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December 20, 2011

VIA FED EX

Ms. Bridget C. Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of Chief Clerk, MC 105
12100 Park 35 Circle
Austin, Texas 78753

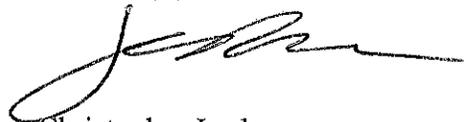
Re: Docket No. 2011-1847-DIS, Lakehaven Municipal Utility District of Collin County;
TCEQ Internal Control No. 02222011-D02

Dear Ms. Bohac:

In connection with the referenced matter, enclosed are an original and seven copies of
Petitioner's Response to Collin County's Request for a Contested Case Hearing.

Please contact me should you have any questions.

Very truly yours,



Christopher Jordan

cc: See Service Certificate
(attached to enclosure)

CGJ:adb
Enclosures
Lakehaven/Creation/TCEQLtr(12-20-11)

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2011 DEC 21 PM 2:52
CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2011-1847-DIS

2011 DEC 21 PM 2: 53

PETITION FOR CREATION OF
LAKEHAVEN MUNICIPAL
UTILITY DISTRICT OF
COLLIN COUNTY

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§
§
§

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
CHIEF CLERKS OFFICE

**PETITIONER'S RESPONSE TO COLLIN COUNTY'S
REQUEST FOR A CONTESTED CASE HEARING**

Farmersville Investors, LP ("Petitioner"), files this Response to the request of Collin County (the "County") for a contested case hearing on Petitioner's application for creation of Lakehaven Municipal Utility District of Collin County (the "District"). For the reasons set forth below, the County's request should be denied, and the recommendation of Commission staff to grant the Petition and approve creation of the District should be followed.

Under applicable Water Code provisions, the County's stated concerns are not among the considerations pertinent to the Commission's review of the Petition, and therefore such concerns are insufficient grounds for a contested case hearing. In addition, the Commission may not grant the County's request for a contested case hearing unless it determines that the requestor is an "affected person," and the County has failed to demonstrate, or even assert, that it is an "affected person" under the Water Code and Commission rules.

1. The County's stated concerns are insufficient grounds for a contested case hearing.

As indicated in the attached Technical Memorandum, Commission staff has reviewed the Petition and supporting materials and has concluded that the District is feasible, practicable, would be of benefit to the land within the District, and is necessary as a means to

finance utility facilities and provide utility service to future customers within the District. The Water Code sets forth the criteria to be used by the Commission in making such a determination. Under Section 54.021, Water Code, in determining whether a proposed municipal utility district is "feasible and practicable and if it is necessary and would be a benefit to the land included," the Commission is required to consider the following:

(1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;

(2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and

(3) whether or not the district and its system and subsequent development within the district will have an unreasonable effect on the following:

(A) land elevation;

(B) subsidence;

(C) groundwater level within the region;

(D) recharge capability of a groundwater source;

(E) natural run-off rates and drainage;

(F) water quality; and

(G) total tax assessments on all land located within a district.

TEX. WATER CODE § 54.021(b).

The County asserts that Petitioner's application "does not take into account the effect the creation of this special district will have on the County's limited resources in this area, including, but not limited to, transportation, health and safety and emergency services." None of the County's concerns is reflected in the considerations set forth in Section 54.021,

Water Code. If the Legislature had intended for such concerns to be considered by the Commission in its review of a creation petition, then these concerns would be reflected in this section.

It is important to note that in making its determination of feasibility, practicability, benefit and necessity, the Commission has been directed by the Legislature to consider *only* the factors set forth in Section 54.021. The Legislature did not use any broadening language such as “among other considerations” or “including.” The list of considerations set forth in Section 54.021 is intended to be exclusive, and to the extent none of County’s concerns falls within those considerations explicitly listed in this section, the County’s request is not sufficient to support the granting of a contested case hearing.

Further, the County has not shown (or even alleged) that the Petition fails to conform to the requirements of Sections 54.015 and 54.021, Water Code, and the County’s request does not challenge the conclusions of Commission staff that the project is feasible, practicable, necessary and a benefit to land in the District. *See* TEX. WATER CODE § 54.021(d).

The County raises no issues of fact that could properly be contested in a case hearing. The concerns that the County raises do not form a permissible basis for Commission review of the Petition, and the County does not demonstrate any statutory or regulatory deficiency with respect to the Petition or the supporting application materials. A petition for creation of a municipal utility district is not required by statute or Commission rule to address the generalized concerns set out in the County’s request.

2. The County is not an “affected person.”

The Water Code prohibits the Commission from granting a request for a contested case hearing “unless the commission determines that the request was filed by an affected person as defined by Section 5.115” of the Water Code. TEX. WATER CODE § 5.556(c). Section 5.115 defines “affected person” as “a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing”—an interest not “common to members of the general public.” *Id.* § 5.115(a).

As Section 5.155(a) of the Water Code requires, the Commission has adopted a rule “specifying factors which must be considered in determining whether a person is an affected person.” 30 TEX. ADMIN. CODE § 55.203(c). The six non-exclusive factors are:

- (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 and safety of the person, and on the 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.

In addition, to qualify as an “affected person,” the County “must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.” *Stop*

the Ordinances Please v. City of New Braunfels, 306 S.W.3d 919, 926 (Tex. App.—Austin 2010, no pet.). It must show an injury to a legally protected interest that is “concrete and particularized,” not “conjectural or hypothetical.” *Id.*

In its request, the County fails even to assert its status as an “affected person.” As recited above, the County’s only allegation is that Petitioner’s application does not take into account the effect of the District on County resources. The County does not demonstrate how this alleged deficiency reveals an affected interest that is unique to the County. The County has not shown that it has any particularized interest in the creation of this special district that is different than the interest of the general public.

Simply asserting that the creation application does not explicitly take into account certain County concerns does not demonstrate a concrete and particularized harm to a legally protected interest. In fact, the County does not show that it would be adversely affected – or, for that matter, affected at all – by creation of the District, only that Petitioner’s application does not take into account the effect of creation on certain areas of County concerns. The County cannot expect Petitioner – or for that matter, the Commission – to speculate or hypothesize as to what those effects may be. The County has not demonstrated any concrete injury to a legally protected interest.

The County’s request is silent as to what concrete and particularized harm would flow from any failure of the creation application to take into account the County’s concerns; again, the County cannot expect Petitioner and the Commission to infer what that harm may be. The County has made the Commission aware that the creation application does not address certain County concerns, but it fails to tie these general concerns to any particularized harm resulting

from creation of the District. Any harm implied by the County's request is only hypothetical.

Further, the concerns expressed by the County are not by any means unique to creation of the District – they would be concerns about development of *any* land within the County. In other words, it is not creation of the District that concerns the County, but rather residential development in general. The County's general and speculative concerns pertaining to all residential development within its boundaries are not sufficient to confer it with affected-person status with respect to the instant matter.

To the extent the County alleges any injury to a legally protected interest (and we would assert that it does not), that injury would be purely conjectural or hypothetical, and thus would fail the *New Braunfels* test cited above. As such, the County has not met its legal burden in demonstrating that it is an "affected person" with a statutory right to be heard on the Petition.

Finally, as set forth above, Commission rules require that in order for a governmental entity to attain "affected person" status, it must demonstrate its "statutory authority over or interest in the issues relevant to the application." 30 TEX. ADMIN. CODE § 55.203(c)(6). The County's request provides no support for the premise (or even an assertion) that it has statutory authority over any of the issues relevant to the application, and Petitioner would assert that there is no such statutory authority. With respect to the County's "interest," as set forth in Section 1 of this Response, the issues that the County has raised are, by statute, not relevant to the Commission's review of the Petition and supporting application materials.

3. Conclusion

The County has raised no disputed issues of fact relevant to the Commission's review of the Petition. Because the County has failed to provide sufficient grounds for a contested case hearing on the Petition and has failed to demonstrate affected-person status, Petitioner respectfully requests that the Commission (i) deny the County's request for a contested case hearing, and (ii) follow the recommendation of Commission staff to grant the Petition and approve creation of the District.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

Texas Commission on Environmental Quality

TECHNICAL MEMORANDUM

To: Linda Brookins, Director
Water Supply Division

Date: September 19, 2011

Thru: ^{2/12/11} ^{XB} Tammy Benter, Manager
Utilities & Districts Section

^{AS} ^{9/22/11} Anthony Schneider, P.E., Team Leader
^{RN} ⁹⁻¹⁹⁻¹¹ Utilities & Districts Section

From: ^{OB} ⁹⁻¹⁹⁻¹¹ Craig Barnes, Districts Creation Review Team

Subject: Petition by Farmersville Investors, LP for Creation of Lakehaven Municipal Utility District of Collin County; Pursuant to Texas Water Code Chapters 49 and 54.
TCEQ Internal Control No. 02222011-DO2 (TC)
CN: 106091838 RN: 603815945

A. GENERAL INFORMATION

The Commission received a petition within the application requesting approval for the creation of Lakehaven Municipal Utility District of Collin County (the "District"). The petition was signed by Leon J. Backes, sole manager of Farmersville Investors GP, LLC, general partner of Farmersville Investors, LP (the "Petitioner"). According to the petition, the Petitioner is the owner of a majority in value of the land in the proposed District, and there is one lienholder, Liberty Bank of Arkansas, on the property to be included in the proposed District. By signing the petition, the lienholder has consented to the creation of the proposed District.

The District is proposed to be created and organized according to the terms and provisions of Article XVI, Section 59 of the Texas Constitution, and Chapters 49 and 54 of the Texas Water Code.

Location and Access

The proposed District is located just west of State Highway 78 and north of County Road 550, south of County Road 553 and west of County Road 551 in southeastern Collin County, on the eastern side of Lavon Lake. The proposed District is a few miles southwest of the City of Farmersville. Access will be provided via State Highway 78 and County Road 551. The petition states that the proposed District is not located within the corporate boundaries or extraterritorial jurisdiction of any municipality.

Metes and Bounds Description

The proposed District contains one tract of land totaling 375.9 acres. The metes and bounds description of the proposed District has been checked by the Commission's staff and found to form an acceptable closure.

Statements of Filing Petition

Evidence of filing the petition with the Collin County clerk's office and the Commission's Region 4 office has been received.

Type of Project

The proposed District will be considered a "developer project" as defined by Commission rules. Therefore, developer cost participation, in accordance with 30, Texas Administrative Code, Section 293.47, will be required.

Developer Qualifications

The proposed District will be developed and managed by Provident Realty Advisors, Inc., an affiliate of the petitioner, Farmersville Investors, LP. Provident Realty Advisors, Inc. has developed several master planned community developments in the Dallas/Fort Worth area and Houston.

Appraisal District Certificate

The proposed District has provided an affidavit from the Collin Central Appraisal District dated February 15, 2011 which states the Petitioner owns 100% of the land in the proposed District.

Temporary Director Affidavits

The Commission has received affidavits for Commission consideration of the appointment of temporary directors for the following:

Jewellie Arnold
Tom Kailey

Yvonne D. Bone
Dirk Foster

Tiffany McDaniel

Each of the above persons named is qualified, as required by Section 293.32(a), to serve as a temporary director of the proposed District as each (1) is at least 18 years old; (2) is a resident of the state of Texas; and (3) either owns land subject to taxation within the proposed District, or is a qualified voter within the proposed District.

Notice Requirements

Proper notice of the application was published in the McKinney Courier-Gazette, a newspaper regularly published or circulated in Collin County where the district is proposed to be located, on July 10 and 17, 2011, and posted at the Collin County Courthouse on a bulletin board used for posting legal notices, on July 14, 2011. Accordingly, the notice requirements of Section 293.12(b) have been satisfied.

B. ENGINEERING ANALYSIS

The creation engineering report indicates the following:

Availability of Comparable Service

The proposed District is not within the corporate boundaries and extraterritorial jurisdiction of any municipality. Copeville Special Utility District (SUD) is the Water Certificate of Convenience and Necessity (CCN) holder (CCN 11376) and no sewer CCN exists. Copeville SUD is expected to be the retail provider of water and will operate and maintain water facilities within the proposed District.

Water Supply

The proposed District anticipates receiving retail water supply from Copeville SUD. The District will be required to contribute its pro rata share of offsite waterlines, pumping, and storage facilities.

Water Distribution

The water distribution system for full development of the proposed District will consist of approximately 65,880 linear feet of internal lines ranging in size from 8-inches to 12-inches and 13,400 linear feet of 12 inch line offsite to connect to Copeville SUDs ground storage tank. Valves, fire hydrants, and flushing valves will be provided at intervals required by TCEQ and Copeville SUD.

Wastewater Treatment

The wastewater generated by the development of the proposed District will be conveyed to its interim wastewater treatment plant until the future North Texas Municipal Water District (NTMWD) regional wastewater treatment plant is constructed. The proposed District intends to receive wholesale wastewater treatment from the NTMWD when it is completed.

Wastewater Collection

The wastewater collection system for full development of the proposed District will consist of approximately 61,870 linear feet of internal lines ranging in size from 8-inches to 15-inches and 2,500 linear feet of 15-inch line offsite.

Storm Water Drainage

The storm water runoff system within the proposed District will consist of curb inlets, outfall structures, and approximately 34,660 linear feet of internal lines ranging in size from 18-inches to 8'x6' box culverts. The flows will outfall into unnamed tributaries of Lavon Lake.

Topography

The area within the proposed District has moderate to steep slopes. The land elevation ranges from approximately 560 feet to 510 feet above mean sea level. Drainage within the proposed District generally flows northwest and southeast to unnamed tributaries of Lavon Lake.

Floodplain

Flood Insurance Rate Map number 48085C0435J dated June 2, 2009, indicates a small section of the proposed District lies within Zone A. No homes or other improvements will be made within this section.

Impact on Natural Resources

The creation of the proposed District should not have an adverse effect on land elevation, groundwater levels, recharge capability, subsidence, natural runoff rates and drainage, or water quality.

C. SUMMARY OF COSTS

<u>Construction Costs</u>	<u>Total Cost</u> ^(*)
A. Developer Contribution Items	
1. Clearing & Grubbing	\$ 141,000
2. Water Distribution	2,861,280
3. Wastewater Collection	3,035,320
4. Wastewater Collection – Offsite	102,500
5. Drainage	4,161,540
6. Excavation – Detention	601,600
7. Contingencies (15.3% of Items 1-6)	1,665,114
8. Engineering & Testing (16.8% of Items 1-7)	<u>2,112,401</u>
Total Developer Contribution Items	\$ 14,680,755
B. District Items	
1. Water Supply Facilities	\$ 2,044,760
2. Wastewater Treatment – District	1,145,000
3. Water Interconnect	630,600
4. Contingencies (15.1% of Items 1-3)	575,064
5. Engineering & Testing (15.4% of Items 1-4)	674,724
6. Land Acquisition	<u>30,000</u>
Total District Items	\$ 5,100,148
TOTAL CONSTRUCTION COSTS (68.86% of (BIR))	\$ 19,780,903
<u>Non-Construction Costs</u>	
A. Legal Fees (2.5%)	\$ 718,125
B. Fiscal Agent Fees (2.0%)	574,500
C. Interest Costs	
1. Capitalized Interest (2 years @ 6.0%)	3,447,000
2. Developer Interest (2 years @ 6.0%)	2,370,108
D. Bond Discount (3.0%)	861,750
E. Creation/Operating Costs	500,000
F. Bond Issuance Costs	191,476
G. Bond Application Report Costs (6 @ \$30,000)	180,000
H. Attorney General's Fee	28,725
I. TCEQ Bond Issuance Fee (0.25%) + \$600	<u>72,413</u>
TOTAL NON-CONSTRUCTION COSTS	\$ 8,944,097
TOTAL BOND ISSUE REQUIREMENT	\$28,725,000

Note: (1) Assumes 100% funding of anticipated developer contribution items, where applicable. Eligibility of costs for District funding and 30% developer contribution requirements will be determined in accordance with Commission rules in effect at the time bond applications are reviewed.

D. ECONOMIC ANALYSIS

Land Use

The land use for the proposed District is projected in the following table:

<u>Development</u>	<u>Acres</u>	<u>ESFCs⁽¹⁾</u>
Single-Family	344	1,646
Open Space/Parks/Floodplain	16	0
Street Right-of-Way	<u>16</u>	<u>0</u>
	376	1,646

Note: (1) Equivalent single family connections.

Market Study

A market study, prepared by Residential Strategies, Inc., has been submitted in support of the creation of the proposed District. The market study indicates the proposed District will contain approximately 1,646 lots for single-family homes. Residential Strategies, Inc. submitted a supplement to the original market study which indicates an annual absorption rate of 60 ESFCs in 2013, 74 ESFCs in 2014, 93 ESFCs in 2015, 114 ESFCs in 2016, and 118 ESFCs in 2017 and thereafter, resulting in build-out of the District in approximately 14.5 to 15 years.

Project Financing

The estimated total assessed valuation of the proposed District at completion is as follows:

<u>Type of Units</u>	<u># of Units</u>	<u>Average Unit Value</u>	<u>Total Value at Build-out</u>
Single-Family (50' lots)	822	\$ 125,000	\$ 102,750,000
Single-Family (60' lots)	824	\$ 145,000	\$ 119,480,000
		Total Assessed Valuation	\$ 222,230,000

Considering an estimated bond issue requirement of \$28,725,000 (assuming 100% financing), a coupon bond interest rate of 6.0%, and a 25-year bond life, the average annual debt service requirement would be approximately \$2,247,062. Assuming a 95% collection rate and an ultimate taxable assessed valuation of \$222,230,000, a tax rate of about \$1.06 per \$100 assessed valuation would be necessary to meet the annual debt service requirements.

The total year 2010 overlapping tax rates on land within the proposed District are shown in the following table:

<u>Taxing Jurisdiction</u>	<u>Tax per \$100 valuation</u>
Farmersville ISD	\$1.31
Collin County	0.24
Collin County Community College	0.09
Proposed District	<u>1.16⁽¹⁾</u>
Total tax per \$100 valuation	\$2.80

Note: (1) Includes a \$1.06 debt service tax rate and a \$0.10 maintenance tax rate.

Based on the proposed District tax rate and the year 2010 overlapping tax rate on land within the proposed District, the project is considered economically feasible.

Water and Wastewater Rates

Based on the information provided, the estimated monthly fee for 10,000 gallons of water and wastewater would be \$102.76.

Comparative Water District Tax Rates

A tax rate of \$2.80 per \$100 assessed valuation for the proposed District is comparable to other developments in the area. Based on the requirements of Section 293.59, this project is economically feasible.

E. SPECIAL CONSIDERATIONS

County Notification

Application material indicates that the proposed District is outside of the corporate limits and extraterritorial jurisdiction of any city. Therefore, pursuant to Texas Water Code Section 54.0161, the Commission sent a letter, dated June 10, 2011, to the Collin County Commissioners Court notifying them of the proposed District. In response to the letter submitted to the county, the Collin County Commissioners Court stated in a July 13, 2011 letter that the application does not consider effects on the county and requests a contested case hearing.

F. CONCLUSIONS

1. Based on Commission policy, compliance with Commission rules, and review of the engineering report and supporting documents, the proposed District is considered feasible, practicable, would be a benefit to the land within the proposed District, and would be necessary as a means to finance utilities and to provide utility service to future customers.
2. Based on a review of the preliminary engineering report; market study; the proposed District's water, wastewater, and drainage facilities; a combined projected tax rate of \$1.16; the proposed District obtaining a 6.0% bond coupon interest rate; and other supporting data, the proposed District is considered feasible under the feasibility limits prescribed by Section 293.59.

3. The recommendations are made under authority delegated by the Executive Director of the Texas Commission on Environmental Quality.

G. RECOMMENDATIONS

1. Grant the petition for creation of Lakehaven Municipal Utility District of Collin County.
2. The order granting the petition should include the following statements:

“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.”

3. Appoint the following to serve as temporary directors until permanent directors are elected and qualified:

Jewellie Arnold
Tom Kailey

Yvonne D. Bone
Dirk Foster

Tiffany McDaniel

H. ADDITIONAL INFORMATION

The petitioners' professional representatives are:

Attorney:	Mr. Christopher Jordan – Crawford & Jordan, LLP
Engineer:	Mr. Adam Conway, P.E. – Pettit Barraza, LLC
Market Analyst:	Mr. Ted Wilson – Residential Strategies

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by the methods indicated below on this the 20th day of December, 2011, to:

FOR THE EXECUTIVE DIRECTOR

via first class and electronic mail:

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REQUESTER

via first class mail:

Mr. Bill Bileyu
County Administrator
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Christopher Jordan