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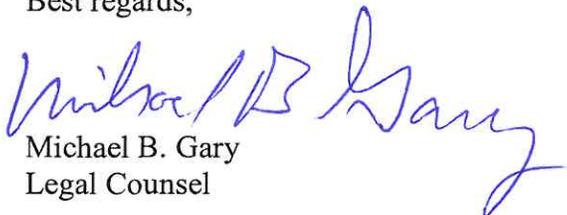
Agenda Docket Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
Austin, Texas 78711-3087

Re: GIM Channelview, LLC's Appeal of the Executive Director's
Negative Use Determination regarding Use Determination
Application No. 12826;
TCEQ Docket No. 2012-1683-MIS-U.

Dear Ms. Castanuela and Agenda Docket Clerk:

Attached for electronic filing, please find a copy of Harris County Appraisal District's Response Brief to the Appeal by GIM Channelview, LLC, as referenced above.

Best regards,


Michael B. Gary
Legal Counsel

cc: Attached mailing list.

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TCEQ Docket No. 2012-1683-MIS-U

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TCEQ DOCKET NO. 2012-1683-MIS-U

APPEAL OF THE EXECUTIVE	§	BEFORE THE
DIRECTOR'S NEGATIVE USE	§	
DETERMINATION ISSUED TO GIM	§	TEXAS COMMISSION ON
CHANNELVIEW COGENERATION	§	
LLC, CHANNELVIEW	§	ENVIRONMENTAL QUALITY
COGENERATION FACILITY		

HARRIS COUNTY APPRAISAL DISTRICT'S RESPONSE BRIEF TO GIM CHANNELVIEW, LLC'S APPEAL OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATION ON APPLICATION NO. 12826

Harris County Appraisal District (hereinafter "HCAD") files this Response Brief to the appeal of the Executive Director's negative use determination for Application for Use Determination No. 12826, as submitted by GIM Channelview LLC, for the Channelview Cogeneration Facility located at 8580 Sheldon Road, Houston, Harris County, Texas.

I. Background

On July 10, 2012, the Executive Director issued a negative use determination for use determination application No. 12826 concerning heat recovery steam generators and steam turbines. Subsequently, GIM Channelview ("Channelview") appealed the negative use determination. On September 4, 2012, HCAD received a notice of the appeal, dated August 31, 2012, from the Texas Commission on Environmental Quality ("TCEQ"). The notice advises that response briefs are due on or before 5:00pm on Thursday, October 4, 2012 in the Commission's Office of Chief Clerk (OCC).

II. Requirements for Analysis of Exemption Statutes such as Section 11.31

The Supreme Court of Texas has set forth the requirements for the review of a claim for an exemption under the Texas Property Tax Code. The Supreme Court has stated,

“...exemptions from taxation are not favored by the law and will not be favorably construed.”¹
The Court has further set forth that, “Statutory exemptions are subject to strict construction...”²
and that, “...the burden of proof of clearly showing that the organization falls within the statutory
exemption is on the claimant.”³

The statutory exemption at issue here is codified in Section 11.31 of the Texas Property Tax Code. Therefore, based on the requirements established by the Texas Supreme Court, and as delineated immediately above, Section 11.31 must be strictly construed against the granting of an exemption, and Channelview must bear the burden of overcoming an exemption that shall not be favored by the law.

III. Response to Appeal

At the outset, it should be noted that Channelview’s Appeal incorrectly states that the Executive Director was statutorily charged with completing the review of Tier IV applications within 30 days of receipt of an administratively complete application.⁴ Also Channelview’s Appeal inaccurately references the TCEQ Rules as having exempted Tier IV Applications from describing the anticipated environmental benefits from the installation of the pollution control property.⁵ However, Section 11.31(m) of the Property Tax Code states:

(m) Notwithstanding the other provisions of this section, if the facility, device, or method for the control of air, water, or land pollution *described in an application for an exemption under this section* is a facility, device, or method included on the

¹ North Alamo Water Supply Corporation v. Willacy County Appraisal District, et al, 804 S.W. 2d 894, 899 (Tex. 1991).

² *Id.*

³ *Id.*

⁴ GIM Channelview LLC’s Appeal of TCEQ’s Negative Use Determination for App. No. 12826 at 2 (hereinafter, the “Channelview’s Appeal”) (citing Tex. Prop. Tax Code §11.31(m) and 30 Tex. Reg. 932, 933 (Feb. 1, 2008).

⁵ *Id.*

list adopted under Subsection (k), the executive director of the Texas Commission on Environmental Quality, not later than the 30th day after the date of receipt of the information required by Subsections (c)(2) and (3) and without regard to whether the information required by Subsection (1) has been submitted, shall determine that the facility, device, or method described in the application is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution and shall take the actions that are required by Subsection (d) in the event such a determination is made.⁶

As can be seen from the italicized language in the quote above, Subsection (m) only applies if the property at issue has been described in an application for an exemption. According to HCAD's records, there has been no application for an exemption submitted for the property at issue.

By way of further explanation, Section 11.31 of the Property Tax Code addresses two different applications, the application for an exemption under Chapter 11 of the Property Tax Code, and the application for a use determination under Subsection (c) of Section 11.31.⁷ It is important to note that the Executive Director and the TCEQ only determine the use of the property, they are not charged with the granting of an exemption. In other words, the Executive Director and the TCEQ are providing what is akin to an asset characterization, which can then be used in an application for a statutory exemption.⁸

As such, if a separate application for an exemption has not been submitted addressing the property at issue, then Subsection (m) of Section 11.31 is not applicable. It also follows that if

⁶ Tex. Prop. Tax Code §11.31 (m) (WESTLAW current through 2011) (emphasis added).

⁷ Tex. Prop. Tax Code §11.31(c) (WESTLAW current through 2011), *and see* 30 TAC §17.10 (2008) (entitled Application for Use Determination).

⁸ An application for an exemption under Section 11.31 is addressed in Section 11.43 of the Property Tax Code. An application for a use determination is addressed in Subsection (c) of Section 11.31 and Section 17.10 of the Texas Administrative Code. Also, Subsection (i) of Section 11.31 states that the Chief Appraiser shall except a letter concerning a final determination from the Executive Director as conclusive evidence, however, in contrast, the Subsection does not state that the exemption is granted. Further,

Subsection (m) is not applicable, then the statement in Channelview's Appeal that the Executive Director has 30 days within which to complete a review of a Tier IV application is incorrect. Further, the statement that TCEQ Rules have exempted Tier IV applications from describing the anticipated environmental benefits from the installation of the pollution control property is misleading, as this is a *statutory* requirement found in Subsection 11.31(c)(1), and only excused from the requirements of Subsection (c) if Subsection (m) is applicable.

Channelview's Appeal also states that the Rules in effect in 2008 placed upon a Tier IV applicant, the responsibility of proposing a reasonable method for determining a use determination, and the Executive Director was to review the proposed method and make the final determination.⁹ Channelview's Appeal then goes on to complain that the Executive Director did not state that Channelview's methodology or calculations were unreasonable, or that they inaccurately calculated the tax exempt percentage.¹⁰ Channelview's Appeal even goes on to complain that the Executive Director didn't describe for the property owner an alternative methodology by way of an explanation to the property owner.¹¹ However, contrary to Channelview's complaints, the 2008 Rules clearly state:

Part B of the Equipment and Categories List is a list of the pollution control property categories set forth in §11.31(k) of the Texas Tax Code. These categories are described in generic terms without use of brand names or trademarks. *Property used solely for product collection or for production purposes is not eligible for a positive use determination...*¹²

⁹ Channelview's Appeal at 2.

¹⁰ *Id.*

¹¹ *Id.* at 2-3.

¹² 30 Tex. Admin. Code §17.14(a) (2008) (TCEQ, Tax Relief for Property Used for Environmental Protection) (emphasis added).

Therefore, once the threshold determination is made by the Executive Director that property is used solely for production, there is no methodology or calculation authorized by the Property Tax Code or the Rules. Channelview wishes to complain of methodologies and calculations that would apply only if the subject property were not used solely for production. Further still, the Property Tax Code states in Subsection (b) to Section 11.31:

The executive director may not make a determination that property is pollution control property unless the property meets the standards established under rules adopted under this section.¹³

Finally, Channelview injects an unauthorized reasonableness standard upon the Executive Director and an unauthorized requirement for the Executive Director to articulate flaws in the property owner's calculations.¹⁴ However, there is no reasonableness standard in the analysis of an exemption statute, it is a strict construction standard with the burden of proving qualification for an exemption placed upon the claimant for the exemption.¹⁵ Additionally, the requirements for a notice letter do not require any articulation of flaws on the part of the Executive Director. In pertinent part, Subsection (d) of Section 11.31 states:

The executive director shall issue a letter to the person stating the executive director's determination of *whether* the facility, device, or method *is used wholly or partly* to control pollution, and *if applicable*, the proportion of the property that is pollution control property.¹⁶

In summary, the Executive Director must make a determination of whether property is used solely for production when applying the 2008 Rules, which were the Rules in effect at the

¹³ Tex. Prop. Tax Code §11.31(h) (WESTLAW current through 2011).

¹⁴ Channelview's Appeal at 3.

¹⁵ North Alamo Water Supply Corporation v. Willacy County Appraisal District, et al, 804 S.W. 2d 894, 899 (Tex. 1991).

time of the filing of the use determination application. Additionally, Subsection (d) of Section 11.31 places the determination of the use of property upon the Executive Director as a statutory duty, subject to the parameters of the Property Tax Code, and the Rules adopted there under, and subject to review via appeal to the TCEQ. Further, the notice requirement found in Subsection (d) states the Executive Director is to notify the claimant of the Director's determination, which in the application at hand was that the claimant's property was not used wholly or partly to control pollution, but rather was used solely for production. Therefore, the Executive Director's notice was clear and appropriate for the purposes of the statute. And finally, the burden of proving qualification for the exemption is placed on the claimant, Channelview, for an exemption disfavored by the law, not upon the Executive Director to disprove Channelview's claims under an unauthorized reasonableness basis.

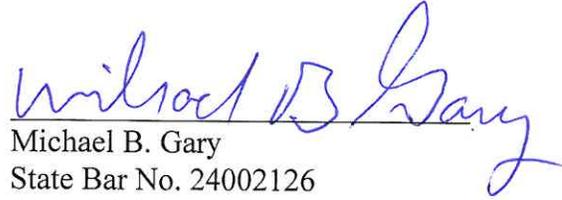
IV. Conclusion

Based on the foregoing and for the reasons stated herein, HCAD respectfully requests that the Commission deny GIM Channelview LLC's appeal, and uphold the Executive Director's Negative Use Determination for Application No. 12826.

¹⁶ Tex. Prop. Tax Code §11.31(d) (WESTLAW current through 2011).

Respectfully submitted,

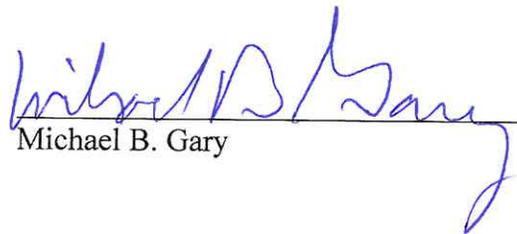
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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2012, an original of the Harris County Appraisal District's Response Brief was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, electronically at <http://www10.tceq.state.tx.us/epic/efilings/>, and that copies were also mailed to all other persons on the attached mailing list on the same day.



Michael B. Gary