State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

December 23, 2008

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 DEC 23 PM 4: 13
CHIEF CLERKS OFFICE

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-07-2163; TCEQ Docket No. 2005-1686-DIS; In Re: Application Of Galilee Partners, L.P., For Creation Of Maypearl Water Control And Improvement District No. 1 Of Ellis County, Texas

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than January 12, 2008. Any replies to exceptions or briefs must be filed in the same manner no later than January 22, 2008.

This matter has been designated **TCEQ Docket No. 2005-1686-DIS; SOAH Docket No. 582-07-2163**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Katherine L. Smith

Katherine L. Smith
Administrative Law Judge

KLS/Ls
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: MAYPEARL WCID NO 1

SOAH DOCKET NUMBER: 582-07-2163

REFERRING AGENCY CASE: 2005-1686-DIS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ KATHERINE L. SMITH

REPRESENTATIVE / ADDRESS | **PARTIES**

SCOTT HUMPHREY
ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-0574 (PH)
(512) 239-6377 (FAX)
shumphre@tceq.state.tx.us

OFFICE OF PUBLIC INTEREST COUNSEL

DOCKET CLERK
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF THE CHIEF CLERK
PO BOX 13087
AUSTIN, TX 78711
(512) 239-3300 (PH)
(512) 239-3311 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHRISTINA MANN
ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087, MC-103
AUSTIN, TX 78711-3087
(512) 239-4014 (PH)
(512) 239-6377 (FAX)

OFFICE OF PUBLIC INTEREST COUNSEL

ALICIA M LEE
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
ENVIRONMENTAL LAW DIVISION, MC 163
MC-175 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-0133 (PH)
(512) 239-0606 (FAX)

EXECUTIVE DIRECTOR

SAL LEVATINO
ATTORNEY
LAW OFFICE OF SAL LEVATINO
1524 SOUTH IH-35, SUITE 234
AUSTIN, TX 78704
(512) 474-4462 (PH)
(512) 482-0051 (FAX)

GALILEE PARTNERS, L.P.

SKIP NEWSOM
ATTORNEY AT LAW
THE LAW OFFICES OF SKIP NEWSOM
6806 BEE CAVES ROAD, SUITE 1-A
AUSTIN, TX 78746
(512) 477-4121 (PH)
(512) 477-2860 (FAX)
(512) 431-9511 (CELL)

GALILEE PARTNERS, L.P.

CHRISTIAAN SIANO
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-173 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-0600 (PH)
(512) 239-0606 (FAX)

TCEQ EXECUTIVE DIRECTOR

W. LEE AUVENSHINE
ASSISTANT COUNTY & DISTRICT ATTORNEY
ELLIS COUNTY, TEXAS
TEMPORARY ADMINISTRATION BUILDING
1201 N. HWY. 77, SUITE 104
WAXAHACHIE, TX 75165-7832
(972) 825-5035 (PH)
(972) 825-5047 (FAX)

ELLIS COUNTY, TEXAS

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

APPLICATION OF GALILEE PARTNERS, L.P., FOR CREATION OF MAYPEARL WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1 OF ELLIS COUNTY, TEXAS	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 DEC 23 PM 4:18
CHIEF CLERKS OFFICE

PROPOSAL FOR DECISION

On April 21, 2005, the Applicant, Galilee Partners, L.P., applied to the Texas Commission on Environmental Quality (TCEQ) for creation of Maypearl Water Control and Improvement District (WCID) No. 1 (District) of Ellis County, Texas, pursuant to Article XVI, Section 59 of the Texas Constitution and Texas Water Code, Chapter 51. The case was referred to the State Office of Administrative Hearings (SOAH) on February 2, 2007, for a contested hearing. Based upon the evidence presented, the Administrative Law Judge (ALJ) recommends that the application be denied.

I. BACKGROUND

The proposed District is located south of the Dallas–Fort Worth Metropolitan/ Metroplex area in southwestern Ellis County, due east of Waxahachie, southeast of Midlothian, Cedar Hill and Duncanville, and due south of Arlington. App. Ex. 6. It is located outside the incorporated limits or extra-territorial jurisdiction of any municipality. It lies between IH 35W and 35E along farm-to-market road (FM) 157. According to the Applicant, Ellis County has approved a major thoroughfare to connect to State Highway 360, which runs north/south from DFW Airport through Arlington. App. Ex. 6; Ellis County Ex. 6 at 2. The proposed District consists of approximately 227 acres, including approximately 150 acres for building 798 homes, 13 acres for commercial development, a 10-acre school site, and 53 acres of flood plain, open space, and utility easements. Tr. at 20,120-22; App. Ex. 3A at 9. Half of the housing lots will consist of about 4,400 square feet and the other half of about 5,500 square feet. Tr. at 27-28; App. Ex. 3A at 9.

According to the Applicant, the application addresses the creation of a district that will be the organizational mechanism by which utility services, including potable water service, drainage, and sanitary sewer services, authorized by TPDES Permit No. WQ001464001, are to be provided to the anticipated residential and commercial development. A district allows for the construction and operating costs of providing municipal type services to be borne solely within the created community. The district mechanism also provides for a governmental structure that will ensure the continued provision of services at rates and taxes determined by a local board of directors.

II. PROCEDURAL MATTERS

A. History

TCEQ found the Application to be administratively complete on May 25, 2005. Pursuant to the notice rules set out in 30 TEX. ADMIN. CODE (TAC) § 293.12, Applicant published notice of the application for the creation of the District on August 16 and 23, 2005, in the *Waxahachie Daily Light*, a newspaper generally circulated in Ellis County. On August 17, 2005, Applicant posted notice of the application at the Ellis County Courthouse. On August 12, 2005, TCEQ received a letter of protest from the Ellis County Engineering Department, attaching an August 9, 2005, resolution from the Ellis County Commissioner's Court opposing the creation of the District. On September 12, 2005, TCEQ received a letter of protest from the Ellis Prairie Soil and Water Conservation District, raising several dam safety issues. On September 15, 2005, TCEQ received a letter from Mountain Peak Special Utility District raising concerns that the proposed District might interfere with its CCN. In response to the dam safety concerns, the Applicant's engineer provided TCEQ with a revised engineering report dated May 8, 2006, excluding residential development from the area potentially exposed to a dam breach.

On January 24, 2007, TCEQ considered the application and the requests for a hearing and referred the case, in an interim order dated February 2, 2007, to SOAH where it was assigned

docket number 582-07-2163. At a preliminary hearing held on May 14, 2007, ALJ Tom Walston named the following parties: Applicant, the Executive Director (ED), the Office of Public Interest Counsel (OPIC), and protestants Ellis County and the Ellis Prairie Soil and Conservation District (EPSWCD).

On July 22, 2005, Applicant filed an application for wastewater permit, TPDES Permit No. WQ001464001, which was referred to SOAH for a hearing on August 23, 2007. The case was assigned docket number 582-08-0020, and it was consolidated with this case at a preliminary hearing on October 29, 2007. The hearing on the merits was held on April 17 and 18 and June 20, 2008, before ALJ Katherine Smith. The record closed on October 16, 2008, with the filing of briefs. The County, EPSWCD, the ED, and OPIC oppose creation of the District.

B. Protestants' Standing

In its initial closing brief, Applicant asserted that Ellis County and the EPSWCD should be dismissed as parties from this proceeding pursuant to 30 TEX. ADMIN. CODE (TAC) § 55.203 because they lack standing or a justiciable interest.

Ellis County countered in its reply that the issue of whether Ellis County and EPSWCD had a sufficient justiciable interest in this proceeding was considered by TCEQ on January 24, 2007, when it considered the application and protestants' requests for a contested hearing. Ellis County noted that Applicant did not file either a response to the protestants' hearing requests or a reply to the ED's and OPIC's responses determining that Ellis County and EPSWCD satisfied criteria sufficient to establish a justiciable interest warranting a contested case before SOAH. As previously noted, the Commission issued an interim order referring the matter to SOAH for a contested case hearing after the requests for a contested case hearing were evaluated pursuant to 30 TAC Chap. 55. Ellis County also points out that the Applicant did not raise the issue of lack of justiciable interest at the preliminary hearing conducted on May 14, 2007, at which time the ALJ designated Ellis County and EPSWCD as parties.

Based upon the procedural history, the ALJ finds that Applicant waived the issue of lack of justiciable interest. Furthermore, the last time for Applicant to raise the issue was when it filed its objections on April 1, 2008, to the County's and EPSWCD's prefiled testimony, which gave the Applicant full notice of the protestants' positions. Because it did not do so then, Applicant is estopped from raising an objection now.

III. DISCUSSION

For TCEQ to grant the application requesting the creation of a WCID, the applicant must meet the following four criteria set out in Section 51.021(a) of the Texas Water Code:

(1) organization of the district as requested is feasible and practicable;

(2) the land to be included and the residents of the proposed district will be benefited by the creation of the district;

(3) there is a public necessity or need for the district; and

(4) the creation of the district would further the public welfare.

In addition, if a substantial development is proposed, a market study must support the application for the creation of the special district. 30 TAC § 293.11(a)(6).

A. Benefit to the Land and Residents—Criterion (2)

The County, supported by EPSWCD, was the only party to challenge that the District would be a benefit to the land and its potential residents. The County's expert witness Dr. Ray Perryman, an economist who provides advice on economic development and demographic trends, contends that the District does not meet this criterion because developing the land in the manner proposed prevents the land from going to its "ultimate highest and best use." Tr. at 438. The County also argues that the land within the proposed District and its potential 3,000 residents would not benefit from the District because those persons would be located

downstream of a flood prevention dam that is currently inadequate to protect the lives and property of those persons.

The ALJ does not interpret criterion (2) to mean the highest development of the land and does not interpret the issue of benefit to the land and residents as broadly as the County does, but like Staff interprets the criterion to mean the most healthful and least intrusive use of the land. Because the proposed District intends to rely on the funding to provide comprehensive water, wastewater, and drainage services so that residents will not have to rely on individual wells and septic systems, the ALJ finds that the District will benefit not only the land within the District, but also the residents of the District.

B. Feasible and Practicable—Criterion (1)

1. Applicant's Position

According to the Applicant, this issue requires: (1) a delineation of the proposed development plan and the services proposed to be provided by the district; (2) a description of the facilities from which those services will be furnished at full development; (3) an estimate of the capital costs and operating expenses associated with providing such services; (4) an analysis of anticipated bond issue requirements; and (5) a projection of ad valorem and maintenance tax rates and revenues by which to meet such cost and expense estimates at full build-out. Applicant states that each of those components is set forth in its District Creation Application filed with TCEQ on April 20, 2005, App. Ex. 1 and 1A, as amended by the revised Preliminary Engineering Report and Hydraulic Analysis dated May 8, 2006, and January 23, 2007, App. Exs. 2, 2A, and 2B. The engineering report sets forth the following:

> Section III examines the existing conditions of the project site and details the improvements for the site's water, sewer, and drainage infrastructure.
>
> Section IV sets forth the current development concept plan to use the approximately 226 acre tract for approximately 150 acres of residential housing,

> 13 acres of commercial development, a 10-acre school site, and 53 acres of flood plain, open space, and utility easements.
>
> Section VII provides an engineering estimate for the cost of capital improvements needed to provide potable water supply and distribution, sanitary sewer service, treatment and disposal, and drainage control, amounting to $8,645,304 at full development, with a total bond issue requirement of $10,350,000.
>
> Section VIII addresses the economic feasibility of the development plan based on current and projected assessed valuations, proposed tax rates, and service rates. The total district tax rate at full development is projected to be $0.99 per $100 assessed valuation composed of a $0.94 debt tax rate and a $0.05 maintenance tax rate, which Applicant contends is reasonable and comparable to other district rates in the area. App. Ex. 2 at 16; App. Ex. 4 at 10. Water rates were projected on the basis of current rates in the area and sewer rates were forecast to be competitive. App. Ex. 4 at 12.

According to the Applicant, the project will be constructed in phases with developer financed infrastructure. Applicant points out, however, that no District bonds for the reimbursement of the developer financed infrastructure costs will be approved, however, by TCEQ or the Attorney General and sold until the certified tax rolls of the District show an assessed valuation sufficient to meet the debt requirements of such bonds under the District's approved tax rate. Tr. at 228-30, 262-69. Applicant asserts that from an engineering and economic perspective, the proposed District's creation, organization, and planned utility services are feasible and practicable. App. Ex. 2 at 17-20; App. Ex 4 at 10-12; ED Ex. 8 at ED-3.

2. Other Parties' Positions

In assessing this issue, the ED traditionally looks to the rules set out in 30 TAC § 293.59, of which subsection (a) and (b) state:

> (a) In addition to determining the engineering feasibility of a project, the commission shall also determine the economic feasibility of each proposed bond issue, bond amendment, and extension of time application for a bond issue. The staff of the commission shall use the following sections in making economic feasibility analysis. In its written recommendations to the commission, which

> analyze the particular application, the staff shall always address the economic feasibility.
>
> (b) Economic feasibility is the determination of whether the land values, existing improvements, and projected improvements in the district will be sufficient to support a reasonable tax rate for debt service payments for existing and proposed bond indebtedness while maintaining competitive utility rates. Utility rates that do not exceed the rates of the largest city in the geographic area in which the district is located are conclusively deemed to be competitive. Economic feasibility is influenced by many factors and varies widely depending on economic conditions, the real estate market, the number of competing projects, and geographic location.

The ED notes that under 30 TAC § 293.59(k)(3)(C), the combined projected tax rate for a district's first bond issue cannot exceed $1.00. Applicant's financial adviser, Ms. Maria Urbina, testified that the tax rate of the District would be $1.00 per $100 of assessed valuation. App. Ex. 4 at 10.[1] Although the ED notes that Applicant's witness Ted Wilson testified that it was not practical and feasible to place the 798 proposed homes on the property and streets at this time, the ED declined to equate feasibility with marketability. Tr. at 163, 188. Therefore, the ED does not dispute the feasibility of the District and recommends finding that the District is feasible consistent with previous agency practice. Tr. at 631.

OPIC and Ellis County relate this issue to that of the issue of need set forth in criterion (3). OPIC and Ellis County question whether the development would feasibly attract sufficient buyers to ensure the success of the development. OPIC and Ellis County challenge the credibility of the Applicant's market study prepared by Residential Strategies, Inc. Dr. Perryman specifically tied the issue of feasibility to that of the marketability of the lots. Tr. at 437. In addition, Dr. Perryman testified that the project is not practical because without the ability to sell lots, it would be difficult to pay for the infrastructure, which in turn would affect the ability to sell bonds. Tr. at 416-17.

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[1] The ED notes in its closing brief that although there was some confusion over whether the number would be $.99 or $1.00, the ED is satisfied that those are within the feasibility limits set out in 30 TAC § 293.59.

As much as the Applicant and ED would prefer the ALJ to consider only the issues of engineering feasibility and the amount of the projected tax rate for the District's first bond issuance as set forth at 30 TAC § 293.59(k)(3)(C), the ALJ cannot ignore the dictates of 30 TAC 293.59(b), which requires that issues such as economic conditions, the real estate market, and geographic location be addressed. Therefore, this issue brings into question the information contained in the market study required by 30 TAC § 293.11(a)(6), which is addressed next.

C. Public Necessity or Need for the District—Criterion (3)

The ED, OPIC, the County, and EPSWCD contend that Applicant did not meet its burden of proof with regard to this issue because of the insufficiency of its market study.

1. Applicant's Position

Applicant asserts that the District is necessary to accommodate the sustained growth occurring in the Dallas-Fort Worth Metroplex and to provide affordable housing, which has been limited by zoning regulations by cities desiring larger and more costly lot sizes and houses and corresponding tax bases. App. Ex. 3 at 4; tr. at 641-42, 683-84. Applicant asserts that development of affordable housing cannot occur at the proposed location unless the District is created to assist in the financing of utility infrastructure and to provide for water, wastewater, solid waste disposal, and storm water control services. App. Ex. 2 at 18. Applicant contends that the County has opposed the District's creation since 2005 because the County prefers one acre, septic-tank-dependent residential development and sees the potential for using the district-creation process as a means of limiting lot sizes, a power over which it has no authority under the Texas Local Government Code. App. Ex. 1 at 5-7.

In response to the other parties' description of the rural nature of Applicant's property, Applicant notes that the property is situated in the corridor of the Metroplex growth between IH 35W and 35E, within easy commuting distances to locations of commerce and industry:

15 miles south of Arlington, 9.5 miles west of Waxahachie, 10 miles south of Cedar Hill, and 3 miles from Midlothian.[2] Applicant contends that those localities essentially preclude affordable housing through zoning and subdivision regulations that have driven up the price of land and housing.

Applicant contends that the recent economic downturn caused by lending abuses, which has reduced financing opportunities for persons seeking starter homes and led to the retraction of new housing starts, has emboldened the County's position and enabled the County to assert that the projected development contemplated by the District's creation is not necessary and is too remote to be successfully marketed. Applicant criticized the testimony of the County's two expert witnesses, Dr. Perryman and Michael Atwood, noting in particular that neither had performed their own market study. Applicant also contends that their testimony was contradictory. At one point they testified that there is no market demand for the type of proposed development because the mortgage crisis has caused a surplus housing inventory and the rural location and proposed lot sizes of the development could cause the development project to fail. And yet, they also testified that the Metroplex's economic and job growth continues to be sizeable and that Ellis County's population is expected to double over the next 20 years to approximately 380,000. Tr. at 328, 399-400. Applicant notes, moreover, that both witnesses expressed the view that the DFW housing market should recover by 2009 and that new housing starts should commence within that time. Tr. at 285, 307. Applicant notes that Ray Perryman also admitted that it is common for information to become dated within a reasonably short period of time due to the dynamic nature of economic activity. Tr. at 398-99.

Applicant presented the testimony of two professional home builders, Zachary Jones and Jagjit Singh, who pointed to a number of successful, affordable, medium-density housing developments, which had begun in rural and distant areas on small lots of 40 - 50 foot widths and which are now in highly developed communities. Tr. at 647-56, 681. They both expressed the

[2] Applicant's closing brief at 8. The distances are apparently in dispute. The County places the distances at 8-10 miles from Midlothian and 15 miles from Waxahachie. Closing brief at 9-10.

opinion that the proposed development within the District would be successful due to the experienced need for affordable housing, the location's low-land cost, the lack of zoning restrictions on lot size, and its proximity to major existing and proposed traffic corridors and developing job opportunities in the south Metroplex. Tr. at 638-706. Each testified that based upon their experience, it would take at least two years to complete the engineering, subdivision plat approvals, lender financing, and builder contracts to commence actual construction within the District after the creation of the District. *Id.* Applicant points out that the two-year time frame fits neatly with the two-year time frame for recovery from the mortgage crisis and resumption of new housing starts that the County's witnesses project.

Applicant also belittled the other parties' contention that the proposed development is not necessary or viable because the market study submitted in 2005 no longer represents today's market conditions due to the current financial crisis and lack of credit availability. According to the Applicant, such reasoning is flawed because the only requirement of the market study is to ensure that the projected valuation of the development matches the proposed district tax rate for the ultimate retirement of the district debt at full build-out. Applicant contends that the market study can make no assumptions about future inflation or economic downturns that can influence both the development build-out and the timing of future district bond issues.

According to the Applicant, more precise and accurate market studies are submitted to TCEQ when a district approves the issuance of bonds. Those studies reflect certified tax roll valuations, not market projections, and are matched to the amount of debt to be issued rather then the full amount of developer debt incurred to build out the district. Applicant contends that it is presumptuous and naïve for the parties to contend that the Water Code requires an applicant to demonstrate immediate and present market viability for a real estate development during fluctuating market conditions in order to create a district to serve such development two to four years in the future. Applicant notes that a developer constructs a real estate development and utility infrastructure at its own risk. Whether such development is successful does not impact the viability of the district creation since the district merely operates the facilities to provide service

within the district. District bonds will not be sold to reimburse the developer for the cost of the facilities unless such bonds are approved by the Commission or the Attorney General following extensive review of the assessed value within the district to the proposed debt ratio and of the marketability of such securities.

Applicant disparages ED witness Prabin Basnet's testimony because he changed his testimony and because he lacks sufficient expertise to render an opinion. Applicant claims that Mr. Basnet's reversal was based solely upon Mr. Perryman's opinion that the development will not be successful because of the subprime mortgage bust, even though he had a copy of Dr. Perryman's testimony before he filed his initial prefiled testimony. Applicant also points out that Mr. Basnet admitted that he had no qualifications to conduct a market study or to assess the need for housing developments in any location.

Applicant asserts that necessity and need should only be determined based upon the need to create the district to provide utility services, and not based upon an imagined directive to examine disputed housing needs and economic conditions and to second guess the property owners, engineers, development experts, and financial consultants as to whether the proposed subdivision development is desirable. Applicant charges that TCEQ should not be performing land use planning functions in the guise of district creation approval.

2. The County's Position

Focusing on the market study, the County notes that Edward (Ted) Wilson, Jr., the analyst who performed the market study, defined the "Target Market Area," for the District as the unincorporated areas of Ellis County, and the cities of Mansfield, Midlothian, Waxahachie, and Venus. App. Ex. 3A at 8; tr. at 167. Relying on the data provided, the County points out that of the 2,055 housing starts that occurred within the target area during the fourth quarter of 2003 through the third quarter of 2004, 1,173 (57%) were within the City of Mansfield, Tarrant County, approximately 20 miles north of the proposed District. Within Ellis County, Midlothian,

located 8-10 miles north of the District, accounted for an average of 340 annual starts; Waxahachie, located 15 miles east of the District accounted for 284 annual starts; and the City of Venus, located approximately 5-6 miles from the proposed District, accounted for an average of 20 annual starts. App. Ex. 3A at 8. Yet, the County notes, Mr. Wilson concluded that in 2004, a market existed to sell 100 homes per year within the proposed District. Tr. at 174. The County points out that Mr. Wilson acknowledged that the proposed District is located in a very rural area at the intersection of two rural FM roads and is located south of the Dallas–Fort Worth Metropolitan area. App. Ex. 3 at 5; tr. at 158-59. The County adds that the market analysis was largely influenced by the housing boom in the Dallas–Fort Worth Metropolitan area, and which Mr. Wilson acknowledged, never even reached the City of Maypearl, which is six miles from the proposed District. Tr. at 171-72.

The County offered the testimony of Dr. Perryman and Michael Atwood in support of its position. Mr. Atwood, a real estate appraiser who has analyzed real estate in Ellis County and North Texas during his 30-year career, testified that, since 2004, the number of building permits sought and issued by the governmental entities in Ellis County has decreased significantly each year, with the exception of Maypearl, which did not experience any growth at all. Ellis County Ex. 7 at 43-47. Dr. Perryman testified that there has never been a demand for the type of development planned by the Applicant and that there will not be demand for such development in the foreseeable future, regardless of national and regional market trends. He testified specifically that putting 800 houses on 40-foot lots in a remote, rural area with mediocre highway access, and located several miles from the nearest school, hospital, police and fire stations, employers, and grocery stores is contrary to the principles of reasonable, urban development. Ellis County Ex. 8 at 17-19; tr. at 440-41, 445. Dr. Perryman testified further that even if there had been no economic downturn, such developments would be occurring closer to current cities, within their extra-territorial jurisdictions. Tr. at 444.

Noting that the total assessed valuation (and resulting tax receipts) drives the reimbursement of the developer and repayment of the bonds, Dr. Perryman criticized

Ms. Urbina's reliance on the market study in determining the projected total assessed valuation of the homes in the proposed District. According to Dr. Perryman, the projected costs for constructing the water distribution system, sanitary sewer system, wastewater treatment, storm drainage, and other related items total almost $10.35 million and the calculated total bonding capacity indicated is $10.35 million, yet if the build-out assessed valuation is lower than the assumed $98.93 million, the ability to service the debt will be affected. He stated further that the reliance on outdated information that is no longer applicable to establish the financial feasibility and debt service capacity of an infrastructure investment presents a fatal flaw in the overall information used to support the creation of the District, particularly in light of the notable changes in market conditions. Ellis County Ex. 8 at 14.

3. OPIC's Position

OPIC questions the relevancy of Applicant's market study in regards to whether such a development would attract sufficient buyers to ensure the success of the development, inasmuch as the study relates only to the market in 2004. OPIC notes that even Ted Wilson admitted that the information in the study is out of date and that that it should not be relied upon now. Tr. at 183. Mr. Wilson suggested that it would not be prudent for the Applicant to update the market study until the developer was ready to act upon the update because of the litigation and because an update done today would not be relevant one or two years from now. App. Ex. 3 at 5.

OPIC also notes that Kirk Wilson, a real estate development consultant, who sponsored the application for the creation of the District, which included the market study and the engineering report detailing the physical attributes of the tract of land to be included in the District, also did not recommend updating the market study because of the age of the application and the cost of the process. Tr. at 54. He downplayed the significance of the market study suggesting that it was a "snapshot in history" and implying that is was a pro forma requirement. Tr. at 71, 109. OPIC notes that Kirk Wilson admitted that the market has changed dramatically

since the 2005 market study and that there are enough lots available in the Metroplex to accommodate current demand for the kind of development proposed. Tr. at 59.

In spite of Applicant's belief that there will eventually be a need for dense, entry level affordable housing at the proposed location when the market rebounds, OPIC points to the counter testimony of Dr. Perryman, who questioned whether the development would ever be feasible. As noted above, Dr. Perryman, testified that such a dense development in a rural location, six miles from even the nearest town with mediocre highway access, is atypical and goes against the very nature of how development tends to occur. He testified that such a location is more conducive to larger lot sizes. Ellis County Ex. 8 at 8-9, 19; tr. at 403, 443-44, 453. He also testified that high fuel costs and poor accessibility to commerce would preclude such a development. Tr. at 444-45.

4. The ED's Position

The ED defended Mr. Basnet's amended testimony, which the ED contends was influenced by the subsequent testimony of Applicant's witnesses and Dr. Perryman's ultimate opinion that the development would not be successful in the foreseeable future because there was no market for the type of development irrespective of the current-housing market. ED Ex. 8 at 5. The ED notes that Mr. Basnet had put the Applicant on notice in his March 25, 2008, prefiled testimony of his concerns about the applicability of the market study. App. Ex. 5 at 6. The ED charges that the change in market conditions placed an even greater obligation on the Applicant to provide additional evidence showing that the development and the build-out of homes would proceed in a reasonable time because of the length of time that had passed since the filing of the application.

The ED also asserts that Mr. Basnet's lack of qualifications to conduct a market study or to assess the need for housing developments did not discredit the ED's position. Because protestants provided enough evidence challenging the Applicant's market study, the burden

shifted back to the Applicant to prove the need for the development, which would be the ultimate funding source within the proposed District. Based upon the testimony of all the witnesses, the ED asserts, Mr. Basnet determined that Applicant failed to prove that a market exists for the development, and thus, there is no proven public necessity for the District.

The ED also responded to Applicant's criticism that the ED failed to render technical aid to the Applicant. The ED noted that the aid it is supposed to provide pursuant to Section 51.333(c) of the Water Code relates to waste disposal and control of storm water, not market analysis.

In response to the Applicant's main arguments, the ED questions first Applicant's contention that the "commonly held view" is that need or necessity relates to "the need for the district governing structure,"[3] pointing out that Applicant did not cite to any supporting authority for its position. The ED noted that TCEQ does not require the Applicant to submit any material on the need for a governing structure and that sections 51.020(a) and 51.021 of the Water Code require support to show that the District is necessary. The ED noted that most of the applications for district creation reviewed by TCEQ are not contested, at which time the Commission delegates the authority to the ED to determine need. 30 TAC §§ 50.131(b)(5). To determine need, the ED looks to the market study, which the ED uses to determine the need for the product the district proposes to offer. Tr. at 609-10. The ED further made the point that nothing forecloses consideration of the need for the subdivision that will be included within the boundaries of the district because success of the governing structure is dependent upon the success of the subdivision. The ED notes that a district is a taxing mechanism to fund infrastructure, which requires a tax base to pay for the bonds that will fund the building of the infrastructure. Without residents in the subdivision, the bonds will not be paid. In other words, if there is no need for the underlying subdivision, there is no need for the utility services, no need for the governing body, and no need for the district.

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[3] App. closing brief at 15.

In support of its position, the ED also pointed to the testimony of Kirk Wilson who seemed to dismiss the value of the submitted market study. Specifically, Kirk Wilson testified that the market study does not reflect how building will proceed and that an updated one would not be helpful. Tr. at 52-53. Ted Wilson also indicated that because of the current market, he preferred not to do an updated study that would come back with a negative spin on it. Tr. at 165. The ED notes that Applicant's witnesses indicated that the market would not be ready for such a development for the next two years because of the surplus of undeveloped lots in the Dallas–Fort Worth area. Tr. at 58, 178, 187, 190. The earliest that Kirk Wilson thought that lots could be sold in the development is five years from now. Tr. at 63.

The ED contends that Applicant is relying solely on abstract market trends of the general Dallas–Fort Worth area to support its contention that there is a demand for the housing proposed by its application. Although Ted Wilson contends that the project is in the path of growth in the area and that at some time there will be a need for affordable housing in the corridor, his testimony addressed more the need for affordable housing in general. Tr. at 201, 211, 203. Even when the market study was prepared, it is doubtful that it accurately reflected the need for the District because it was not based upon demand in the area of the proposed District, but it was a snapshot of a brighter time in the over-all area that might not be seen for quite a while. Tr. at 163, 172, 307, 320.

In response to the Applicant's reliance on the testimony of two home builders, Zackary Jones and Jagjit Singh, the ED questioned much of their opinions because they had not reviewed the input of protestants' market experts. Tr. at 678-79, 692. The ED further questioned Mr. Jones and Mr. Singh's credibility because they had never been involved in a district creation before and because Mr. Singh had not even inspected the location of the project. Tr. at 677, 702, 698. ED also notes that Zackary Jones has a direct interest in the District because he is a 10-13% owner of Galilee Partners. Tr. at 674-75. And even though Kirk Wilson stated that builder contracts would serve as a better predictor of demand than a market study, Ted Wilson admitted that one could not get builders to sign up at this time. Tr. at 36, 54, 88, and 214.

5. Analysis

As the ED noted, Applicant provided no support for its contention that the "commonly held view" is that need or necessity relates to "the need for the district governing structure." The Applicant also provided no support for its position that the only requirement of the market study is to ensure that the projected valuation of the development matches up with the proposed district tax rate for the ultimate retirement of the district debt at full build-out. Reply Brief at 6. To take such a position would require one to ignore the dictates of 30 TAC § 293.59(b), which requires that the economic feasibility of the project, including the influence of economic conditions, the real estate market, and geographic location, be considered.

The Applicant's failure to provide an updated market study was problematic, but understandable. But even its initial one was questionable. To project onto a small, specific area statistical data derived from a broad geographic area is not supportable, particularly when data derived from a closer area says otherwise.

The Applicant criticized Mr. Basnet for previously approving the creation of three municipal districts with identical lot size densities after the mortgage crisis hit, and yet not this proposed District. As Ellis County pointed out, three of those districts were municipal districts, Liberty County Municipal District Nos. 2 and 3, and Williamson County Municipal District No. 15. The two in Liberty County were located within the extra-territorial jurisdiction of the City of Houston. The one in Williamson County is located on IH 35 within the extra-territorial jurisdiction of the City of Georgetown. In those areas, development was reasonably anticipated. Furthermore, to obtain approval, the applicants for the proposed districts were required to first seek approval from the cities of Houston and Georgetown pursuant to § 54.016 of the Water Code. In contrast, the proposed District in this case will be located in a rural area that may not see the hoped for development for many years to come.

In its Application Applicant alleges that the District is needed because it is located within an area that will experience substantial and sustained residential and commercial growth within the immediate future, that is urban in nature, and that is not supplied with adequate water and sanitary sewer and drainage facilities and services. While it may be true that the area is not supplied with adequate water and sanitary sewer and drainage facilities and services, the area is not urban in nature, and it will not experience substantial and sustained residential and commercial growth within the immediate future. Therefore, the ALJ finds that there is no public necessity or need for the District and that organization of the District is not economically feasible.

D. Further the Public Welfare

EPSWCD and the County weighed in heavily on this issue. The Applicant suggests, however, in its closing brief that the protestants are barred from providing evidence about whether the District would further the public welfare because Water Code § 51.020 limits their testimony to whether the District is necessary, would benefit the land, or would be feasible or practicable. According to the Applicant, the limitation is in contrast to Water Code § 51.021, which also includes the issue of furtherance of the public welfare.

Despite the Applicant's argument, Water Code § 51.020 puts no such limit on the presentation of protestants' evidence. Furthermore, the time to raise such an issue was when Applicant filed its objections to the County's and EPSWCD's testimony on April 1, 2008. Because it did not do so, it waived the objection.

1. Chambers Creek Flood Prevention Site No. 49A

Of primary concern to EPSWCD and the County is Chambers Creek Flood Prevention Site No. 49A, which is one of 113 improved sites (flood prevention dams) managed by EPSWD, and which the protestants co-sponsor. Chambers Creek Flood Prevention Site No. 49A is

upstream of the subject property and its breach inundation area is on the property located near the center of the proposed District. Both parties are financially responsible for the operation and maintenance of the 113 improved sites. According to the testimony of Lee Harris, ECPWCD's chairman, the County appropriated $36,000 towards the maintenance and upkeep of the 113 improved sites in 2007. ECPSECD Ex. 1 at 3. Mr. Harris also testified that it receives approximately $10,000.00 a year from other governmental sources and that it has no independent fundraising mechanism. *Id.*

EPSWCD notes that Warren Samuelson, TCEQ's Dam Safety Program Coordinator, informed EPSWCD that because of the likely increase in traffic flow caused by the proposed District, the hazard classification of the dam would be increased from a low hazard risk to a significant hazard risk. ED Ex. 4 at 5. The increase will require that substantial modifications be made to the dam itself, in addition to the complete construction of an armored slope throughout the breach inundation area. Ellis County Ex. 2 at 1; EPSWCD Exs. 1, 1A-F, & 2. The total cost of the work to upgrade the dam is estimated to be more than $1,000,000. *Id.*

EPSWCD and Ellis County assert that they do not have the funds with which to make the necessary improvements to the dam that the proposed District would require, and they argue that the Applicant should be responsible for the modifications to Chambers Creek Flood Prevention Site No. 49A. EPSWCD contends that it should not be forced to rely on Applicant's unenforceable promise of property tax monies to fund the necessary improvements as the Applicant has not offered adequate proof that a market exists to support the sale of 798 homes on 4,000/5,000 sq. foot lots in a remote region of Ellis County. EPSWCD relies finally on the opinion of State Conservation Engineer John Mueller of the National Resource Conservation Service of the United States Department of Agriculture. If the development is allowed to occur and the hazard classification of the dam is increased, Mr. Mueller recommends that the approval require the developer to bear the expense of making the necessary improvements to the dam to meet the high hazard criterion prior to starting construction within the breach inundation area. EPSWCD Ex.1B.

EPSWCD complains that the Applicant offered no significant testimony to address the issue raised by the presence of a large dam above the proposed development and the substantial expenditures to the dam that will be required if the District is approved. EPSWCD contends that the only effort the Applicant plans to address is modification of the engineering plan to widen the breach area and provide an armored slope. In response, EPSWCD complains that the armored slope may create more of a problem by moving a substantial amount of water quickly to the nearby farm-to-market road in the event of a breach, causing the potential for excessive flooding of the road and danger to motorists. EPSWCD and the County contend that the unaddressed need for such a costly revision requires the denial of the Application.

2. Other Public Safety Issues and Service Costs

The County charges that Applicant's preliminary engineering report contains little or no evidence addressing the public welfare issue. The County also cites to the testimony of Jim Wiegert, who prepared the engineering report, who admitted that the report did not mention how the creation of the District would further the public welfare. Tr. at 126-28. After cross-examination, Mr. Wiegert testified that the District would provide adequate drainage, a regional sanitation system, and fire prevention via fire hydrants. Tr. at 151-52, 155-56. The County counters that the mere presence of fire hydrants without trained firefighters does not prevent or extinguish fires.

Protestants and OPIC contend that the creation of the District would not further the public welfare because of the strain that the remote new residents would have on current public services relative to the limited tax revenue that would be derived from the District's residents. The County contends that the fourth element of Tex. Water Code § 51.021 requires that the availability of adequate traffic control; police, fire, and emergency medical services; and school services; as well as issues of an over-burdening tax rate also be considered. The County charges that the Applicant failed to provide sufficient evidence that those concerns will be met, and, therefore, creation of the District will not further the public welfare.

The County notes that Ellis County, EPSWCD, Ellis County Emergency Services District No. 1, the Maypearl Independent School District (ISD), and the City of Maypearl each passed ordinances opposing the creation of the District citing public welfare concerns. Ellis County Exs. 1A, 3A, 4A, 10, 11, and 15. The Ellis County Commissioners Court also expressed concerns that a development of its size and density at the proposed location would create an unsafe traffic volume on the county roads. Ellis County Ex. 10.

The County relies particularly on the testimony of County Commissioner Heath Sims, who testified that the proposed District is six miles from the nearest fire department, which is an all-volunteer fire department, and 15 miles away from the nearest hospital in Waxahachie. He testified further that the Ellis County Sheriff's Department is responsible for more than 950 square miles, with generally no more than five officers designated for patrol at a given time. He noted that assuming each house in the District contained three to four persons, the proposed development would be the sixth largest population in the county behind Waxahachie, Ennis, Red Oak, Midlothian, and Ovilla and that its population would be greater than several incorporated cities and towns, including Alma, Bardwell, Ferris, Garrett, Italy, Maypearl, Milford, Oak Leaf, Palmer, and Pecan Hill. Ellis County Ex. 1 at 2-3. Commissioner Sims further testified that the District's residents would have to pay a total tax rate of approximately $3.00 per hundred dollar valuation, even though they would not be receiving municipal services. *Id.* at 4.

Captain Danny Williams of the Ellis County Sheriff's Department buttressed Commissioner Sims' testimony when he testified that, based upon the demonstrated ratio of calls per home per year from the Spanish Grant and Buffalo Hills subdivisions, the Sheriff's Department would expect to receive approximately 1,378 calls per year from the proposed subdivision. Because of the distance, the response times for each call would be lengthy. Captain Williams expressed additional concern that the Sheriff's Department is not presently equipped to provide the level of municipal services that it currently provides to city residents within Ellis County to the new subdivision. Ellis County Ex. 5 at 2.

Ellis County Planner Barbara Leftwich testified about her concerns about the proposed subdivision's location at the northwest quadrant of FM 157 and FM 2258, which are two-lane rural roadways. She specifically expressed concern about the lack of an internal road/bridge connecting the two tracts that make up the proposed development. Children living within the western tract and walking to a proposed school located in the eastern tract would have to cross the flood plain using the FM 2258 bridge, which is a standard rural bridge on a high-speed roadway, or cross the flood plain and creek stream by self-made footpath. The current bridge does not provide a safe separation of pedestrians and vehicles. And a footpath through a flood plain can be hazardous during high rains. She also noted that persons living in the western tract would have to make a difficult left turn onto FM 2258 to access the retail services planned in the eastern tract. Ellis County Ex. 6 at 1-2.

Don Frisbee, President of the Board of Directors for Ellis County Emergency Service, District No. 1, testified that they do not have the resources, and will not for the near future, to fund new facilities and equipment, as well as staffing, to provide adequate emergency services to the potential increase in population in District No. 1 of almost 42%. Ellis County Ex. 3 at 1-2.

Maypearl ISD Superintendent Lynn Dehart testified that the projected doubling of the current school population that the proposed development would likely bring would challenge the school district's ability to provide continuing superior education. Ellis County Ex. 4 at 2. The County was particularly critical of Ted Wilson's failure to contact anyone with the ISD and to consider the impact that the development would have on Maypearl ISD. Tr. at 176. According to Ray Perryman, a development of this size would unfairly impose costs on other county residents because the development could double the number of students in the school system without providing a commensurate amount of revenue from the additional residents. Ellis County Ex. 8 at 15-16.

Even though the planned water development and planned wastewater services would benefit the residents of the proposed development, OPIC contends that the overall impact of the

District would not further the public welfare, because other critical services would be lacking. In addition to the specific concerns relating to traffic conditions and dam safety for the residents of the proposed development, OPIC asserts that the political entities responsible for ensuring the public welfare raised significant concerns that the District would impact all county residents.

3. Applicant's Response

The Applicant contends that the overall objections raised by the protestants are not legitimate because the concerns are not among the criteria found in the Water Code or the Commission's rules and because those issues are independent of any district creation and would be encountered as a result of any residential development in the area. The Applicant maintains that the term "public welfare," as used in the code, relates specifically to the distribution and reclamation of the state's waters and the control of drainage, which are a "public right and duty" under Article XVI, Section 59 of the Texas Constitution.

Relying on the testimony of Kirk Wilson, Applicant contends that the public welfare would benefit from the development of affordable housing to meet the needs of an increasing Metroplex workforce for starter homes in a growing economy and in an environmentally sound manner without depending upon septic tanks. App. Ex. 1 at 7. Mr. Wilson suggests that the County opposes the plan because it only envisions one acre lots served with septic tanks. *Id.* at 6.

Applicant argues that other property owners will not be subsidizing the proposed development because the Ellis County median property value is below the valuation associated with the residential development to occur within the proposed District. Applicant asserts that the County simply does not want a lower income workforce community, even though it has approved a thoroughfare to serve industrial and commercial areas in the immediate vicinity of the proposed District that will spawn the development as envisioned.

Applicant maintains that the impacts allegedly associated with dam hazard ratings, school population, law enforcement and emergency services, and traffic should not be scrutinized in the context of a water district creation proceeding because those issues are beyond the purview of TCEQ's authority as historically construed by TCEQ and its Staff.

Applicant specifically berates the County and EPSWCD for their failure to maintain and improve 19 dams in the area that have been upgraded by the NRCS to high risk ratings due to the location of development within breach inundation areas downstream of the dams. Applicant argues that it is not the creation of the district or the residential development that will bring about the higher rating, but rather an increase in traffic flow downstream, which will inevitably occur with any development in the area and which is certain to arise with the County's approval of its Thoroughfare Plan for FM 157, adjacent to the proposed District.

As for the strain on the school district, Applicant contends that the population increase will be gradual and that it is the duty of the ISD to plan for growth in the area that is sure to come. Applicant contends that the projected taxable value of the properties in the proposed District are greater than the median value in Ellis County and that the area within the ISD is largely agriculturally exempt. Applicant claims that the projected burden on the school system is grossly misstated and exaggerated.

Applicant then notes that any new residential development will likely cause public expenditures for social services to increase and that the proposed development will furnish its commensurate share of tax revenues with which to meet such cost increases. Applicant asserts that a more concentrated development will contribute a greater proportion of revenues for less cost than more rural residences given the economies of scale of delivering services to a more densely populated area rather than to a sparsely populated one. The Applicant notes that population shifts are inevitable for the area, and the County should assume its responsibilities to accommodate an increasingly urbanized population.

Applicant contends that the county's own Thoroughfare Plan highlights the begrudged awareness that its roads will be subject to increasing demands due to growth. Applicant contends that it is immaterial as to whether Applicant's property will be served with district utility services or water wells and septic tanks. The impact from area development will be the same.

4. ED's Position

The ED is satisfied that Applicant has satisfied this element. According to the ED, interpreting the term "public welfare" as protestants and OPIC urge would require the ED to examine impacts far beyond the boundaries of the District and to adopt the broad view found in *Texas Citizens for a Safe Future & Clean Water v. R.R. Com'n of Texas,* 254 S.W. 3d 492 (Tex. App.—Austin, 2008, pet. pending). Without specific direction from the Commissioners, the ED declines to interpret the term so broadly at this time. Although the ED agrees that nothing prevents an interpretation of public welfare to include impacts on schools, roads, and emergency services, as the County wants, such an interpretation would be a significant departure from how the ED has historically interpreted the phrase. The ED is satisfied that Petitioner's engineering report produced by James Wiegert, addressed public welfare issues relating to water service, drainage, sewage, and fire protection. Tr. at 152, 155-56.

5. Analysis

In *Texas Citizens*, the Railroad Commission relied solely on the possibility of increased capacity for oil and gas production as the reason for deciding that the proposed injection well was in the public interest. 254 S.W. 3d at 499. And like the ED in this case, the Railroad Commission based its reasoning on its longstanding limited interpretation of the statute. *Id.* at 505. On that basis the Railroad Commission determined that traffic-related concerns were not within its jurisdiction. *Id.* at 498-99. As the majority opinion and concurring opinions of Justices Waldrop and Pemberton determined, however, the Railroad Commission abused its

discretion by limiting its public interest consideration to the conservation of natural resources. *Id.* at 502-03, 504, 507. Use of the phrase "public interest," according to the court of appeals, includes public safety issues such as traffic flow, and local law enforcement, emergency medical, and fire-fighting needs. *Id.* at 501-02.

As the parties noted, the Texas Water Code does not define the term "public welfare." But, as Justice Waldrop suggests, although TCEQ should not take an action outside the context of its duty to encourage the establishment of water and wastewater service, nonetheless, TCEQ should not refuse to consider other aspects of the public welfare outside of the issue of whether providing water and wastewater services would benefit the public. *Id.* at 507.

Use of the phrase "public welfare" encompasses "society's well-being in matters of health, safety, order, morality, economics, and politics." *Black's Law Dictionary* at 1625, 8th ed. (2004). The issue, therefore, is whether the Applicant sufficiently addressed broader public welfare issues. To suggest, as Applicant does, that the decision in *Texas Citizen* was limited to the consequences of unlimited hauling of petroleum waste is not correct. Traffic flow and road safety were more the concern to the court, which specifically disregarded the Railroad Commission's contention that it had no authority over highway use. 254 S.W. 3d at 501, 502, 505, 507.

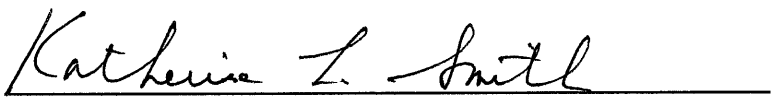
In this case, Petitioner did not address the issue of public welfare in its Engineering Report, and did not consider available police services, fire services, medical services, or traffic safety, which municipalities generally provide. Tr. at 123, 126-29. Yet the Applicant contends that the public welfare would benefit from a more urbanized development for lower income persons. While that is notable goal, the definition has thus been expanded and opens the door to the concerns raised by the protestants. As Justice Waldrops' concurring opinion in *Texas Citizens* suggests, deciding whether a district is a good idea includes the notion of whether it is a good idea in the proposed location, which includes safety-related issues. 254 S.W. 3d at 506.

Applicant argues that a more concentrated development will contribute a greater proportion of revenues for less cost than more rural residences given the economies of scale to deliver services to a more densely populated area than to a sparsely populated one, but provides no data to support it position, and the evidence in this case says otherwise. Putting a dense, urban-like population in a largely rural area without planning for the development of urban-like police, fire, and emergency services is not good planning. Having the physical structure to meet fire emergency needs, yet not have the necessary manpower, does not make sense. Putting a dense urban-like population next to a dam that was designed for a rural area without a guarantee that necessary improvements will be made is unsupportable. Therefore, the ALJ finds that the Applicant did not its burden to show that creation of the District would further the public welfare.

IV. CONCLUSION

Although the proposed District will benefit the land to be included in the District and the residents of the proposed district, the District is not economically feasible, is not a public necessity, and will not further the public welfare as required by § 51.021 of the Water Code.

Signed December 23, 2008.



KATHERINE L. SMITH
ADMINISTRATIVE LAW JUDGE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER denying the Application of Galilee Partners, L.P., for creation of Maypearl Water Control and Improvement District No. 1 of Ellis County, Texas, TCEQ Docket No. 2005-1686-DIS, SOAH Docket No. 582-07-2163.

On _____, 2009, the Texas Commission on Environmental Quality considered the application of Galilee Partners, L.P., (Applicant) to create Maypearl Water Control and Improvement District No. 1 in Ellis County. The purpose of the District is (1) to construct, maintain, and operate a waterworks system for domestic, industrial and commercial purposes; (2) to construct, maintain, and operate a sanitary sewer collection system; and (3) to control, abate, and change any shortage or harmful excess of waters.

Administrative Law Judge Katherine Smith with the State Office of Administrative Hearings (SOAH) held a hearing on the merits of the Application and prepared a proposal for decision (PFD), which recommended that the Commission deny the Application.

After considering the ALJ's PFD and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Galilee Partners, L.P., filed a petition (or application) to create Maypearl Water Control and Improvement District No. 1 in Ellis County (District) with the Texas Commission on Environmental Quality (TCEQ or Commission) on April 21, 2005.

2. The application was found to be administratively complete on May 25, 2005.

3. On August 16 and 23, 2005, notice of the petition and the right to a contested hearing was published in the *Waxahachie Daily Light*, a newspaper of general circulation in Ellis County.

4. On August 17, 2005, notice of the petition was posted in the Ellis County courthouse at a place where public notices are posted.

5. On August 12, 2005, TCEQ received a letter of protest from Ellis County's Engineering Department, attaching an August 9, 2005, resolution from the Ellis County Commissioner's Court, opposing the creation of the District.

6. On September 12, 2005, TCEQ received a letter of protest from the Ellis Prairie Soil and Water Conservation District (EPSWCD) raising several dam safety issues.

7. On September 15, 2005, TCEQ received a letter from Mountain Peak Special Utility District raising concerns that the proposed District might interfere with its CCN.

8. In response to the dam safety issues raised, Applicant's engineer provided TCEQ with a revised engineering report dated May 8, 2006, in which residential development was excluded from the area that could potentially be affected by a dam breach.

9. On December 15, 2006, TCEQ's Chief Clerk issued a notice of the setting for the Commission's consideration of the requests for a hearing in Austin, Texas.

10. On January 24, 2007, TCEQ considered the application, the requests for a hearing, and the ED's response to the hearing requests and referred the case in an interim order dated February 2, 2007, to the State Office of Administrative Hearings (SOAH) where the case was assigned docket no. 582-07-2163.

13. Notice of the hearing was issued to the Applicant and interested persons on March 21, 2007.

14. A preliminary hearing was held by Administrative Law Judge (ALJ) Tom Walston on May 14, 2007. The Applicant, the ED, the Office of Public Interest Counsel (OPIC), Ellis County, and EPSWCD were named as parties.

15. At a preliminary hearing held on October 29, 2007, ALJ Tom Walston consolidated this case with *In the Matter of the Application of Galilee Partners, L.P., for TPDES Permit No. WQ001464001 in Ellis County, Texas,* which was filed at TCEQ on July 22, 2005, and which was referred to SOAH on August 23, 2007, and assigned Docket No. 582-08-0020.

16. The hearing on the merits was held on April 17 and 18 and June 20, 2008, before ALJ Katherine Smith. The record closed on October 16, 2008, with the filing of briefs.

17. The application requests permission to create a District in southwestern Ellis County, south of the Dallas–Fort Worth Metropolitan/Metroplex area, due east of Waxahachie, southeast of Midlothian, Cedar Hill and Duncanville, and due south of Arlington between IH 35W and 35E along farm-to-market road (FM) 157.

18. The proposed District is located outside the incorporated limits or extra-territorial jurisdiction of any municipality.

19. The proposed District consists of 226 acres, including approximately 150 acres for building 798 homes, 13 acres for commercial development, a 10-acre school site, and 53 acres of flood plain, open space, and utility easements.

20. The purpose of the District is (1) to construct, maintain, and operate a waterworks system for domestic, industrial and commercial purposes; (2) to construct, maintain, and operate a sanitary sewer collection system; and (3) to control, abate, and change any shortage or harmful excess of waters.

21. A District is a taxing mechanism used to fund the construction of the District's infrastructure, which requires a tax base to pay for the bonds that will fund the building of the infrastructure.

22. The total district tax rate at full development is projected to be $0.99 per $100 assessed valuation, composed of a $0.94 debt tax rate and a $0.05 maintenance tax rate, which are reasonable and comparable to other district rates in the area. Water rates were projected on the basis of current rates in the area and sewer rates were forecasted to be competitive.

23. The cost of the capital improvements needed to provide potable water supply and distribution, sanitary sewer service, treatment and disposal, and drainage control, will amount to $8,645,304 at full development, with a total bond issue requirement of $10,350,000.

24. With its application, Applicant provided a market study entitled "Single Family Housing Demand Analysis," dated February 10, 2005, that documented development in the Dallas–Fort Worth Metroplex and housing starts in "Target Market Area" that occurred during the fourth quarter of 2003 through the third quarter of 2004 .

25. The market study referred to the "Target Market Area" as Mansfield, Midlothian, Waxahatchie, Venus, and the unincorporated areas of Ellis County.

26. Applicant concluded that in 2004 a market existed to sell 100 homes per year within the proposed District.

27. The proposed District is located in a very rural area at the intersection of two rural farm-to-market roads.

28. Of the 2,055 housing starts that occurred within the target area during the fourth quarter of 2003 through the third quarter of 2004, 1,173 (57%) were within the City of Mansfield, Tarrant County, located approximately 20 miles north of the proposed District. Within Ellis County, Midlothian, located 8-10 miles north of the District, accounted for an average of 340 annual starts; Waxahachie, located 15 miles east of the District accounted for 284 annual starts; and the City of Venus, located approximately 5-6 miles from the proposed District, accounted for an average of 20 annual starts. The City of Maypearl was not included in the analysis.

29. The market study does not accurately reflect the need for the District because it was not based upon demand in the area of the proposed District, but on growth in the Dallas–Fort Worth Metropolitan area.

30. A dense development in such a rural location, located six miles from the nearest town, with access only to two farm-to-market roads is atypical and counter to the nature of how such development occurs.

31. Since 2004, the number of building permits sought and issued by the governmental entities in Ellis County has decreased significantly.

32. Enough lots are available in the Metroplex to accommodate current demand for the type of development proposed.

33. There will not be demand for such development in the foreseeable future, regardless of national and regional market trends.

34. Chambers Creek Flood Prevention Site No. 49A is a low hazard dam, located upstream of the subject property; its breach inundation area is on the property.

35. Chambers Creek Flood Prevention Site No. 49A is one of 113 improved sites managed by EPSWD. Ellis County and EPSWD are co-sponsors of the dam.

36. The County appropriated approximately $36,000 during the 2007 fiscal year towards the maintenance and upkeep of the 113 improved sites and receives only $10,000 from other governmental sources.

37. Because of the likely increase in traffic flow caused by the proposed District, the hazard classification of the dam would be changed from a low hazard risk to a significant hazard risk. The increase would require that substantial modifications be made to the dam, in addition to the complete construction of an armored slope throughout the breach inundation area located near the center of the proposed District. The total cost of the work to upgrade the dam is estimated to be more than $1,000,000.

38. EPSWCD and Ellis County do not have the funds with which to make the necessary improvements to the dam. Applicant provided no indication that it is prepared to make the necessary improvements to the dam to meet the high hazard criterion prior to starting construction within the breach inundation area.

39. The remoteness of the development would put a strain on current public services relative to the limited tax revenue that would be derived from the District's residents.

40. The Applicant did not address protestants concerns about the strain that the development would place on public services.

41. Assuming each house in the District housed three to four persons, the proposed development would be the sixth largest population in the county behind Waxahachie, Ennis, Red Oak, Midlothian, and Ovilla, and its population would be greater than several incorporated cities and towns, including Alma, Bardwell, Ferris, Garrett, Italy, Maypearl, Milford, Oak Leaf, Palmer, and Pecan Hill.

42. The proposed District is six miles from the nearest fire department, which is an all-volunteer fire department, and 15 miles away from the nearest hospital in Waxahachie. Ellis County Emergency Services District No. 1 does not have the resources, and will not for the near future, to fund new facilities and equipment, as well as staffing, to provide adequate emergency services to the potential increase in population in District No. 1 of almost 42%.

43. Although the district would provide adequate drainage, a regional sanitation system and fire prevention via fire hydrants, the presence of fire hydrants without trained firefighters does not further the public welfare.

44. Ellis County Sheriff's Department is responsible for more than 950 square miles, with generally no more than five officers designated for patrol at a given time. Based upon the demonstrated ratio of calls per home per year from the Spanish Grant and Buffalo Hills subdivisions, the Sheriff's Department would expect to receive approximately 1,378 calls per year from the proposed development. The Sherriff's Office is not presently equipped to provide the level of municipal services that it provides to city residents within Ellis County to the new subdivision.

45. The size and density of the development at the proposed location would create unsafe traffic volume on FM 157 and FM 2258, which are two-lane rural roadways.

46. Children living within the western tract and walking to a proposed school located in the eastern tract would have to cross the flood plain using the FM 2258 bridge, which is a standard rural bridge on a high speed roadway, or cross the flood plain and creek stream by self-made footpath. The current bridge does not provide a safe separation of pedestrians and vehicles. And a footpath through a flood plain can be hazardous during high rains.

47. Persons living in the western tract would have to make a difficult left turn onto FM 2258 to access the retail services planned in the eastern tract.

48. Providing comprehensive water, wastewater, and drainage services so that residents will not have to rely on individual wells and septic systems would benefit the land within the District and the residents of the District.

49. The terrain of the territory to be included in the proposed District is conducive to a waterworks system and sanitary and storm sewer systems being constructed at a reasonable cost.

50. Applicant failed to prove that there is a need for the District and that it is economically feasible because Applicant did not establish that there is a need for the proposed development. Without the need for the proposed development, there is no need for utility services, no need for a governing body, and no need for the District.

51. Putting a dense, urban-like population in a largely rural area without planning for the development of urban-like police, fire, and emergency services would not benefit the public welfare.

52. Putting a dense urban-like population next to a dam that was designed for a rural area would not benefit the public welfare.

CONCLUSIONS OF LAW

1. Pursuant to TEX. WATER CODE ANN. (Water Code), Chapter 51, and Article XVI, Section 59, of the Texas Constitution, the Texas Commission on Environmental Quality (Commission) has the authority to approve the creation of a water control improvement district.

2. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. (Gov't Code) § 2003.047.

3. Based on the above Findings of Fact and Conclusions of Law, all public notices, including the notice of contested case hearing were given in compliance with the requirements of Water Code § 51.028, 30 TAC § 293.12, and Gov't Code §§ 2001.051 and 2001.052.

4. Based on the above Findings of Fact and Conclusions of Law, the Commission has jurisdiction to consider and, if warranted, approve the Application.

5. Based on the above Findings of Fact, the proposed District will benefit the land to be included in the District and the residents of the proposed district in accordance with § 51.021(a)(2) of the Water Code.

6. Based on the above Findings of Fact, the proposed District is not economically feasible in accordance with § 51.021(a)(1) of the Water Code.

8. Based on the above Findings of Fact, there is not a public necessity or need for the proposed District as required by § 51.021(a)(3) of the Water Code.

9. Based on the above Findings of Fact, the creation of the District will not further the public welfare as required by § 51.021(a)(4) of the Water Code.

10. Based on the above Findings of Fact and Conclusions of Law, the Applicant has failed to meet its burden of proof on all issues.

11. Based on the above Findings of Fact and Conclusions of Law, the Application should be denied.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The Application of Galilee Partners, L.P., for Creation of Maypearl Water Control and Improvement District No. 1 of Ellis County, Texas is denied.

2. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to all parties.

3. If any provisions, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and other requests for general or specific relief, if not expressly granted herein, are hereby denied for want of merit.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Buddy Garcia
Chairman