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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
Blas J. Coy, Jr., *Public Interest Counsel*

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CHIEF CLERKS OFFICE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 25, 2008

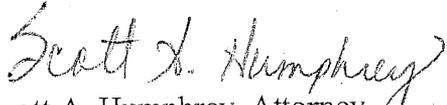
LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: ROMAN FOREST CONSOLIDATED MUNICIPAL UTILITY DISTRICT
TECQ DOCKET NO. 2007-1068-DIS**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,


Scott A. Humphrey, Attorney
Public Interest Counsel *by jla*

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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TCEQ DOCKET NO. 2007-1068-DIS

APPLICATION OF ROMAN FOREST	§	BEFORE THE TEXAS
CONSOLIDATED MUNICIPAL	§	COMMISSION ON
UTILITY DISTRICT OF	§	ENVIRONMENTAL
MONTGOMERY COUNTY TO ADOPT	§	QUALITY
AND IMPOSE A STANDBY FEE	§	

OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUEST FOR HEARING

TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Hearing Request concerning the above-referenced matter.

I. Background

Roman Forest Consolidated Municipal Utility District of Montgomery County (Roman Forest, District or Applicant) has applied to the TCEQ for authority to adopt and impose an annual uniform operation and maintenance standby fee of \$216.00 per equivalent family connection for a period of three years on unimproved property within the District. The application was filed pursuant to Chapter 49 of the Texas Water Code, 30 Texas Administrative Code (TAC) Chapter 293 and the procedural rules of the TCEQ.

The standby fee is a personal obligation of the person owning the property on January 1 of the year for which the fee is assessed. A person is not relieved of his pro-rated share of the standby fee obligation on transfer of title to the property. On January 1 of each year, a lien is attached to the undeveloped property to secure payment of any standby fee imposed and the

interest or penalty, if any, on the fee.

The purpose of standby fees is to distribute a fair portion of the cost burden for operation and maintenance costs of the District facilities to owners of property who have not constructed vertical improvements but have water, wastewater or drainage facilities or services available. Any revenues collected from the operation and maintenance of standby fees shall be used to supplement the District's operations and maintenance account.

The Executive Director of the TCEQ declared the application administratively complete on March 16, 2007. Notice of the application was published on May 31 and June 7, 2007 in the *Houston Chronicle*, a newspaper of general circulation in Montgomery County. The Applicant mailed notice to each property owner that may be subject to the impact fee on May 29, 2007. The comment period ended on July 9, 2007.

In response to the notices, the TCEQ received one timely filed hearing request from James and Francine Albright and a letter self-described as a request to overturn the Executive Director's approval of the application from Mohammed Ashraf. OPIC recommends granting the hearing request and denying Mr. Ashraf's request.

II. Requirements of Applicable Law

Under 30 TAC § 293.145(d):

The commission may act on an application without holding a public hearing, if a public hearing is not requested by the commission, the executive director, or an affected person in the manner prescribed by commission rule during the 30 days following the final publication of notice under this section. If the commission determines that a public hearing is necessary, the chief clerk shall advise all parties of the time and place of the hearing.

This application is filed under Chapter 49 of the Texas Water Code and was declared

administratively complete on March 16, 2007. Therefore, the hearing requests associated with this application are evaluated under Subchapter G of Chapter 55 of the Commission's rules.

A hearing request concerning the approval of an impact fee is governed by 30 TAC § 55.251, which specifies that:

(c) A hearing request must substantially comply with the following:

- (1) Give the name, address, and daytime telephone number of the person who file the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;
- (3) request a contested case hearing; and
- (4) provide any other information specified in the public notice of application.

In order to grant an individual's request for a contested case hearing, the Commission must find that the request is made in writing and by an affected person. 30 TAC § 55.251(b).

An affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TAC § 55.256(a). This justiciable interest does not include an interest common to the general public. *Id.* Section 55.256(c) of 30 TAC provides relevant factors that will be considered in determining whether or not a person is affected. These factors include, but are not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

III. Hearing Request; Affected Person Analysis

The Albrights contend that the standby fees are an outrageous hardship on property owners who receive absolutely no benefit from the District. They say it is hard enough for retirees to make ends meet without having to pay a fee for which they receive no service in return.

OPIC is persuaded that Mr. and Mrs. Albright are affected persons entitled to a contested case hearing. While the Albrights do not state so directly, OPIC infers from their letter that they own property within the District that is subject to payment of the standby fee. Therefore, the Albrights have demonstrated their interest in this application as one not common to the general public.¹ If the Applicant can show the Commission that the Albrights are not subject to and would not have to pay the standby fee, then OPIC would reconsider its recommendation. However, based on the representations by the Albrights, OPIC recommends the Commission find they are affected persons entitled to a contested case hearing.

Mr. Ashraf has also filed a letter requesting the Commission to overturn the Executive Director's approval of the application. There is no such relief available with regarding this application. An application for a standby fee is filed under 30 TAC Chapter 55, Subchapter G. With respect to applications filed under Subchapter F, a person may file a request for

¹ 30 TAC § 55.256(a)

reconsideration of the Executive Director's decision. Such a request would pertain to a draft permit which the Executive Director presumably would have issued but for the request for a contested case hearing or reconsideration of the ED's decision. A "motion to overturn" is a procedural mechanism available under the Commission's Chapter 50 rules and allows for Commission review of any final action on an application by the ED.

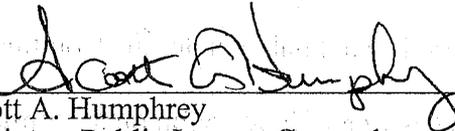
In this case, however, the ED has not issued any such draft approval of this application, nor has the ED taken any final action that is subject to the Chapter 50 rules. Therefore, there currently exists no approval of anything the ED has done that would be subject to a request for reconsideration or a motion to overturn. As a result, OPIC recommends denial Mr. Ashraf's request.

IV. Conclusion

For the reasons set forth above, the OPIC recommends that the Commission find that the James and Francine Albright are affected persons entitled to a contested case hearing. OPIC recommends the Commission refer this matter to SOAH. OPIC further recommends denying the request filed by Mr. Ashraf.

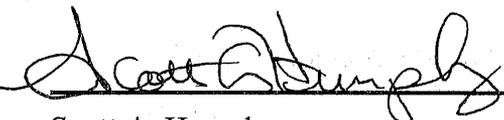
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2008, the original and eleven copies of the foregoing were served upon the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Scott A. Humphrey

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TECQ DOCKET NO. 2007-1068-DIS

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