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**TCEQ DOCKET NO. 2005-1686-DIS**  
**SOAH DOCKET NO. 582-07-2163**

CHIEF CLERKS OFFICE

IN THE MATTER OF THE	§	BEFORE THE TEXAS COMMISSION
APPLICATION OF GALILEE	§	
PARTNERS, L.P. FOR THE	§	
CREATION OF MAYPEARL	§	ON
WATER CONTROL AND	§	
IMPROVEMENT DISTRICT NO. 1	§	
OF ELLIS COUNTY, TEXAS	§	ENVIRONMENTAL QUALITY

**APPLICANT'S EXCEPTIONS**  
**TO**  
**PROPOSAL FOR DECISION and ORDER**

TO THE HONORABLE COMMISSIONERS:

COMES NOW, Galilee Partners, L.P., Applicant in these proceedings, and submits these Exceptions to the Proposal for Decision and accompanying Order issued by the State Office of Administrative Hearings on December 23, 2008 in this matter and in support thereof would show the following:

**I. Introduction to Exceptions**

The PFD recommends that the district creation application be denied, but that the wastewater permit to serve the development and proposed district be granted. This proposed anomaly is based upon the ALJ's reasoning that, while the proposed district will benefit both the land and the residents to be included within the district, such district is not necessary because the development proposed is not economically viable or feasible in the current market economy. Without an immediate market demand for the development, the ALJ opines that there is no need

for a district to govern such development. The ALJ further reasons that creation of the district would not further the public welfare because the proposed development might strain local police, fire and emergency services and lies adjacent to a rural dam for which no funding provisions have been made to prevent downstream roadway flooding in the event of a dam breach. None of these issues have previously been addressed in this manner by any prior TCEQ district creation decisions and the case presents significant policy ramifications for the Commission.

**II. Applicant takes Exception to the Proposal for Decision because it errs in recommending that the creation of the proposed district be denied because the proposed development is not economically feasible and the district is not, therefore, necessary. Conclusions of Law Nos. 6, 8, 10 and 11; Findings of Fact Nos. 17, 29, 30, 32 – 33 and 50.**

The PFD's focus on the immediate economic feasibility of the proposed development calls into question the economic viability of any district designed to provide utility services to a residential development in this current economic crisis; however, the Commission continues to create such districts without any staff qualified or otherwise trained to conduct or assess housing demands, location suitability or market forecasts. The PFD expressly relies upon Commission Rule 293.59(b) which, the ALJ proclaims, "dictates...that the economic feasibility of the project, including the influence of economic conditions, real estate market, and geographic location, be considered." This reasoning is flawed in several respects. The statutes simply do not require an economic feasibility analysis at the time of district creation because it is the developer of the district who bears all risk of failure, not the district or the public at large.

**A. Statutory Requirements**

The statutory requirement in Texas Water Code Section 51.021(a) (1) is that the “organization of the district as requested is feasible and practicable.” This refers to the reasonableness of the proposed structure of the district as a utility operation and infrastructure funding or reimbursement mechanism, not the probability that the proposed development will be successfully marketed. Whether the development has been or is currently successful enough to allow for the issuance of bonds for developer reimbursement is reviewed by the TCEQ when reviewing a bond application only after the district is created, not before. Commission Rule 293.59(b), on its face, expressly applies to the TCEQ’s approval of specific bond issues for specific project reimbursements, not district creations. The PFD’s express and multiple reliance on the Rule is not only misplaced, it is fundamentally erroneous. The time and place for a project financial feasibility review under Rule 293.59(b) is at the time when the Commission’s approval for the issuance of district bonds is sought, not at the very preliminary stage when the district is proposed for creation. Likewise, the statutory requirement of Texas Water Code Section 51.021(a) (3) that there be a public necessity or need for the district requires an examination of whether the proposed facilities are suitable and necessary to serve the lands included within the district, not a snapshot economic assessment of housing demands, real estate markets and demographic projections.

Few cases have construed the Commission’s duties and authority under the district creation statutes. However, no cases have construed Texas Water Code Section 51.021(a)(1) and (3) as authorizing, much less requiring, an examination of the immediate economic feasibility of the development proposed within the district or equating the public necessity criterion for the district’s creation with immediate market viability of the tracts proposed to be served by the

district. Indeed, the case law is expressly to the contrary:

We prefer to give the act a reasonable and practical construction, and to say that by its terms it intends to confer, and does confer, upon the commissioners' court the power and duty to determine the feasibility and practicability of the proposed organization of the district as related to each of the several tracts of land included therein; that the power to determine whether or not the proposed improvements are needed relates to each of the several tracts of land included within the district; that the power to determine whether or not the proposed the creation of the district would be a public utility carries with it the power to determine whether or not the lands to be included would be benefitted; and that the power to define the boundaries of the district carries authority with it to determine whether or not the lands within these boundaries will be protected from overflows or be benefitted by the protection afforded by the creation of the district – and with power, therefore, to exclude from the district such lands as would not thus be protected or thus benefitted. Tarrant County WCID No. 1 v. Pollard, 12 S.W.2d 134 at 136 (Tex. Comm'n App. – 1929) quoting the Texas Supreme Court in Rutledge v. State, 7 S.W. 2d 1071.

Moreover, the ALJ appears to have completely disregarded the testimony of nearly all witnesses that they fully expected the current economic crisis to be resolved within two years, the time required before any marketing of the property could even begin, in any event, because of final engineering of plans, subdivision plat approvals, lender financing approvals and builder purchase and development contracts. The Texas Water Code recognizes that proceeding with the physical development of a district will not occur overnight and at a minimum allows for at least five years to pass before the Commission may dissolve a district due to a lack of district activity. Texas Water Code Section 49.321. The PFD likewise ignores the testimony of area builders to the effect that rural affordable residential developments such as that proposed here have been proven to be successful elsewhere in the Metroplex area. The PFD ignores the timing element required for any development to go forward and assumes a static economic condition contrary to the testimony in this case. No one has a crystal ball to project 2 to 3 years in the future, much less base a market study upon such projections to present in an evidentiary hearing for the

creation of a reclamation and conservation district. Under the prevailing financial crisis of today's markets it is cavalier and naive to proffer the view that we must wait for the market recover before we can create a district to serve a need that may have evaporated in the time required to actually institute the development. Such a view disregards the established need for affordable residential housing in the DFW Metroplex area and the immense waste of resources required to restart the process after market recovery. The PFD' restrictive view that unless a proposed development is immediately marketable, it is not economically feasible or necessary to be served by future district funded infrastructure is simply not supportable under accepted industry standards for the timing of development and the reality of fluctuating market conditions.

B. Proposed Findings of Fact

The proposed findings to which these Exceptions relate are, in large part, misleading and omit critical facts bearing upon their application to this proceeding.

1. FF No. 17

Proposed Finding No. 17 is in error. The proposed district is located in northwestern Ellis County and is within the Dallas-Fort Worth (DFW) Metroplex, not south of it. It lies between and south of the major Metroplex highway corridors of US 360, US 287 and US 67.

2. FF No. 29

Applicant's market study accurately reflected the need for affordable housing at the time it was commissioned and prior to the financial crisis of the past three years. It was based upon the growth experienced in that portion of the DFW Metroplex of which the district site is a part.

3. FF. No. 30

Finding No. 30 was disputed by each of Applicant's development experts who testified as to a variety of successful developments of similar density as that proposed for this district in various parts of the DFW Metroplex at a time when the area was rural and undeveloped.

4. Finding No. 32 is based solely upon the inventory of lots generated by the failing loan industry. All experts offered the opinion that market conditions would improve within a two year time frame so as to liquidate such inventory.

5. Finding No. 33 is supported by the testimony of one witness only, who believed that the location of the proposed district was more suitable for the development of one acre septic tank dependent lots. Each of Applicant's builder witnesses expressed the opinion that the local market would improve and given the location of the proposed district site, it would be an excellent development site for affordable workforce housing due to the proximity to major thoroughfares and jobs. The County's own adoption of its Major Thoroughfare Plan for FM 15f, fronting the proposed district site, belies Finding No. 33, because the County's adoption in 2007 was based upon perceived growth corridors and the availability of land suitable for industrial and commercial development.

6. Finding No. 50

Finding No. 50 is in error. A difference in evidence is not a failure of proof. Applicant established that there is a continued need for affordable workforce housing in the area because of municipal zoning restrictions which require greater acreage and square footage than is affordable by a growing workforce. Applicant established that the development site is conveniently located near major thoroughfares which are to be extended to the area to be developed. Applicant

established that there is a need to provide drainage, water, and wastewater infrastructure to serve the residents proposed for the district. Applicant established that the district is necessary to provide an affordable means by which to operate and eventually fund such infrastructure improvements.

C. Conclusions of Law

PFD Conclusions of Law 6, 8, 10 and 11 are based upon the proposed findings to which Applicant has taken exception. Under the standards espoused by the PFD, few districts could be created and, under the current economic crisis, none can be created. Yet the Districts section of the TCEQ continues to approve district creations. The Commission should reject the policy urged by the PFD because it is not in keeping with historic Commission practice, is contrary to the case law, and improperly focuses upon a current economic conditions instead of the economic conditions which may prevail at the time that the district development has been constructed for which a bond approval application has been filed with the Commission.

**III. Applicant takes Exception to the Proposal for Decision because it errs in recommending that the creation of the proposed district will not further the public welfare. Conclusion of Law Nos. 9, 10 and 11; Findings of Fact Nos. 34-47 and 51-52.**

The PFD proposes the incongruous conclusion that the district is unnecessary because the residential development is not financially viable in the current real estate and financial market

while simultaneously asserting that the proposed residential and commercial land use and resulting workforce population will so unduly strain local services as to not be in the public interest. In the 88 year history of Texas Water Code Section 51.021(a)(4), never before has the Commission or its predecessors viewed the public welfare criterion as suggesting that typical indirect, off-site impacts which any real estate development will have on local social services such as police, fire, emergency services, traffic regulation and schools may be utilized to defeat the creation of a water district intended to provide affordable water, sewer and drainage improvements and services to local residents. The Commission's functions and duties under the Water Code and Constitution are to promote the conservation and development of the State's water resources for public benefit, not the regulation of private property development or land use decisions under the guise of "public welfare" protection.

A. Texas Constitution and applicable statutes.

Article XVI, Section 59 of the Texas Constitution declares:

(a) The conservation and development of all of the natural resources of this State, and development of parks and recreational facilities, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, ... the reclamation and drainage of its overflowed lands, and other lands needing drainage, ... and the preservation and conservation of all such natural resources of the State are each and all hereby declared **public rights and duties**; and the Legislature shall pass all such laws as may be appropriate thereto.

(b) There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

The proposed district's purposes and legal authority are grounded in Article XVI, Section 59. The Texas Legislature has provided for the creation of such district following a hearing at which testimony is taken as follows:

- (a) At the hearing on the petition, any person whose land is included in or would be affected by the creation of the district may appear and contest the creation of the district and may offer testimony to show that the district:
  - (1) is or is not necessary;
  - (2) would or would not be a public utility or benefit to land in the district; and
  - (3) would or would not be feasible or practicable.
- (b) The hearing may be adjourned from day to day.

Such language expressly omits reference to "public welfare" considerations not otherwise included within the Section authorizing the hearing. While Section 51.021(a)(4) ostensibly requires that the Commission determine that "the creation of the district would further the public welfare", such public benefit criteria has historically and judicially been viewed as requiring consideration of the benefits to the tracts to be included within the district:

The language is likewise susceptible of another meaning, and that is that the finding that the district is a public benefit or utility includes the finding of benefits to each and every tract included within the project. For in determining what is a public benefit, necessarily the rights of the individuals composing that public enter into the consideration. M., K. & T RY. Co. V. Rockwall County Levee District, (Tex. Sup.) 297 S.W. 206. Tarrant Co. WCID No. 1 v. Sutton, 12 S.W.2d 134 at 136 (Tex. Comm'n App. 1929).

#### B. The Public Welfare Test

The PFD appears to view the workforce population to be served by the proposed district as a threat to the public welfare. The PFD's proposed Conclusion of Law No. 9 relies solely upon Proposed Findings of Fact Nos. 34-47 and 51-52, to the wholesale exclusion from Commission consideration of the Constitutional duties and purposes of the district, the benefits to the properties included within the district, the growing nature of the DFW Metroplex and the continued need for affordable workforce housing projected for the area. The PFD's exclusive focus on the alleged social service impacts of the proposed development at full build-out makes

no attempt to determine the causal relationship between the creation of the district, as opposed to any development in the vicinity, and the alleged impacts which the PFD asserts may occur. Such determination, however, is a critical first step to giving weight to either side of the evidentiary fulcrum upon which to support any determination that the impacts of district creation, as distinguished from those impacts likely associated with any development, are of such a magnitude that the alleged harm to the public clearly outweighs the public benefit afforded by local drainage control, organized wastewater treatment, regional water supply and distribution through fire protection rated lines, improved property values, an affordable housing alternative for the area's workforce and an increased tax base for local taxing authorities.

As indicated in the PFD, the Executive Director has never considered indirect societal impacts as determinative of whether the public welfare will be furthered by the creation of the district. The PFD, however, urges that this historic view has changed as a consequence of the Austin Court of Appeals' recent ruling in Texas Citizens for a Safe Future and Clean Water v. Railroad Commission of Texas, 254 S.W.3d 492 (Tex. App. – Austin, 2008, pet. pending). In Texas Citizens, the Austin Court ruled that the Railroad Commission's statutory requirement to find that the use of a salt water waste disposal injection well is in the public interest under Texas Water Code Section 27.051(b)(1) required it to consider, in addition to taking evidence thereon, the public safety issue impacts associated with 20 to 50 trucks hauling up to 5000 barrels of saltwater waste over blind curved dirt roads used by pedestrians and children in the neighborhood of the disposal site. In remanding the case to the Commission, the Court stated:

The Commission does not need the authority to regulate road safety issues in order to determine whether the development of an injection well will create traffic-related problems if such magnitude that the harm to the public outweighs the benefit of increased

oil and gas production. The Commission is not being asked to regulate road safety, but merely to consider potential threats to public safety before issuing an injection well permit...When reconsidering the public interest finding on remand, the Commission might also consider whether any possible conditions may be applied to the injection well to alleviate relevant public safety-concerns. Id at Opinion page 8.

Unlike the Court in Texas Citizens, the PFD does not propose that the Commission determine whether the alleged development impacts outweigh the benefits to be afforded by the proposed district or whether any conditions could be applied so as to alleviate such impacts. Rather, the PFD recommends that, as a matter of public policy, the Commission should decide that increased demands on fire (voluntary fire department), emergency services (property taxing district), roads (County and State) and police (Sheriff's department) which are necessarily incidental to any development should be considered so contrary to the public welfare as to constitute grounds for preventing the formation of a constitutional conservation and reclamation district. In order to evaluate the propriety of such policy, the specific findings of fact urged by the PFD need to be examined.

C. Proposed Findings of Fact

The proposed findings to which these Exceptions relate are, in large part, misleading and omit critical facts bearing upon their application to this proceeding.

1. FF Nos. 34 – 38 and 52: Dam Safety Impacts

Proposed Finding Nos 34 through 38, while factual, omit relevant facts to reach a pre-ordained conclusion. A dam's hazard rating is influenced, not by its danger of breach, but by the amount of traffic encountered in downstream roadways or if residents are located within the potential breach inundation area. In this case, no habitations are to be located within the breach

inundation area and the district has voluntarily and expressly assumed the financial cost of constructing the armored slope throughout the breach inundation area. The County and EPSWCD maintain numerous high hazard rated dams upstream of developments without apparent concern for their failure to upgrade such dams for downstream protection. In this case, the basis for the dam's potential re-rating from a low risk to significant risk is strictly based upon a projected increase in traffic volume near the intersection of FM 2258 and FM 157, a roadway fronting the subject property and for which the County has approved a multilane high volume Major Thoroughfare Plan. Unfortunately, the Commission's own dam safety expert, specifically asked, could not provide any breakdown as to the amount of traffic flow or volume which triggers any dam hazard rating assessments. While the district is not adverse to financially assisting the County and EPSWCD in the required dam modifications, the entire cost of such upgrade should not be borne solely by the district or its residents since the benefits resulting from such upgrades enure to the entire area, not simply the property to be included within the district. However, Finding No. 38 erroneously recites that the dam must meet high hazard criterion, rather than the significant hazard rating referenced in Finding No. 37. Finding No. 52 is not fact based and is vague, unqualified and inappropriate. The dam hazard rating is a function of traffic volume on a downstream public roadway, not the density of a proposed development located in proximity to the dam. The development's build-out and concomitant traffic increases will not occur overnight, allowing plenty of time and opportunity for whatever structural modifications to the dam may ultimately be required. In any event, the PFD appears to wrongly assign sole financial responsibility to the Applicant for conducting substantial cost improvements to property not owned by the Applicant as a pre-condition to the development of Applicant's property. That

would appear to constitute a taking of property for public use and an illegitimate exercise of the Commission's district creation authority.

2. FF Nos. 39 – 47 and 51: Public Services Impacts

Finding No. 39 purports to determine that the proposed development will strain current public services in an amount that is disproportionate to the tax revenue to be derived from residents within the district. The record shows otherwise since the median value of the developed properties within the proposed district are higher than the median property values within Ellis County as a whole.

Finding No. 40 is immaterial to the issue presented, since the impact on public services will be the same for any development, whether or not it utilizes a district creation process to make the provision of utility services more affordable and accountable.

Findings No. 41 and 42 fail to quantify the alleged harm complained of. Most of Ellis County is rural and distant from emergency services. However, residents of the District will still be paying for such services through their taxes in the same manner as other County and municipal residents.

Finding No. 43 is simply a red herring. The fire department is volunteer. The proposed finding assumes without support that residents of the proposed district will not volunteer to prevent and fight fires in the area. The finding purports to diminish the importance of fire rated lines and hydrants in a residential subdivision.

Finding No. 44 appears to say that municipalities should not retain their own police protection and that the Sheriff's office owes greater responsibility to residents of cities than to

rural constituents. The district's residents will be paying the same tax rate for these public services as municipal residents or any other residential group within the County and it is simply unreasonable to associate impacts of this nature to the proposed district as distinguished from any other residential development within the County.

Finding Nos. 45 through 47 are unquantified and unqualified as to the alleged unsafe nature of traffic volume on these roadways. The County has approved a multilane Major Thoroughfare Plan for FM 157. Real estate developments occur throughout the State using two-lane rural roadways. There is nothing unique about the proposed development in this regard. Internal development roadways and bridges are the focus of subdivision development plat approvals under the Texas Local Government Code by which such internal features are frequently changed. A district development plan should be sufficiently flexible to accommodate such changes. The PFD appears to wrongfully perceive that a development plan filed with a district creation application is immutable and not subject to change by the developer or local authorities.

Finding No 51 ignores the repeated efforts of the Applicant reflected in the record to meet with County officials to plan for the development of these public services. The County insisted that only septic tank dependent one-acre lots be considered for the development and curtailed further discussions regarding the provision of such services. The property developer cannot plan for such services on its own as they are services provided by other governmental entities within the County, not a WCID as proposed in this proceeding. The County's refusal to participate in these planning efforts should not be used to criticize the Applicant for a lack of public services planning, much less serve as the basis for denying the district creation application opposed by the

County.

D. Conclusions of Law

Conclusions of Law Nos. 9, 10 and 11 are catch-all conclusions set forth in the statutory language and based upon the foregoing Findings excepted to. Conclusion No. 10, in particular, is grossly inaccurate and mischaracterizes Applicant's evidence in this case. That the PFD author disagrees that there is a need for affordable housing, that the proposed site lies in the growth corridor to take advantage of area thoroughfares and job opportunities and that the development will be able to move forward successfully within a two to four year time frame is not a failure of proof, it is a failure to understand the dynamics of district development and the historic practices of the Commission in the creation of conservation and reclamation districts.

**IV. Applicant takes Exception to the PFD's determination that Applicant waived its challenge to Ellis County's and EPSWCD's standing to proceed in this matter because such ruling is legally incorrect.**

The PFD asserts, without citation to authorities, that Applicant's challenge to the standing of the party protestants in this case under the Commission's justiciable interest rules has been waived because same was not raised at an earlier time. The standing of a party is essential to subject matter jurisdiction and is grounded in the Texas Constitution and may be raised at anytime during the litigation. Texas Association of Business v. Texas Air Control Board, 852 440, 443 - 445 (Tex. 1993). In this case, without the protestants' protest and intervention there would have been no case or controversy to have been transferred to SOAH for contested case

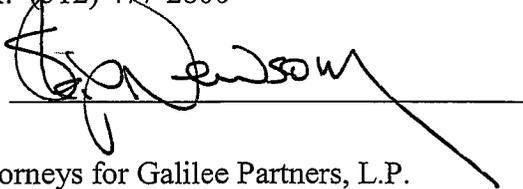
hearing. Applicant re-urges its challenges by these Exceptions. Such challenge is incorporated within Applicant's Closing Argument made part of the record of these proceedings and is hereby incorporated by reference hereto as if set forth verbatim.

**Wherefore, Premises Considered,** Applicant, Galilee Partners, L.P. urges that its Exceptions to the Proposal for Decision and Accompanying Order be granted and that the creation of the district requested by Applicant's Application be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true copy of Applicant's Exceptions to Proposal for Decision and Order were served on the following parties by facsimile and/or United States mail, first class, on this 22nd day of January, 2009:

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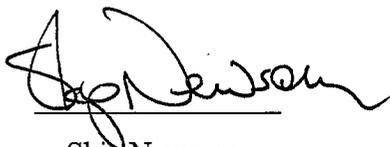
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