). However, because notice of the impact fee request was widely published, it appears that some **current** customers who are not engaging in new development

activity, having seen the notice, mistakenly thought that their interests were at issue and that they might have to pay the fee.

This apparent confusion has resulted in the filing of a number of Requests for Hearing by customers who do not indicate that they are engaging in development activity, who provide no indication that they will be required to pay the proposed fee, and who therefore do not satisfy the requirement that they specifically identify how and why the impact fee would affect them in a particularized manner.¹

The Requests for Hearing filed by the following listed persons fall into that category:

R.D. Bilbrey, Peaceful Lane (September 18, 2006)²
Roy Brown, 19484 Somerset Road (October 9, 2006)³
Julian & Rhonda Childs, 1250 Peaceful Lane (September 18, 2006)
Mark & Wendy Dickey, 1220 Peaceful Lane; Martha Eurey, 1200 Peaceful Lane; Sue Wilson, 1195 Peaceful Lane (Combined letter, October 4, 2006)
Guadalupe Gonzales, 2806 Almond Field (September 21, 2006)
Denise Ingledue, 25927 Torch Lily (September 25, 2006)
Dianne & Ken Joaquin, 9703 Cylburn Park (September 14, 2006)
Mark & Sylvia Mennel, 4619 Tamaron Park (September 20, 2006)
Pauline Perry, 6303 Pioneer Point Drive (September 18, 2006)
Su & Jenny Yim, 923 Queens Oak (October 2, 2006)⁴

¹ Current customers stand to *benefit* from the impact fee that the District is requesting. One of the goals of the proposed impact fee is to ensure that the cost of new development is imposed fairly and that existing customers are not forced in effect to subsidize such new development through existing rates. Without the increased revenue sought by the District through the requested impact fee, the District would be forced to continue to reallocate financial resources from existing areas of the District to ensure that new developments have sufficient water capacity. This reallocation creates inequities for current customers. These are the very inequities that the District is seeking to address in this proceeding, by asking the Commission for permission to adjust the current impact fee rate structure.

² Unless otherwise noted, date references herein regarding Requests for Hearing will be to the date-stamp affixed to the document by the Chief Clerk.

³ Mr. Brown's letter acknowledges that he is a current customer of the District and that the impact fee application "does not immediately impact me" but expresses the concern that he might be assessed an impact fee in the future, should he ever decide to install a new meter on his property. Mr. Brown does not contend that he is engaging in or even planning any development activity that would be subject to the proposed impact fee, and as such Mr. Brown is not an affected party.

⁴ See Affidavit of Kerry A. McCollough, attached hereto. None of these persons contends that he or she is engaging in or planning any development activity that would be subject to the proposed impact fee. In addition to failing the "affected person" test, a number of the Requests also raise issues that are not relevant and are outside of the scope of an impact fee proceeding. See, e.g., Requests for Hearing filed by Mr. Bilbrey and Mr. and Mrs. Childs (requesting a hearing based on allegations of poor service and arguing that the District should not be allowed to expand).

Another deficient Request for Hearing is the one filed by G.G. Gale, Jr., Vice President, Timberwood Development Company (September 18, 2006). Mr. Gale does not contend that he will be personally affected by the proposed impact fee. To the contrary, he purports to speak “on behalf of all Timberwood Park residents (and possibly all Waterwood residents)” Mr. Gale offers no support for his conclusory suggestion that he has somehow been authorized to speak for that entire group of residents. His Request for Hearing fails to meet the requirement that the party requesting the hearing show a personal interest in the application at issue.

Two Requests for Hearing have been filed on behalf of Bitterblue, Inc. (“Bitterblue”) (September 21, 2006; September 22, 2006). They are largely duplicative. Each is based on the premise that the District is attempting to expand its service area through an amendment to the District’s CCN and that, through such an expansion, the properties represented by Bitterblue would be affected by the impact fee. Thus, Bitterblue requests a hearing because the District’s application would, according to Bitterblue, “establish an impact fee on the land owned by the above-referenced entities which Bitterblue represents” — those entities being Bass Properties, L.P., Anton and Marjorie Friesenhahn, and Kinder Partnership, Ltd. According to the Requests for Hearing, the properties owned by those entities are “within the area proposed to be added by the District to its service area in the referenced State Office of Administrative Hearings matter [SOAH Docket No. 582-03-3725].”

Bitterblue’s statements may have been correct at one time. Those statements, however, are no longer correct. It is true that the District did, at one time, seek to amend its Certificate of Convenience and Necessity (CCN) so as to expand the District to include additional geographic areas, including the properties represented by Bitterblue. However, the District subsequently withdrew its application to amend the CCN, and the contested case in which the CCN was being

adjudicated has been dismissed.⁵ As a result, the District submitted a revised Capital Improvements Plan and Impact Fee Calculation reflecting the District's withdrawal of the application to expand the District's service area.

Because Bitterblue's claim to standing appears to be limited to its representation of properties that no longer stand to be affected by the proposed impact fee, Bitterblue is not an affected party and its Requests for Hearing should be denied.⁶

The Request for Hearing filed by Monte Lloyd (September 20, 2006) is deficient because he, too, is not an affected person. His Request for Hearing acknowledges that he does not reside within the District's service area. He does not state that he is intending to engage in development activity within the District; rather, he expresses a concern that the District might expand to include his residence in the future. Because no application for such an expansion is pending, Mr. Lloyd's concerns are entirely speculative and as such he does not qualify as an affected person under the Water Code and the Commission's rules.

Accordingly, it appears that a number of persons who have filed Requests for Hearing are not affected parties and should not be participants in any contested case hearing that might be

⁵ SOAH Docket no. 582-03-3725; *see* Affidavit of Kerry A. McCollough, attached hereto.

⁶ In addition, Bitterblue's request for hearing seeks to raise issues outside the scope of an impact fee proceeding. Bitterblue admits that it seeks to inject into this proceeding an issue previously raised in a case before SOAH, *i.e.* whether the District has legal authority to provide retail water utility service to additional areas. The issue in an impact fee proceeding, however, is whether the proposed fee is reasonable, equitable, and necessary to finance improvements. *See* 30 Tex. Admin. Code § 293.174. Thus, Bitterblue has failed to demonstrate that its complaint is within the Commission's authority in this proceeding — a point that in any event is moot given that the District no longer seeks to extend its service area to include the properties represented by Bitterblue.

scheduled. To summarize, the persons who have filed deficient Requests for Hearing that should be denied are:

R.D. Bilbrey
Bitterblue, Inc.
Roy Brown
Julian & Rhonda Childs
Mark & Wendy Dickey / Martha Eurey / Sue Wilson
G.G. Gale, Jr. / Timberwood Development Company
Guadalupe Gonzales
Denise Ingledue
Dianne & Ken Joaquin
Monte Lloyd
Mark & Sylvia Mennel
Pauline Perry
Su & Jenny Yim

IV. WITHDRAWN REQUESTS

On October 5, 2006, the Habitat for Humanity filed a request for hearing, signed by its Vice President, Natalie Griffith. On September 21, 2006, Mission del Lago filed a request for hearing, signed by James A. Mattox. In a March 21, 2007 communication to interested parties, however, the Chief Clerk's office indicated that Habitat for Humanity and Mission Del Lago had withdrawn their requests for hearing. Accordingly, the District considers those requests to be moot and accordingly the District will not respond to those requests here.⁷

V. PUBLIC COMMENTS.

The Commission received certain letters that discuss the proposed impact fee but that either fail to request a hearing or expressly state that the filing party is not requesting a hearing. These letters are in the nature of public comments, and because the question currently at issue is whether a hearing should be held, the District will not respond to any such comments that do not

⁷ The District respectfully reserves the right to respond to those Requests for Hearing if for any reason those Requests are not deemed by the Commission to have been withdrawn.

include a request for such a hearing. *See* 30 Tex. Admin. Code § 55.251(c)(3) (hearing request must “request a contested case hearing”).

Letters from the following listed persons fall into this category:

Bright Star Ministries and Outreach / Pastor Ryan Staveley, 840 Palo Alto Drive
(September 14, 2006)

Esther Cabral, 526 Lovett (September 21, 2006)

Jerald Mallernee, 22906 Cardigan Chase (September 28, 2006)

Pape-Dawson Engineers / M. Lee Niles, 555 E. Ramsey (September 21, 2006)

Mrs. Carl E. Powell, 20130-1 Somerset Road (September 26, 2006)

Annie Spinks, 8022 Wayword Trail (September 18, 2006)

Robert Thorne, 134 Ware Blvd. (September 18, 2006)

In addition, the letters filed by Ms. Cabral, Mr. Mallernee, Mrs. Powell, Ms. Spinks, and Mr. Thorne suffer from the flaws discussed Section III above, *i.e.* each of the letters fails to demonstrate that the person who signed it is an affected party. There is no indication that Ms. Cabral, Mr. Mallernee, Mrs. Powell, Ms. Spinks, or Mr. Thorne would face a particularized or personal impact should the impact fee be assessed. It therefore appears that the above persons should not be included in any hearing held on the District’s application.

VI. CONCLUSION.

If the Commission believes that it would be appropriate and in the public interest, then the District would welcome a hearing on the impact fee application. The District requests that any such hearing be placed on an expedited schedule. The parties to any such proceeding, however, should exclude the persons who, as discussed above, (1) filed Requests for Hearing

that are deficient as discussed above, (2) filed Requests for Hearing that were subsequently withdrawn, or (3) only filed public comments. Those persons are as follows:

Persons filing deficient Requests for Hearing

R.D. Bilbrey
Bitterblue, Inc.
Roy Brown
Julian & Rhonda Childs
Mark & Wendy Dickey / Martha Eurey / Sue Wilson
G.G. Gale, Jr. / Timberwood Development Company
Guadalupe Gonzales
Denise Ingledue
Dianne & Ken Joaquin
Monte Lloyd
Mark & Sylvia Mennel
Pauline Perry
Su & Jenny Yim

Persons whose Requests for Hearing have been withdrawn

Natalie Griffith / Habitat for Humanity
Mission del Lago / James A. Mattox

Persons filing public comments, not a Request for Hearing

Bright Star Ministries and Outreach / Pastor Ryan Staveley
Esther Cabral
Jerald Mallernee
Pape-Dawson Engineers / M. Lee Niles
Mrs. Carl E. Powell
Annie Spinks
Robert Thorne

Respectfully submitted,

**CLARK, THOMAS & WINTERS,
A Professional Corporation**

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TCEQ DOCKET NO. 2006-1833-DIS

APPLICATION BY BEXAR	§	BEFORE THE TEXAS
METROPOLITAN WATER	§	COMMISSION ON
DISTRICT FOR AUTHORITY	§	ENVIRONMENTAL QUALITY
TO INCREASE IMPACT FEES	§	

AFFIDAVIT OF KERRY A. McCOLLOUGH

STATE OF TEXAS §
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared Kerry A. McCollough, a person known to me, who, after being duly sworn, deposed upon her oath as follows.

“1. My name is Kerry A. McCollough. I am at least twenty-one (21) years of age, of sound mind, have never been convicted of a felony or a crime of moral turpitude, and am fully competent in all respects to make this Affidavit as if called as a witness in this proceeding.

2. I am the Planner of the Bexar Metropolitan Water District (“District”) and I have held that position since July 2005. As part of my duties I have been involved in the development of the District’s impact fee application, and I am familiar with that application and the documentation related to it. I make this affidavit based upon facts personally known to me, and they are all true and correct.

3. I have reviewed the Requests for Hearing filed in this proceeding. I have also reviewed records of the District identifying the current customers of the District. That review shows that a number of the Requests for Hearing before the Commission have been filed by current customers of the District, for example individual homeowners who are receiving service

from the District and who have not provided any indication that they are engaging in development activity that would be subject to an impact fee. Such persons include the following:

R.D. Bilbrey, Peaceful Lane (letter file-marked September 18, 2006)
Roy Brown, 19484 Somerset Road (October 9, 2006)
Esther Cabral, 526 Lovett (September 21, 2006)
Julian & Rhonda Childs, 1250 Peaceful Lane (September 18, 2006)
Mark & Wendy Dickey, 1220 Peaceful Lane; Martha Eurey, 1200 Peaceful Lane; Sue Wilson, 1195 Peaceful Lane (Combined letter, October 4, 2006)
Guadalupe Gonzales, 2806 Almond Field (September 21, 2006)
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Robert Thorne, 134 Ware Blvd. (September 18, 2006)
Su & Jenny Yim, 923 Queens Oak (October 2, 2006)

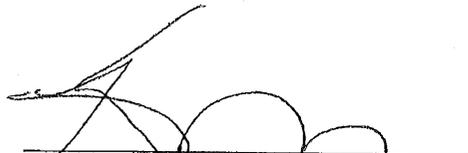
4. It also appears that certain Requests for Hearing are based on the assumption that the proposed impact fee would apply not only to new development in the District's current service area but also to new development in additional areas outside of the District's current service area, through an expansion of the District's service area accomplished through amendment to the District's Certificate of Convenience and Necessity (CCN). That assumption is not correct. It is true that, at one time, the District was attempting to amend its CCN to expand its service area to include additional areas. Reflecting this possible expansion, the District's original impact fee application made reference to areas outside of the District's current service area, as did the District's Capital Improvements Plan (CIP). The District's initial fee calculations also took this possible expansion into account.

5. However, the District subsequently withdrew its application to amend the CCN to expand its service area. Because the District has withdrawn its application to amend its CCN to expand its service area, the District's impact fee calculations have been adjusted accordingly

(resulting in a reduction in the requested fee from \$2,556 to \$2,376), and the District's CIP has been revised accordingly as well. Given these changes, in particular the District's withdrawal of its application to expand the service area, the current situation is that the proposed impact fee would only affect persons engaging in new development within the District's current service area, not persons engaging in new development outside of that service area.

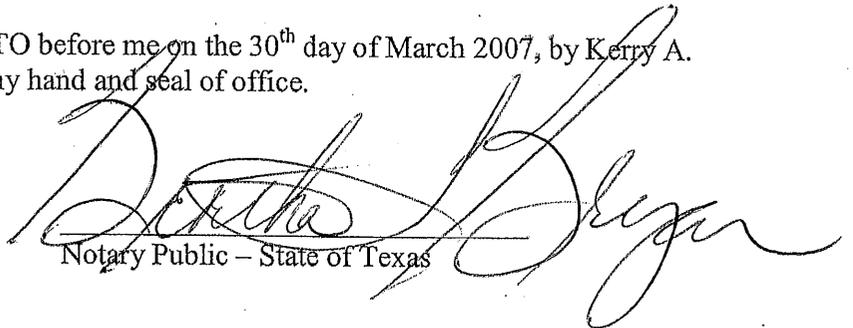
6. For that reason, the geographic areas referenced in the Requests for Hearing filed by Bitterblue, Inc. (referencing Bass Properties, the Friesenhahn property, and Kinder Partnership), would not be affected by the requested impact fee. Those properties would have been within the expanded area contemplated by the CCN amendment, but as stated above the District has withdrawn its application to amend the CCN and as such those properties no longer stand to be affected by the proposed impact fee.

7. Further affiant sayeth not."


KERRY A. MCCOLLOUGH

SUBSCRIBED AND SWORN TO before me on the 30th day of March 2007, by Kerry A. McCollough, to certify which witness my hand and seal of office.




Notary Public - State of Texas

CERTIFICATE OF SERVICE

I certify that the foregoing document was served this 2nd day of April, 2007 on the following persons by depositing the same in the United States first-class mail, postage prepaid, and/or by facsimile transmission, as indicated below.



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