

SOAH DOCKET NO. 582-08-1700  
TCEQ DOCKET NO. 2008-0091-UCR

2009 JUN 12 PM 2:32

PETITION OF RATEPAYERS § BEFORE THE STATE OFFICE  
APPEALING RATES § CHIEF CLERK'S OFFICE  
ESTABLISHED BY §  
CLEAR BROOK CITY § OF  
MUNICIPAL UTILITY §  
DISTRICT § ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 582-09-1168  
TCEQ DOCKET NO. 2008-1645-UCR

PETITION OF § BEFORE THE STATE OFFICE  
WEST TRAVIS COUNTY § OF  
MUNICIPAL UTILITY §  
DISTRICT NO. 3 § ADMINISTRATIVE HEARINGS

AND

SOAH DOCKET NO. 582-08-2863  
TCEQ DOCKET NO. 2008-0093-UCR

APPEAL OF THE RETAIL WATER § BEFORE THE STATE OFFICE  
AND WASTEWATER RATES OF §  
THE LOWER COLORADO RIVER § OF  
AUTHORITY §  
§ ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S BRIEF ON CERTIFIED QUESTIONS**

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW the Executive Director of the Texas Commission on Environmental Quality (TCEQ) and files The Executive Director's Brief on Certified Questions. Specifically, the ALJs certified and the Commission accepted the following questions:

1. Is Texas Water Code section 49.2122 so inconsistent with Texas Water Code section 13.043(j) that the two statutory provisions cannot be harmonized?
2. Does Texas Water Code section 49.2122(b) create a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious?

3. Does Texas Water Code section 49.2122(b) only create a presumption that customer classes established by the district are properly established absent a showing that the district action establishing the classes was arbitrary and capricious?
4. If the answer to Question No. 2 is YES, does Texas Water Code section 49.2122(b) require the petitioner to make an initial showing that the district's rate-setting action was arbitrary and capricious?
5. If the answer to Question No. 4 is YES, in the circumstance that there is no showing that the district action setting rates was arbitrary and capricious and the rates are therefore presumed to be "properly established," is there any further inquiry required into whether the rates themselves are valid? If so, what is the standard under which the rates themselves must be judged?
6. If the answer to Question 2 is YES, is the petitioner required to make the initial showing the district's rate setting action was arbitrary and capricious whether the rate affected is for retail service, wholesale service, or raw water?

### **I. Applicable Law**

The following statute is the basis of the Request for Answers to Certified Questions:

Texas Water Code Sec. 49.2122. ESTABLISHMENT OF CUSTOMER CLASSES.

(a) Notwithstanding any other law, a district may establish different charges, fees, rentals, or deposits among classes of customers that are based on any factor the district considers appropriate, including:

- (1) the similarity of the type of customer to other customers in the class, including:
  - (A) residential;
  - (B) commercial;
  - (C) industrial;
  - (D) apartment;
  - (E) rental housing;
  - (F) irrigation;
  - (G) homeowner associations;
  - (H) builder;
  - (I) out-of-district;
  - (J) nonprofit organization; and
  - (K) any other type of customer as determined by the district;
- (2) the type of services provided to the customer class;
- (3) the cost of facilities, operations, and administrative services to provide service to a particular class of customer, including additional costs to the district for security, recreational facilities, or fire protection paid from other revenues;

- and
- (4) the total revenues, including ad valorem tax revenues and connection fees, received by the district from a class of customers relative to the cost of service to the class of customers.

**(b) A district is presumed to have weighed and considered appropriate factors and to have properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously.**

Added by Acts 2007, 80th Leg., R.S., Ch. 1430, Sec. 7.01, eff. September 1, 2007.

## II. Background of Texas Water Code Section 49.2122(b)

Section 49.2122 was enacted in apparent response to litigation between Clear Brook Municipal Utility District (MUD) and TCR Highland Meadow Limited Partnership (TCR) regarding a rate order adopted by the MUD. The order, adopted on October 9, 2003, established a new rate scheme for apartment units but left single-family residence and commercial rates unchanged. TCR, an apartment owner affected by the rate change, appealed the rate increase to district court. At the hearing, the MUD explained that it was experiencing a funding crisis and increased apartments' rates for water service because unlike homeowners, apartment dwellers do not contribute *ad valorem* taxes to help fund district projects. Thus, charging apartment dwellers higher rates would result in a more equitable distribution of costs of providing the various services funded by the district. In a May 4, 2005 order, the Harris County District Court found that the MUD acted arbitrarily and illegally in increasing the rates because the rate bore no relationship to the District's expenses in providing apartments with services.<sup>1</sup> The case eventually settled out-of-court.

During the 80<sup>th</sup> legislative session (2007), the legislature enacted Texas Water Code Section 49.2122. According to the committee's bill analysis, the background and purpose of the bill is as follows:

Currently, the water rate structure is unfairly different for apartment complexes versus single family residences. The fair establishment of water rates ensures that all of the district's customers pay an equitable share of the expenses for the services provided by the district. HB 2301 would allow a district to establish different fees among classes of customers based on any factors the district considers appropriate.<sup>2</sup>

The language proposed by this bill was eventually rolled into Senate Bill 3, which was enacted effective September 1, 2007. On August 9, 2007, Clear Brook MUD's Board

---

<sup>1</sup> TCR Highland Meadow Limited Partnership v. Clear Brook Municipal Utility District, Cause No. 2004-21026, 334<sup>th</sup> Judicial District Ct. of Harris Co., at 6 (filed May 4, 2005), attached hereto as Attachment A.

<sup>2</sup> House Comm. on Natural Resources, Bill Analysis, Tex. H.B. 2301, 80<sup>th</sup> Leg., R.S. (2007), Attached hereto as Attachment B.

adopted another rate order like the previous one. The rate change was effective on September 1, 2007. TCR appealed the MUD's rate change order and the case is currently pending at SOAH. In addition to the case involving Clear Brook MUD, two other appeals of district rate-setting actions are pending at SOAH and have been abated pending the outcome of the commission's consideration of the certified questions: an appeal of LCRA's raw water rates and an appeal of LCRA's retail water and sewer rates.

### **III. The Code Construction Act**

Chapter 311 of the Texas Government Code is the Code Construction Act, which contains a non-exclusive set of rules meant to describe and clarify common situations in order to guide the preparation and construction of codes.<sup>3</sup> Each of the provisions below may be useful in construing Section 49.2122(b) and are reproduced here for convenience of reference.

#### **Sec. 311.011. COMMON AND TECHNICAL USAGE OF WORDS.**

- (a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage.
- (b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

#### **Sec. 311.021. INTENTION IN ENACTMENT OF STATUTES.**

In enacting a statute, it is presumed that:

- (1) compliance with the constitutions of this state and the United States is intended;
- (2) the entire statute is intended to be effective;
- (3) a just and reasonable result is intended;
- (4) a result feasible of execution is intended; and
- (5) public interest is favored over any private interest.

#### **Sec. 311.023. STATUTE CONSTRUCTION AIDS.**

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and
- (7) title (caption), preamble, and emergency provision.

#### **Sec. 311.024. HEADINGS.**

The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.

---

<sup>3</sup> Tex. Gov't Code Sec. 311.003.

Sec. 311.025. IRRECONCILABLE STATUTES AND AMENDMENTS.

(a) Except as provided by Section 311.031(d), if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.

Sec. 311.026. SPECIAL OR LOCAL PROVISION PREVAILS OVER GENERAL.

(a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.

(b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.

#### IV. ED's Recommended Responses to Certified Questions

1. **Is Texas Water Code section 49.2122 so inconsistent with Texas Water Code section 13.043(j) that the two statutory provisions cannot be harmonized?**

**RESPONSE: No; Texas Water Code section 49.2122 can be harmonized with Texas Water Code section 13.043(j).**

Texas Water Code Section 13.043, regarding Appellate Jurisdiction, provides ratepayers within districts the opportunity to appeal to the commission the decision of the governing body of the district affecting their water, drainage, or sewer rates. Subsection (j) provides the standard by which the commission must judge those rates:

In an appeal under this section, the commission shall ensure that every rate made, demanded, or received by any retail public utility or by any two or more retail public utilities jointly shall be just and reasonable. Rates shall not be unreasonably preferential, prejudicial, or discriminatory but shall be sufficient, equitable, and consistent in application to each class of customers. The commission shall use a methodology that preserves the financial integrity of the retail public utility. For agreements between municipalities the commission shall consider the terms of any wholesale water or sewer service agreement in an appellate rate proceeding.

Section 49.2122 is not in direct conflict with Section 13.043(j) because both can be given effect simultaneously. Statutes should be read so that they can both be effectuated, if at all possible. This principle is repeated again and again by the courts, establishing a strong precedent:

- In construing a statute, a court must, among other things, “presume that the Legislature intended a just and reasonable result” and “construe all portions of a statute... to be effective, if possible.” *City of Seabrook v. Port of Houston Auth.*, 199

S.W.3d 403, 430 (Tex. App.--Houston [1st Dist.] 2006, pet. filed); see Tex. Gov't Code Ann. § 311.021(2)-(3) (Vernon 2005).

- A court will prefer a construction of two statutes that effectuates both unless the statutes are irreconcilable. See *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984) (citing *State v. Standard Oil Co.*, 107 S.W.2d 550, 559 (Tex. 1937)); see also Tex. Gov't Code Ann. §§ 311.021(2), .025(a)-(b), .026(a) (Vernon 2005) (indicating a legislative preference for harmonizing statutes if possible so that entire statutes may be effective).
- “Irreconcilable conflict involves a direct conflict such that ‘it is impossible to comply with both provisions at the same time.’” Tex. Att’y Gen. Op. No. GA-0369 (2005) at 4 (quoting Tex. Att’y Gen. LO-98-124, at 4).

The Code Construction Act complements this well-settled precedent, requiring that if a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.<sup>4</sup>

In his Order No. 6, Administrative Law Judge William Newchurch employed this rule of construction when harmonizing Water Code Sections 49.2122(b) and 13.043(j). Judge Newchurch’s interpretation is that the ratepayer must first show that the district action was arbitrary and capricious, giving effect to Section 49.2122(b). Once established, the district then has the burden to prove that its rates are just and reasonable, giving effect to Section 13.043(j). Absent a showing that the district action was arbitrary and capricious, the rate is presumed valid. By initially placing the burden on the ratepayers to show that the rates were arrived at in an arbitrary and capricious manner, and then conducting a hearing on whether those rates are just and reasonable, both statutes are given effect. The Executive Director agrees with this interpretation.

Further support for placing the initial burden of proof on the ratepayers comes from the Code Construction Act. The Act directs us to consider the object sought to be attained and circumstances under which the statute was enacted.<sup>5</sup> The provision was enacted in response to a district court case in which the ratepayer appealed a district’s rate change. The district court judge found that it was “unlawful for the District to base its water rate decisions...solely upon the difference in *ad valorem* revenues” generated by different classes of customers and that the district “acted arbitrarily and illegally” in setting rates this way.<sup>6</sup> The parties subsequently settled out of court. In the next legislative session, representatives of the MUD supported the new provision. Mr. Ashley Callahan, an attorney with Fulbright & Jaworski, who represented the MUD in the litigation, testified for the bill. As for the object to be obtained, Mr. Callahan testified that the provision would “(give) some standards which can head off some unnecessary litigation and give

---

<sup>4</sup> Tex. Gov’t Code Section 311.026(a).

<sup>5</sup> Tex. Gov’t Code §§ 311.023 (1) and (2).

<sup>6</sup> *TCR Highland Meadow Limited Partnership v. Clear Brook Municipal Utility District*, Cause No. 2004-21026, 334<sup>th</sup> Judicial District Ct. of Harris Co., at 6 (filed May 4, 2005), attached hereto as Attachment A.

some guidance for the courts in that litigation which cannot be avoided.”<sup>7</sup> The circumstances giving rise to the provision and the testimony in support of it show that the object of the new provision was to create an initial hurdle for a ratepayer to clear to successfully challenge a district rate change. Shifting the initial burden accomplishes this object and makes sense, given the circumstances of its development in apparent reaction to the district court proceedings.

Once again, Sections 13.043 and 49.2122(b) are not irreconcilable and should both be given effect. Moreover, even if there were a conflict, the latest enactment would control, in this case Section 49.2122(b).<sup>8</sup>

- 2. Does Texas Water Code section 49.2122(b) create a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious?**

**RESPONSE: Yes; the terms “charges, fees, rentals, and deposits” used in the statute clearly include rates, a necessary component of a bill that charges for water and/or sewer service.**

This result is dictated by the principle of statutory interpretation that words should be accorded their plain meaning. It is well-settled that courts should first look to the plain meaning of the words in the statute and, if the meaning is unambiguous, interpret the statute so that it comports with the plain meaning expressed.<sup>9</sup> The Code Construction Act codifies this case-law principle, requiring words and phrases to be construed according to common usage unless they have acquired a technical meaning.<sup>10</sup>

Rates could be considered either a charge or a fee in the common usage of those terms. Furthermore, the Water Code defines the term “rate” to include “charges”.<sup>11</sup> Section 49.2122(b) states that “[a] district is presumed . . . to have properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously.” By its plain language, the provision creates a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious.

- 3. Does Texas Water Code section 49.2122(b) only create a presumption that customer classes established by the district are properly established absent a showing that the district action establishing the classes was arbitrary and capricious?**

---

<sup>7</sup> Testimony on H.B. 2301 in the House Committee on Natural Resources, 80<sup>th</sup> Leg., R.S. (March 28, 2007) available at Archived Broadcasts, <http://www.house.state.tx.us/committees/audio80/welcome.htm>, starting at approximately 1:14:18 into the archived recording. A transcription of the testimony is attached hereto as Attachment C.

<sup>8</sup> Tex. Gov’t Code § 311.025(a).

<sup>9</sup> *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003).

<sup>10</sup> Tex. Gov’t Code § 311.011.

<sup>11</sup> Tex. Water Code § 13.002(17): “Rate” means every compensation, tariff, charge, fare, toll, rental, and classification...

**RESPONSE:** No; subsection (b) refers to “charges, fees, rentals, and deposits” but not to “customer classes.” Even if the provision creates a presumption that customer *classes* were properly established, it does not *only* create that presumption. It would also create a presumption as to the rates themselves, as stated in response to Question No. 2, above.<sup>12</sup>

4. **If the answer to Question No. 2 is YES, does Texas Water Code section 49.2122(b) require the petitioner to make an initial showing that the district’s rate-setting action was arbitrary and capricious?**

**RESPONSE:** Yes; by a plain reading, the provision requires the petitioner to make the initial showing that the district’s rate-setting action was arbitrary and capricious.

5. **If the answer to Question No. 4 is YES, in the circumstance that there is no showing that the district action setting rates was arbitrary and capricious and the rates are therefore presumed to be “properly established,” is there any further inquiry required into whether the rates themselves are valid? If so, what is the standard under which the rates themselves must be judged?**

**RESPONSE:** No; if Section 49.2122(b) is construed and applied in the manner described in response to the first question, placing the initial burden on the ratepayer, no further inquiry into the rates is required.

Further inquiry is not required because the statute creates a presumption that those rates are “properly established” if they were arrived at in a manner that is not arbitrary and capricious. An agency<sup>13</sup> acts arbitrarily and capriciously when it (1) fails to consider a factor the legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result.<sup>14</sup> Absent such a showing, the rates must be properly established because that presumption has not been rebutted. The Executive Director interprets the phrase “properly established” to mean that the rates are valid. If the rates are presumed properly established, they are valid, and there is no need for a further inquiry into the rates.

6. **If the answer to Question 2 is YES, is the petitioner required to make the initial showing that the district’s rate setting action was arbitrary and capricious whether the rate affected is for retail service, wholesale service, or raw water?**

**RESPONSE:** Yes; the petitioner must make this showing whether the case is for retail service, wholesale service, or raw water.

---

<sup>12</sup> Please see additional discussion regarding applicability of customer classes under Question No. 6, below.

<sup>13</sup> Water districts, to which TWC §49.2122 applies, are governmental agencies. Tex. Const. art. XVI, §59(b).

<sup>14</sup> City of El Paso v. Public Util. Comm'n, 883 S.W.2d 179, 184 (Tex.1994).

Water Code section 49.2122(b) applies to all district rate cases, without exceptions. The Water Code defines a “rate” broadly as:

every compensation, tariff, charge, fare, toll, rental, and classification or any of those items demanded, observed, charged, or collected whether directly or indirectly by any retail public utility for any service, product, or commodity described in Subdivision (23) of this section and any rules, regulations, practices, or contracts affecting that compensation, tariff, charge, fare, toll, rental, or classification.<sup>15</sup>

This definition includes retail service rates, wholesale service rates, and raw water rates. If the legislature had intended to limit the application of this provision to *retail* rates, it would have done so.

## V. Implications of this Statutory Interpretation

In briefing the Administrative Law Judge, one of the Petitioners, West Travis County MUD No. 3, stated that the application of Section 49.2122(b) that the ED has espoused here would establish “a completely new and unprecedented process for review raw water rate appeals.”<sup>16</sup> Similarly, the City of Bee Cave states that a finding that Section 49.2122(b) creates a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious “would dramatically change the law regarding the review of district set rates.”<sup>17</sup> The ED agrees that the provision represents a significant change. It significantly alters the manner in which appeals from district rate-setting actions are conducted. Before the enactment of Section 49.2122, a district had the burden of proof to show that its rates were just and reasonable.<sup>18</sup> Now, the ratepayer must first meet the burden of showing an arbitrary and capricious act. The practical effect of this change is that it will be more difficult for ratepayers to successfully appeal a district action affecting their water or sewer rates.

---

<sup>15</sup> Tex. Water Code § 13.002(17).

<sup>16</sup> Reply Brief of West Travis County Municipal Utility District No. 3 Regarding the Hearing Process and the Burden of Proof (SOAH Docket No. 582-09-1169), at pp. 1 - 2.

<sup>17</sup> Bee Cave’s Brief in Opposition of Request for answers to Certified Questions, at p.6.

<sup>18</sup> 30 TAC § 291.12.

## VI. Conclusion

The best evidence of the meaning of Section 49.2122(b) is the text of the provision itself. By its plain language, Section 49.2122(b) gives districts the benefit of the doubt on their rates in all types of cases. The ratepayer must first show that the district action was arbitrary and capricious, giving effect to Section 49.2122(b). Once established, the district then has the burden to prove that its rates are just and reasonable, giving effect to Section 13.043(j). Absent a showing that the district action was arbitrary and capricious, the rate is presumed valid, and no further inquiry is required.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark Vickery, Executive Director

Stephanie Bergeron Perdue, Deputy Director  
Office of Legal Services

Robert Martinez, Director  
Environmental Law Division



---

Shana L. Horton, Staff Attorney  
Environmental Law Division  
State Bar No. 24041131  
P. O. Box 13087, MC-173  
Austin, Texas 78711-3087  
(512) 239-1088

CERTIFICATE OF SERVICE

I certify that on June 12, 2009, the original and 8 copies of the Executive Director's Brief on Certified Questions were filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk and a copy was transmitted to all persons listed on the attached Mailing List by e-mail, hand delivery, fax and/or interagency mail, as indicated.

*Shana L. Horton*

Shana L. Horton, Staff Attorney  
Environmental Law Division  
Texas Commission on Environmental Quality

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

2009 JUN 12 PM 2:32

CHIEF CLERKS OFFICE

**MAILING LIST**

**SOAH Docket Nos. 582-08-1700, 582-08-2863, and 582-09-1168**

Les Trobman, General Counsel Texas Commission on Environmental Quality VIA HAND-DELIVERY	Georgia Crump Lloyd, Gosselink, Blevins, Rochelle & Townsend, P.C. gcrump@lglawfirm.com
The Honorable Henry D. Card State Office of Administrative Hearings P.O. Box 13025 Austin, Texas 78711-3025 VIA INTERAGENCY MAIL and FAX to 512-475-4994	Stephanie Albright Lloyd, Gosselink, Blevins, Rochelle & Townsend, P.C. salbright@lglawfirm.com
The Honorable William G. Newchurch State Office of Administrative Hearings P.O. Box 13025 Austin, Texas 78711-3025 VIA INTERAGENCY MAIL and FAX to 512-475-4994	Sheridan Thompson Lower Colorado River Authority sheridan.thompson@lcra.org
The Honorable Kerrie Qualtrough State Office of Administrative Hearings P.O. Box 13025 Austin, Texas 78711-3025 VIA INTERAGENCY MAIL and FAX to 512-475-4994	James Rader Lower Colorado River Authority Legal Services james.rader@lcra.org
Eli Martinez TCEQ Office of Public Interest Counsel emartin@tceq.state.tx.us	Jim Mathews Mathews & Freeland, LLP jmathews@mandf.com
Dylan Russell Hoover Slovacek LLP russell@hooverslovacek.com	Randall B. Wilburn Wilburn Consulting, LLC wilburnconsulting@austin.rr.com
Paul Sarahan Fulbright & Jaworski LLP psarahan@fulbright.com	

# **Attachment A**

Order of the 334<sup>th</sup> Judicial District Court of Harris  
County, May 4, 2005, in Cause No. 2004-21026,  
*TCR Highland Meadow Limited Partnership v.*  
*Clear Brook Municipal Utility District*

**F I L E D**  
**CHARLES BACARISSE**  
District Clerk

**MAY 04 2005**

Harris County, Texas

By \_\_\_\_\_ Deputy

CAUSE NO. 2004-21026

*E. Plo*  
*HLO*

TCR HIGHLAND MEADOW LIMITED  
PARTNERSHIP

§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT OF

v.

HARRIS COUNTY, TEXAS

CLEAR BROOK CITY MUNICIPAL  
UTILITY DISTRICT

334<sup>th</sup> JUDICIAL DISTRICT

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

The above-captioned cause came on for trial before the Court without a jury on April 13, 2005 for the limited purpose of a determination by the Court whether Clear Brook City Municipal Utility District's charges for water service provided to TCR Highland Meadow Limited Partnership are arbitrary. Clear Brook City MUD ("the District"), its attorney, TCR Highland Meadow Village L.P. ("TCR"), its attorney, and representatives of the District and TCR were present. After considering the pleadings, the evidence, and the argument and briefs from counsel, the Court makes its findings of fact and conclusions of law as follows:

**FINDINGS OF FACT**

1. The District is a political subdivision of the state, created pursuant to Chapter 54 of the Texas Water Code and the Texas Constitution.
2. The District provides water, sewer, law enforcement, fire protection parks/recreational and other services to customers within its service area.
3. Plaintiff TCR opened the Highland Meadow Village apartment complex ("the Apartments") located within the District's service area in September 2000. The complex has approximately 250 units.
4. The Apartments are low-income housing in that their rents are capped at an amount set by the Internal Revenue Code. The total amount of rent that can be paid by the unit lessees includes water and other utility charges as well as rent. Thus, TCR cannot derive revenue from the water and other utility charges, only the rent portion of the total amount of rent charged.

5. On June 22, 2000, the District adopted a rate order that charged users for water as follows:

- a. Apartments (non-individually metered) – \$25.00 for each occupied unit until occupancy reached 80%, then \$25.00 per unit, with water used in excess of 7,000 gallons per unit charged billed under the following escalating scale:
  - i. First 7,000 gallons times number of units billed (\$25.00 minimum per unit as above)
  - ii. Next 3,000 gallons: \$1.25 per thousand gallons.
  - iii. Next 5,000 gallons: \$1.75 per thousand gallons.
  - iv. Next 10,000 gallons: \$2.50 per thousand gallons.
  - v. All over 25,000 gallons: \$3.00 per thousand gallons.
- b. Commercial:
  - i. First 7,000 gallons: \$20.00
  - ii. Next 3,000 gallons: \$1.50 per thousand gallons.
  - iii. Next 5,000 gallons: \$2.00 per thousand gallons.
  - iv. Next 10,000 gallons: \$2.75 per thousand gallons.
  - v. All over 25,000 gallons: \$3.25 per thousand gallons.
- c. Residential:
  - i. First 7,000 gallons (\$25.00 as above)
  - ii. Next 3,000 gallons: \$1.25 per thousand gallons.
  - iii. Next 5,000 gallons: \$1.75 per thousand gallons.
  - iv. Next 10,000 gallons: \$2.50 per thousand gallons.
  - v. All over 25,000 gallons: \$3.00 per thousand gallons.

6. Under the rate orders in effect since August 5, 1993 through the June 22, 2000 order, the District's minimum charge for water service to apartments was \$20.00 for each occupied unit until occupancy reached 80%, then \$20.00 per unit, with water used in excess of 7,000 gallons per unit charged billed under the same escalating scale used in the June 22, 2000 order.

7. The District's October 9, 2003 rate order for water service to apartments provides that the \$25.00 minimum charge applies to each unit without regard to occupancy, and established the following escalating rate scale for service to apartments:

- a. First 7,000 gallons times number of units (\$25.00 minimum per unit as above)
- b. Next 10,000 gallons: \$1.25 per thousand gallons.
- c. Next 15,000 gallons: \$1.75 per thousand gallons
- d. Next 25,000 gallons: \$2.50 per thousand gallons
- e. All over minimum plus 50,000 gallons: \$3.00 per thousand gallons.

8. The rates for commercial and single family users were not changed by the October 9, 2003 rate order.

9. The District's rates for water usage established in the October 9, 2003 rate order are in effect at present.
10. All apartment complexes within the District have been subject to the same water rate structure at the same time each was applied to TCR, and the District has not treated different apartment complexes differently in terms of water service or rates.
11. The testimony uniformly established that at the time of the June, 2000, rate increase, the sole motivating factor for the Board of the District was a need for an increase in general revenue. The District was experiencing a "funding crisis."
12. The Board did not consider or evaluate the cost of providing water services to the various classifications of customers in assessing the new rates. In fact, in the 15 rate orders since June, 2000, the decisions of the Board have not been supported by any factual data or rate study. The District's counsel admits, however, that the cost of providing water services to both apartments and single family homes is probably about the same.
13. The Board determined that, despite the funding crisis, it would not raise revenue through taxes -- which would necessarily implicate an across-the-board increase to all customers in the District. This decision was motivated, at least in part, by Board members' prior promises to the community not to do so and a desire to be re-elected.
14. The Board saw that apartment complexes were paying less in *ad valorem* taxes when compared to other property owners and determined to raise revenue through greater water rates to Plaintiff and other apartments within the District.
15. In other words, the Board concluded that because apartments in the District provide less revenue through taxes, apartments need to pay higher water rates to "establish equity." The District neither had nor sought any data that would show that the apartments within the District were not paying their fair share for services.
16. The District argues that its rates not illegal or arbitrary because of its present conclusions that, *i.e.*,
  - a. Apartment residents use water differently than single family residents.
  - b. Apartments typically have fewer occupants and fewer bathrooms and plumbing fixtures than single family residences.
  - c. Apartment dwellers do not water landscaping like residential users and single family users generally use more water than apartment dwellers, particularly in the summer.
  - d. Apartment users typically do not exceed the minimum amount of water used, but greater usage by single family residences often pushes single family users over the minimum amount, particularly in the summer. Higher volume usage by single family homes results in greater revenue for the District per home and per gallon of

water sold as the higher rate bands apply to the higher usage, and the District does not receive this greater revenue from apartments like TCR that typically use less than the minimum amount of water.

- e. Car washing is prohibited at the apartments.
  - f. Not all apartment dwellers have washers in their units and therefore are more likely to wait to collect larger washloads than wash smaller loads more frequently, using more water.
  - g. Vacancy rates are different between apartments and single family homes.
  - h. The District also easily knows which single family residences are not occupied by seeing no water use or having service terminated, but must rely on the self reporting of TCR to determine which apartments may be vacant and unoccupied since there is a master meter.
17. It could be that apartments and single family residences with the District use different levels of and generate different amounts of financial support for fire protection and law enforcement services provided by the District; **but the District did not investigate this assumption or consider this fact in setting its rates.**
18. It could be that apartment residences disproportionately use more fire and law enforcement services provided at the expense of the District than single family residences, but apartment customers provided the District with less funds for fire and law enforcement services than single family residents before the rate order change in June 2000; **but the District did not investigate this assumption or consider this fact in setting its rates.**
19. Even if the Apartments use fire services disproportionately, the District does not explain its failure to adjust the water rate once it created a separate line item for fire service.
20. To the extent any of the Court's conclusions of law are determined to be findings of fact, they are adopted here as if fully set forth.

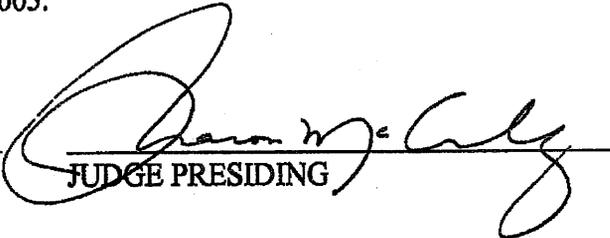
## CONCLUSIONS OF LAW

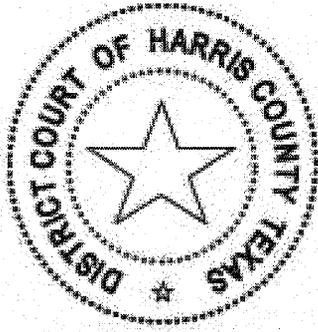
1. Because the District was created pursuant to article XVI, Section 59, of the Texas Constitution, TEX. WATER CODE ANN. § 54.011 (Vernon Supp. 2004), it has a duty to exercise judgment and discretion.
2. This Court is charged solely with making a determination whether the District has acted illegally, unreasonably, or arbitrarily. See *Inverness Forest Improvement District v. Hardy Street Investors*, 541 S.W.2d 454, 460 (Tex.Civ.App.--Houston [1st Dist.] 1976, writ ref'd n.r.e.).

3. The District "may adopt and enforce all necessary charges, mandatory fees, or rentals, in addition to taxes, for providing or making available any district facility or service [ ]." TEX. WATER CODE ANN. § 49.212
4. The purpose for charges or fees under § 49.212 is "for providing or making facilities or services available." The Code does not authorize the District to use charges or fees for the purpose of filling gaps in the general revenue.
5. The District has the right to place consumers within reasonable classifications for purposes of assessing fees or charges based upon such factors as the cost of service, the purpose for which the service or product is received, the quantity or amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a ground of distinction. *See Caldwell v. City of Abilene*, 260 S.W.2d 712, 714-15 (Tex.Civ.App.--Eastland 1953, writ refused).
6. Any matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material billing factor which may justify "discrimination" between categories of customers. *See, e.g. Ford v. Rio Grande Valley Gas Co.*, 174 S.W.2d 479, 480 (Tex. 1943).
7. Such discrimination is arbitrary, however, when it has no factual basis or justification. *See Caldwell v. City of Abilene*, 260 S.W.2d 712, 715 (Tex.Civ.App.--Eastland 1953, writ refused).
8. With regard to the June, 2000, rate increase, the District had no factual basis or support for discriminating between the categories of customers. This is not to say that such a basis or foundation does not or could not exist; the District simply did not look.
9. The District cannot now bolster or shore-up a decision lacking foundation when made. The weight of the credible evidence supports a finding that the District did not consider the appropriate factors when making its June, 2000, rate decision.
10. Moreover, although the District has the right to earn a reasonable profit on its water service, **the rates must nonetheless be reasonably related to the cost of the services rendered.** *See South Texas Public Service Co. v. Jahn*, 7 S.W.2d 942, 945 (Tex.App. -- Austin 1928, writ refused).
11. Again, with regard to the rate scale from June, 2000, and beyond, the rates cannot be reasonably related to the cost of the services rendered because the District did not and has not considered the actual cost of the services rendered.
12. Thus, Plaintiff TCR has met its heavy burden to establish that the District's water rates bear no relationship to the District's expenses in providing apartments with services.

13. It is unlawful for the District to base its water rate decisions, as it did in June, 2000, solely upon the difference in *ad valorem* revenues generated by apartment units compared to other classifications of users in setting the rates that distinguished among different classes of users.
14. The Court finds that for the District to act arbitrarily is not the equivalent of acting cavalierly, as many witnesses assumed. The District did not act cavalierly. The District had a crisis -- not of its Board's making -- and responded in a way it felt was fair to all property owners in the District.
15. However, because the District used its authority to set rates and charges to correct a perceived inequity in the tax structure, it acted arbitrarily and illegally.
16. To the extent any of the Court's findings of fact are determined to be conclusions of law, they are adopted here as if fully set forth.

SIGNED this 4<sup>th</sup> day of May, 2005.

  
JUDGE PRESIDING



I, Theresa Chang, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date  
Witness my official hand and seal of office  
this August 19, 2008

Certified Document Number: 12400696 Total Pages: 6

THERESA CHANG, DISTRICT CLERK  
HARRIS COUNTY, TEXAS

**In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail [support@hcdistrictclerk.com](mailto:support@hcdistrictclerk.com)**

# **Attachment B**

Bill Analysis, H.B. 2301, 80<sup>th</sup> Leg., R.S. (2007)

## **BILL ANALYSIS**

H.B. 2301  
By: Talton  
Natural Resources  
Committee Report (Unamended)

### **BACKGROUND AND PURPOSE**

Currently, the water rate structure is unfairly different for apartment complexes versus single family residences. The fair establishment of water rates ensures that all of the district's customers pay an equitable share of the expenses for the services provided by the district.

HB 2301 would allow a district to establish different fees among classes of customers based on any factors the district considers appropriate.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

SECTION 1. Subchapter H, Chapter 49, Water Code is amended by adding Section 49.2122:

- a) Adds that a district may establish different charges, fees, rentals, or deposits among classes of customers that are based on any factor the district considers appropriate.
- b) Presumes that a district has weighed and considered appropriate factors and has properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously.

### **EFFECTIVE DATE**

Upon passage, or, if the Act does not receive the necessary vote, the Act takes effect September 1, 2007.

# **Attachment C**

Testimony on H.B. 2301 in the House Committee on  
Natural Resources, 80<sup>th</sup> Leg., R.S. (March 28, 2007)

**ARCHIVED BROADCAST TRANSCRIPTION**

Regular Session Broadcasts between 1:14:18 – 1:20:32

House Committee on Natural Resources, March 28, 2007

The following is transcription by Bernadette Denmon (August 15, 2008)

**Committee on Natural Resources – March 28, 2007**

Mr. Fuente:

Chair calls House Bill (HB) 2301 by Rep. Talton.

Mr. Talton:

Thank you Mr. Chairman. You've called up HB 2301?

Mr. Fuente:

Yes.

Mr. Talton:

Mr. Chairman, members of the committee, there is a need for clarification of law that regulates how Municipal Utility Districts in the State of Texas are able to establish rates that are charged on revenues. Specifically, there was the Clear Brook City Municipal Utility District (MUD). There was a shortage of funds available to provide a service, and in this case it was water, and they decided to do a rate charge to different customer classes for water. They had deemed that that was fair, just like cities do when they deem something as an emergency and you can't go behind it and change that. And that's the way case law has always been. So the district did the same thing and then one of the projects...one of the apartment projects sued and said it was improper. The Court in Harris County said it is not set out in law what you can and can't do and you don't have any statutory authority to do it, even though Section of the Water Code 49.212 allows MUDs to generate revenue through rate charges for its services. And it's always been a practice apparently to differentiate between classes of services and what this bill does is it clarifies 49.212 by codifying basically current law, and I have one witness that I'm aware of.

Mr. Fuente:

Any questions for Mr. Talton? Chair calls C. Ashley Callahan.

My name is Ashley Callahan and I'm an attorney with Fulbright & Jaworski. We represented Clear Brook MUD in the litigation that led to the filing of this bill and we would reiterate what Rep. Talton said. This bill just codifies what is current practice across the state by the MUDs and gives some standards which can head off some unnecessary litigation and give some guidance for the courts in that litigation which cannot be avoided.

Mr. Fuente:

You said there is some litigation ongoing right now?

Mr. Callahan:

There's none that I'm aware of. There was a case which was actually resolved by agreement following an adverse ruling.

Mr. Fuente:

So we're not affecting any litigation right now?

Mr. Callahan:

Not to my knowledge, not that I believe so.

Mr. Fuente:

Any questions for Mr. Callahan? Mr. O' Day?

Mr. O' Day:

Mr. Callahan, it looks like you've got classifications for parks and those types of other entities. Is this strictly for the water costs or utility costs for these particular classifications that you are trying to determine?

Mr. Callahan:

That is my understanding...is that it would be for setting the water cost. I don't want to over-speak my knowledge, Rep. O' Day. It is my understanding this is solely limited to water charges and fees...that would apply to any fees that the MUD is authorized to assess, but I believe the genesis of this was the water fee.

Mr. Fuente:

Did your firm participate in drafting this legislation?

Mr. Callahan:

I believe they did, but the extent to which they did, I cannot say. I personally have no knowledge of what we specifically did.

Mr. Fuente:

But you did not?

Mr. Callahan:

No, I did not. I cannot speak for what other people did.

Mr. Fuente:

But maybe you can answer this question anyway. On page 2, line 13.

Mr. Callahan:

Yes, sir?

Mr. Fuente:

Is there any problem...the language says a district is presumed to have weighed and considered appropriate factors to establish the charges. So there is a presumption that

they did. What if we just required them to do that? That they *shall* weigh and consider appropriate factors?

Mr. Callahan:

It would have the same effect and so you would be guaranteeing at that point that they did, as opposed to presuming it. That would be my off-the-cuff answer.

Mr. Fuente:

That's a lawyer there and so I'll talk to him about it.

Any other questions for Mr. Callahan? Mr. Talton? Mr. O' Day?

Would anyone like to comment on, for, or against House Bill 2301?

The chair calls on Mr. Talton to close.

Mr. Talton:

Thank you, Chairman Fuente.

Rep. O' Day, what this does and the reason this was set up is to apply for any services that the MUD does...that's the answer. Because under 212 they can do it now, and all I'm trying to do is clarify that they *can* do it. And on the second question that the Chairman asked, and what they are trying to do here on the B-portion on page 2, line 13 they are trying to save up like cities do when they declare an emergency and they don't have to go out for bid prices because it's an emergency and nobody can go behind, and that's what they're trying to do here, whenever they say it's a presumption; and as you know in law, we can overcome presumptions if they show that they were discriminatory or arbitrary or whatever they do...and we're trying to do it on what case law was. That's kind of what we're trying to do.

Mr. Fuente:

Any questions for Mr. Talton?

Mr. Talton:

And it's not for the battleship. Thank you.

Mr. Fuente:

House Bill 2301 is left pending.

Thank you, sir.