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February 28, 2011

Via Electronic Filing

LaDonna Castañuela
Office of the Chief Clerk
Texas Commission on Environmental Quality
Mail Code 105
PO Box 13087
Austin, TX 78711-3087

Re: Annexation Petition filed by Lancaster Municipal Utility District No. 1; TCEQ Docket No. 2010-1851-DIS

Dear Chief Clerk:

Attached you will find the City of Lancaster's Reply to the Executive Director's and the Office of Public Interest Counsel's Responses to Request for Contested Case Hearing regarding the referenced matter. Please acknowledge the filing by sending us a confirmation number, and please let me know if you have any questions.

Sincerely,



Jim Mathews

cc: Opal Robertson, City Manager
Robert Hager, City Attorney

TCEQ DOCKET NO. 2010-1851-DIS

LANCASTER MUNICIPAL UTILITY	§	BEFORE THE
DISTRICT NO. 1 PETITION TO ANNEX	§	
PROPERTY IN EXTRATERRITORIAL	§	TEXAS COMMISSION ON
JURISDICTION OF THE CITY OF	§	
LANCASTER	§	ENVIRONMENTAL QUALITY

**CITY OF LANCASTER’S REPLY TO THE EXECUTIVE DIRECTOR’S
AND THE OFFICE OF PUBLIC INTEREST COUNSEL’S
RESPONSES TO REQUEST FOR CONTESTED CASE HEARING**

The City of Lancaster (the “City”) files this Reply to the Executive Director’s and the Office of Public Interest Counsel’s Responses to Request for Contested Case Hearing in this matter, and shows the following:

BACKGROUND

The following facts are not in dispute.

1. The Lancaster Municipal Utility District No. 1 (the “District”) currently consists of approximately 327 acres, all of which are situated within the City’s extraterritorial jurisdiction (“ETJ”).
2. The City consented to the creation of the District consisting of 327 acres and entered into a contract to provide water utility service to that District as initially created.
3. On January 28, 2008, the District filed a petition with the City requesting that the City consent to the District annexing approximately 217 additional acres of land into the District’s boundaries, all of which were asserted to be situated within the City’s ETJ.
4. The City denied the District’s petition on March 10, 2008.
5. The District filed a request to obtain water and sewer service from the City on June 6, 2008.

6. The City denied the District's request on July 14, 2008, citing the City's inability to ensure that sufficient infrastructure and services can be provided to such annexed area and that potable water cannot be delivered to the annexed area.
7. On September 25, 2008 the District filed a petition with the TCEQ seeking approval for the proposed annexation of property located within the City's ETJ.
8. The City has filed a request for a contested case hearing opposing the District's petition.
9. The Executive Director (the "ED") filed a response to the City's request for hearing recommending that the request be denied.
10. The Office of Public Interest Counsel ("OPIC") filed a response to the City's request for hearing recommending that the request be granted.
11. The District did not file a response to the City's request for hearing.

APPLICABLE LEGAL AUTHORITIES

Affected Person

The primary issue before the TCEQ is whether the City is an "affected person" under the agency's rules because affected persons have the right to request a contested case hearing.¹ 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 or petition pending before the TCEQ. Furthermore, an interest common to members of the general public does not qualify as a personal justiciable interest.

In determining whether a party is an affected person, all relevant factors shall be considered, including, but not limited to:

- (i) whether the interest claimed is one protected by the law under which the application will be considered;

¹ 30 TAC §55.255 (b)(2).

- (ii) distance restrictions or other limitations imposed by law on the affected interest;
- (iii) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (iv) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (v) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (vi) for governmental entities, their statutory authority over or interest in the issues relevant to the application.²

Required Findings

Section 54.016 of the Texas Water Code provides that if a city does not consent to a municipal utility district annexing land in the city's ETJ, and if the city further refuses to provide that service if requested to do so, then the refusal shall constitute authorization for the inclusion of the land in the district. However, section 54.016 (c) makes clear that authorization for the inclusion of the land within the district under the provisions of section 54.016 means "only *authorization to initiate proceedings* to include the land with the district as otherwise provided" by chapter 54 (emphasis added). As explained below, section 54.016 (c) does not mean that all a district has to do in order to annex land is to demonstrate it has requested service from a city and the city has refused to provide service.

ANALYSIS

Affected Person

The ED mistakenly concludes that the City does not have a justiciable interest and, therefore, is not an affected person because it does not have a contractual obligation to provide water and sewer service to the persons who own the land the District proposes to annex. However, the ED also concludes that the District's petition should be granted because the City

² Id. at §55.256 (c).

will provide the additional water needed in the area proposed for annexation.³ OPIC correctly concludes that the City is an affected person because, in part, it has a water supply contract with the District and the City alleges it cannot provide water to the District for the additional land it seeks to annex. Furthermore, the City is an affected person because, as explained further below, the City's agreement to provide water to the District has a direct bearing on whether the District's petition should be granted.

The City agreed to provide a wholesale supply of water to the District in 2002 when the District was contemplated to contain 327 acres. The City did not agree to provide a supply of water to subsequent expansions of the District. If the TCEQ grants the District's petition, the District undoubtedly will request that the City supply it with more water, which the City will be unable to provide.⁴ Accordingly, the City is an affected person because:

- (i) there is a reasonable relationship between the City's ability to provide water to the District, and the additional amount of water that will be needed to provide service to the annexed area; and
- (ii) if the City were required to provide additional supplies of water to the District, that potentially could have an adverse impact on the City's ability to provide for its own needs while meeting the TCEQ's public water system regulatory requirements.⁵

Furthermore, the City is an affected person because it has authority under state law (the contractual agreement to provide water to the District) over issues contemplated by the application (sufficiency of supplies and infrastructure to serve the additional areas to be

³ Exhibit 1, p. 2 (TCEQ Technical Memorandum).

⁴ Exhibit 2 is Lancaster MUD 1's response to the ED's request for evidence that the District's water supply and wastewater treatment is and would be sufficient to serve the proposed added land. The District expressly identified its contractual agreements with the City of Lancaster as proof of its ability to serve the proposed additional land.

⁵ Factors to be considered to determine whether a person is an affected person include whether a reasonable relationship exists between the interest claimed and the activity regulated, and the likely impact of the regulated activity on the health, safety, and use of property of the person. 30 TAC §55.256 (c)(3) & (4).

annexed).⁶ There can be no question but that the Executive Director supports the District's petition based largely on the misguided belief that the City will provide the District with additional water. Staff's technical memo states that "the District is to be supplied water capacity [by the City] sufficient to serve the entire boundaries of the District, subject to the District providing the City an annual estimate of water required each year." See Exhibit 1, p. 2. That conclusion is without support in the record and, quite simply, is wrong. Nonetheless, the City is an affected person because the ED has concluded the District's petition contemplates having the City provide additional water to the District under the water supply agreement executed by those parties, even though the City has indicated it is not able to do so.

The ED's position that the City lacks standing is also untenable because it is internally inconsistent. The ED argues the City has not identified a justiciable interest in the petition given that it asserts it will not provide additional water to the District, while simultaneously asserting that the City's existing agreement to supply water demonstrates the adequacy of supply needed to show that the addition of land to the District is feasible.

The City is an affected person for another reason. Presently, the City has few restrictions on the amount of land it may annex within its ETJ. However, if the TCEQ grants the District's petition and the City desires in the future to annex part of the District's boundaries, it might instead be required to annex all of the land in the District. Tex. Gov't Code §43.071 (b). Put differently, the City's current right to annex relatively small portions of land could be adversely affected if the TCEQ grants the District's petition because the City would have to annex all or

⁶ The City is an affected person because governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. *Id.* at §55.256 (b).

none of the area within the District. Because the City's current right to annex could be adversely affected if the TCEQ grants the petition, the City is an affected person under the TCEQ's rules.⁷

Required Findings

The ED states that the City's request for a contested case hearing should be denied because there is no factual or legal issue left to resolve in this case before the TCEQ may approve the District's petition. The ED concludes that the only finding the TCEQ has to make to take action on the District's petition is the one required under section 54.016(d) of the Texas Water Code – that the City either does not have the ability to serve, or has elected not to enter into a contract to provide service. The ED argues that finding has been conclusively decided. The ED is wrong because it completely ignores the other findings the TCEQ must make before it may approve the petition.

As noted, section 54.016 (c) states that if a city refuses to provide service, then that refusal may constitute authorization for the inclusion of the land within a district. However, authorization for the inclusion of the land within a district means only *authorization to initiate proceedings* to include the land with the district *as otherwise provided* by chapter 54. Importantly, section 54.021 (a) states that the TCEQ must first find the annexation petition provides for a project that is feasible and practicable and is necessary and would be a benefit to the land to be included in the district before it may grant the petition.⁸ TCEQ staff at one time apparently understood that to be the case because staff made such a preliminary finding in the technical review of the District's petition. See Exhibit 1, p. 3.

The City's position is the District's proposed annexation is neither feasible nor practicable, it is not necessary, and it would not be a benefit to the land to be included in the

⁷ 30 TAC §55.256 (c)(6).

⁸ Section 54.021 (a) is not limited to petitions to create a district and, therefore, it also applies to petitions to expand the boundaries of a district.

District because TCEQ staff incorrectly assumes the City will provide all the water to the District needed to serve the annexed area based on representations made by the District.⁹ The City cannot provide additional supplies of water necessary to provide service to the area proposed for annexation. Therefore, unless the District can demonstrate it has an alternative water supply, its proposal to annex additional land is not feasible and practicable, is not necessary, and would not be a benefit to the land proposed for annexation.

Also, in its request for hearing the City noted that the District's customers have experienced poor water quality. The City's understanding is that the water quality problem might be associated with the district's difficulty in maintaining chlorine residuals in a system that has a relatively high number of dead-end lines. The District's history of low chlorine residuals is another basis for finding the proposed annexation is neither feasible nor practicable.

REQUESTED RELIEF

The City asks that its request for hearing be granted and that the TCEQ transfer the District's petition to the State Office of Administrative Hearings so that it may be set for hearing.

Respectfully submitted,

Mathews & Freeland, L.L.P.
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Facsimile (512) 703-2785

By:



Jim Mathews
TBN: 13188700
email: jmathews@mandf.com
ATTORNEYS FOR
CITY OF LANCASTER

⁹ See Exhibit 2 – Letter from District's counsel incorrectly concluding that City will be able to provide District with additional amounts of water.

CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of February 2011, a true and correct copy of the foregoing document was served by U.S. Mail or facsimile on the following:

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Jim Mathews

EXHIBIT 1

Texas Commission on Environmental Quality

TECHNICAL MEMORANDUM

To: Todd Chenoweth, Director
Water Supply Division

Date: March 25, 2009

Thru: ^{RN} Doug Holcomb, P.E., Manager, Utilities and Districts Section
^{RN} Alex A. (Skip) Ferris, P.E., Leader, Districts Review Team

From: Districts Review Team

Subject: Lancaster Municipal Utility District No. 1; Petition for Authorization to Annex Property, Pursuant to Texas Water Code Section 54.016.
TCEQ Internal Control No. 09252008-D02 (TC)
CN: 601361595 RN: 102682010

A. GENERAL INFORMATION

The above referenced application was received by the Districts Review Team on September 25, 2008 and declared administratively complete on October 7, 2008. Lancaster Municipal Utility District No. 1 (the District), Gary J. Baker, and Deborra L. Baker, (the Petitioners) filed a petition with the Commission for the annexation of 107.760 and 109.711 acres (the combined 217.471 acres is referred to as the Property) into the District under Chapter 54 of the Texas Water Code and the procedural rules of the TCEQ. The petition was signed by Daniel Anderson, vice president of the District, and by Gary J. Baker and Deborra L. Baker as property owners. Application material indicates that the Petitioners own the 217.471 acres and that there are no lien holders on the Property.

The Property is located within the extraterritorial jurisdiction (ETJ) of the City of Lancaster (the City) and within Dallas and Ellis counties. According to February 12, 2007 petitions received by the City on January 28, 2008, the Petitioners requested City consent to District annexation of the 217.471 acres pursuant to Texas Water Code Section 54.016(a). Pursuant to Resolution No. 2008-03-23 dated March 10, 2008, the City denied the request to consent to the addition of the Property. On June 6, 2008, the property owners submitted to the City a petition for water and wastewater service pursuant to Texas Water Code Section 54.016(b). By Resolution No. 2008-07-63 dated July 14, 2008, the City denied the request for water and wastewater service, and the 120-day period for negotiation established by the Texas Water Code Section 54.016(c) has expired. Pursuant to Texas Water Code Section 54.016(d), the Petitioners then filed an application with the Commission for annexation of the Property into the District.

Location and Access

Todd Chenoweth, Director

March 25, 2009

Page 2

The District is located south of the City, east of State Highway 342 and within the ETJ of the City. Application material indicates that the Property proposed for annexation is located directly south of the District, bounded on the east by Reindeer Road and Poe Road, on the south by the Prairie View Addition to Ellis County, on the west by the Green Acres Addition to Dallas County, and bound on the north by Reindeer Road.

Notice

Notice of the application was published on February 8 and 15, 2009, in the *Waxahachie Daily Light*, a newspaper regularly published or circulated in Ellis County, the county where a portion of the Property proposed for annexation is to be located. Notice of the application was also posted on the bulletin board used for posting legal notices in Ellis County on January 27, 2009. Notice of the application was also published on February 5 and 12, 2009, in the *Daily Commercial Record, Inc.*, a newspaper regularly published or circulated in Dallas County, the county where a portion of the Property proposed for annexation is to be located. Notice of the application was also posted on the bulletin board used for posting legal notices in Dallas County on January 27, 2009. Accordingly, the notice requirements of 30 TAC Section 293.12(b) have been satisfied.

B. ENGINEERING ANALYSIS

The 217.471 acres proposed for annexation is to be developed for residential purposes. Application material states that the planned construction of Loop 9 will take an estimated 49 to 75 acres of the District out of development, and the Property will generate sufficient taxable value to offset the loss in value from the construction of Loop 9. Application material indicates that the \$31,665,000 (\$34,975,000 - \$3,310,000) in remaining voter authorized bonds should be sufficient to finance water, wastewater, and drainage facilities to serve the current District area and the annexation tracts.

Water Supply

The District's water supply is provided by the City, who receives water from the City of Dallas. The District is to be provided water capacity sufficient to serve the entire boundaries of the District, subject to the District providing the City an annual estimate of water required each year. Application material states that there is sufficient water supply to serve the District and the proposed annexation tracts.

Wastewater Treatment

The District's wastewater treatment capacity is provided by the City, who has contracted with the Trinity River Authority for capacity in the 24 MGD Ten Mile Creek Regional Wastewater Plant. Application material states that the City has contracted to provide the

District wastewater treatment capacity to serve 1,400 connections, based on 450 gallons per day of water usage. Application material states that with the removal of development acreage for Loop 9 and actual usage being less than 450 gallons per day, the 1,400 connections of capacity should be sufficient to serve the current area and proposed annexation tracts.

C. CONCLUSIONS

1. Based on Commission policy, compliance with Commission rules, and review of the supporting documents, the proposed annexation of Property is considered feasible, practicable, would be a benefit to the Property and would be necessary as a means to provide utility service to future customers.
2. The recommendations are made under the authority delegated by the Executive Director of the Texas Commission on Environmental Quality.

D. RECOMMENDATIONS

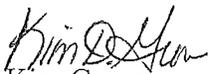
1. Grant the petition for Lancaster Municipal Utility District No. 1 of Dallas County to consider annexing 217.471 acres without City of Lancaster consent.
2. The order granting the petition should include the following statement:

“This order shall in no event be construed as an approval of any proposed agreements or of any particular items in any documents provided in support of the petition for creation, nor as a commitment or requirement of the Commission in the future to approve or disapprove any particular items or agreements in future applications submitted by the District for Commission consideration.”

E. ADDITIONAL INFORMATION

The District's professional representatives are as follows:

Attorney: Ms. Julianne Kugle – Coats, Rose, Yale, Ryman & Lee, PC
Engineer: Mr. Bryan Powell – Jacobs, Inc.


Kim Grona

Districts Review Team

EXHIBIT 2

COATS | ROSE

RECEIVED

JOSHUA J. KAHN

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(713) 653-7339
Direct Fax
(713) 890-3929

February 6, 2009

VIA FEDERAL EXPRESS

Mr. Mathew Ashley (MC-152)
Districts Review Team
Texas Commission on Environmental Quality
12100 Park 35 Circle
North IH-35
Austin, Texas 78753

Re: Lancaster Municipal Utility District No. 1 of Dallas County
Application for Authorization to Annex Property Pursuant to Texas Water Code,
Section 54.016; Notice of Deficiency
TCEQ Internal Control No. 09252008-D02 (NOD 1)
CN: 601361595 RN: 102682010

Dear Mr. Ashley:

In response to your letter, dated January 12, 2009, we submit the following information which is numbered to correspond to the questions in your letter.

1. The District recently became aware that the Texas Department of Public Safety has approved the construction of Loop 9 through the District's current boundaries. The construction of Loop 9 is projected to take approximately 49.75 developable acres (depending on the width of the right-of-way) from the District. Accordingly, the District needs the additional acreage within its boundaries in order to generate sufficient taxable value to offset the loss in value resulting from the Loop 9 construction. Further, the additional acreage within the District will result in additional taxable value for the District which could result in a decrease in the overall tax rate for the District. In addition, the District has \$31,665,000 authorized but unissued bonds from the bond election held within the District on September 14, 2002, which is sufficient to finance the construction of the water, sewer and drainage facilities of the current District and the proposed annexation tracts. Therefore, the annexation of the 107.760 acres and the 109.711 acres into the District is feasible, practicable and to the advantage of the District.

COATS | ROSE | YALE | RYMAN | LEE

A Professional Corporation

3 East Greenway Plaza, Suite 2000 Houston, Texas 77046-0507

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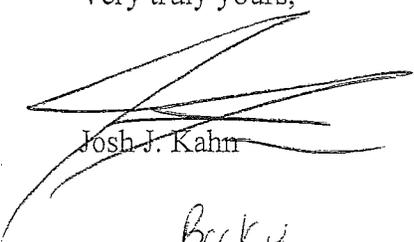
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2. Pursuant to the Water Supply Contract between the City of Lancaster, Texas and G&G Development Partnership, Ltd. Acting of Behalf of Lancaster Municipal Utility District No. 1, the City of Lancaster (the "City") has contracted with the District to provide water capacity sufficient to serve the entire boundaries of the District, subject to the District providing the City an annual estimate of water needed each year. The City then contracts with the City of Dallas for an amount sufficient to serve its residents and the residents of the District for the corresponding year. Therefore, there is sufficient water supply to serve the District and the proposed annexation tracts.

Pursuant to the Waste Disposal Contract between the City of Lancaster, Texas and G&G Development Partnership, Ltd. Acting of Behalf of Lancaster Municipal Utility District No. 1, the City has contracted to provide sufficient wastewater treatment capacity in an amount equivalent to serve 1,400 connections within the District, based on 450 gallons per day average daily flow of water. With the pending removal of acreage for Loop 9, the possible decrease in density in future sections in the District due to market demands, and the fact that actual usage within the District is well below the 450 gallons per day average daily flow of water, the 1,400 equivalent connections should be sufficient to serve the current and all future residents of the District, including residents within the annexation tracts.

Please let me know if you need any additional information. Thank you very much for your cooperation in this matter and please feel free to contact me if you have any questions.

Very truly yours,



Josh J. Kahn

Becky
Donaldson