

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

December 10, 2010

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

**RE: SOAH DOCKET NO. 582-10-2631; TCEQ DOCKET NO. 2009-1573-DIS;  
RE: COLLIN COUNTY WATER CONTROL AND IMPROVEMENT**

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 documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than Thursday, December 30, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than Monday, January 10, 2010.

This matter has been designated **TCEQ Docket No. 2009-1573-DIS; SOAH Docket No. 582-10-2631**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Kerrie Jo Qualtrough".

Kerrie Jo Qualtrough  
Administrative Law Judge

KJQ:cm  
Enclosures  
cc: Mailing List

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**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** COLLIN COUNTY WATER CONTROL AND IMPROVEMENT  
**SOAH DOCKET NUMBER:** 582-10-2631  
**REFERRING AGENCY CASE:** 2009-1573-DIS

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ KERRIE QUALTROUGH**

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LAVON 593 LAND INVESTMENT PARTNERS LP

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CITY OF WYLIE

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xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-10-2631  
TCEQ DOCKET NO. 2009-1573-DIS**

|                                      |          |                                |
|--------------------------------------|----------|--------------------------------|
| <b>PETITION OF LAVON 593 LAND</b>    | <b>§</b> | <b>BEFORE THE STATE OFFICE</b> |
| <b>INVESTMENT PARTNERS, L.P. FOR</b> | <b>§</b> |                                |
| <b>CREATION OF COLLIN COUNTY</b>     | <b>§</b> | <b>OF</b>                      |
| <b>WATER CONTROL AND</b>             | <b>§</b> |                                |
| <b>IMPROVEMENT DISTRICT, NO. 3</b>   | <b>§</b> | <b>ADMINISTRATIVE HEARINGS</b> |

**PROPOSAL FOR DECISION**

The Applicant, Lavon 593 Land Investment Partners, L.P., applied to the Texas Commission on Environmental Quality (TCEQ or Commission) for creation of the Collin County Water Control and Improvement District (WCID), No. 3 (the District) in Collin County, Texas, pursuant to article XVI, section 59 of the Texas Constitution and chapter 51 of the Texas Water Code. The case was referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. Based on the evidence presented, the Administrative Law Judge (ALJ) recommends that the application be granted.

**I. BACKGROUND**

The Applicant proposed that the District would encompass approximately 592.744 acres in Collin County.<sup>1</sup> The District would be located approximately eight miles east of the intersection of FM 2514 (Parker Road) and U.S. Highway 75, with approximately one quarter of a mile of frontage on Parker Road. The area proposed to be included in the District is not within the corporate limits of any municipality. However, the area is located within the extraterritorial jurisdictions (ETJ) of three municipalities: the City of Lucas, the Town of St. Paul, and the City of Wylie (Wylie), the sole Protestant in this case. Applicant determined that approximately 190.42 acres of the proposed District would be within Wylie's ETJ.<sup>2</sup>

Applicant proposed to create the District to finance and to provide water, wastewater, and drainage facilities and services to the area within the proposed District. This area is also within

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<sup>1</sup> App. Ex. 3; App. Ex. 15, Ex. B.

<sup>2</sup> Tr. 123-24.

the area covered by the water certificate of convenience and necessity (CCN) for the Wiley Northeast Special Utility District (Wiley Northeast SUD or SUD).<sup>3</sup> Applicant entered into an agreement with Wiley Northeast SUD to provide both retail water and sewer service. Under this agreement, the District would finance and construct a wastewater treatment plant (WWTP) and convey that plant to the Wiley Northeast SUD. Accordingly, the SUD filed an application for a sewer CCN for the area.<sup>4</sup> In addition to the water and sewer infrastructure, the District would construct drainage facilities to serve the area.

## II. PROCEDURE

On June 28, 2009, and July 5, 2009, notice of the application was published in the *McKinney-Courier Gazette*, a newspaper regularly published or circulated in Collin County.<sup>5</sup> On June 30, 2009, the notice was posted on the bulletin board used for posting legal notices at the Collin County Courthouse.<sup>6</sup>

By order dated February 4, 2010, the Commission granted Wylie's request for a hearing and referred the application to SOAH for a contested case hearing. The Commission set a hearing duration of nine months.

The preliminary hearing was held on March 29, 2010, and the hearing on the merits was held September 8, 2010. A transcript was prepared and the parties submitted closing arguments and responses, with the record closing on October 27, 2010. December 29, 2010 is nine months from the date of the preliminary hearing.

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<sup>3</sup> App. Ex. 13, pg. 8.

<sup>4</sup> App. Ex. 13, pg. 8. Wylie did not object to the SUD's sewer CCN application. Tr. pg. 182-83.

<sup>5</sup> App. Ex. 29.

<sup>6</sup> App. Ex. 30.

### III. APPLICABLE LAW

Under sections 51.331 and 51.333 of the Texas Water Code, the TCEQ has the authority to consider a petition to create a WCID that is proposed to have water, wastewater, and drainage powers. Section 51.333 requires the TCEQ to apply sections 51.027 through 51.031 of the Texas Water Code when determining the merits of a petition to create such a WCID. All parties contend that section 51.021 sets out the factors that must be met to grant an application to create a WCID. This section provides that the TCEQ must grant a petition to create a district if it appears that:

- (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.<sup>7</sup>

Section 42.042 of the Texas Local Government Code also applies to this application since the District would be located within Wiley's ETJ. Section 42.042 provides:

- (a) A [WCID] may not be created in the extraterritorial jurisdiction of a municipality unless the governing body of the municipality gives its written consent . . . .
- (b) If the governing body fails or refuses to give its consent for the creation of the [WCID] . . . within 90 days after the date it receives a written request for the consent, . . . the [applicant] may petition the governing body to make available to the area the water, sanitary sewer services, or both that would be provided by the [WCID].
- (c) If, within 120 days after the date the governing body receives the petition, the governing body fails to make a contract . . . to provide the services, that failure constitutes the governing body's consent to the creation of the proposed [WCID].
- (d) The consent to the creation of the [WCID] is only an authorization to initiate proceedings to create the [WCID] as provided by law.

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<sup>7</sup> TEX. WATER CODE § 51.021(a).

- (f) If the municipality fails or refuses to give its consent to the creation of the [WCID] or fails or refuses to . . . [provide] for the water or sanitary sewer services requested within the time limits prescribed by this section, the applicant may petition the [TCEQ] for the creation of the [WCID]. The [TCEQ] shall allow creation of the [WCID] . . . on finding that the municipality either does not have the reasonable ability to serve or has failed to make a legally binding commitment . . . to provide water and wastewater service adequate to serve the proposed development . . . .

#### IV. DISCUSSION

Wylie does not contest that the application facially complies with the procedural requirements of section 51.021 of the Texas Water Code and the TCEQ's rules, including 30 TAC § 293.11.<sup>8</sup> Rather, Wylie contests the application on three substantive grounds. First, Wylie claims that Applicant failed to meet its statutory burden by demonstrating that there is a "public necessity or need" for the District. Second, Wylie argues that since it owns and operates wastewater facilities capable of serving its ETJ inhabitants, creating a district within its ETJ would be of no benefit to that area. Third, Wylie contends that there is not sufficient evidence to show that the District is financially feasible because Applicant failed to calculate its tax rate based on the costs of constructing and operating a larger wastewater treatment plant (WWTP) than proposed in the application.

Since Wylie limits its objections to the three, substantive issues, the ALJ will not discuss in this PFD the evidence supporting all the other requirements necessary for creation of a WCID. The ALJ will include findings of facts and conclusions of law on those uncontested issues without reciting the evidence that supports those findings.

##### A. Public Need or Necessity

Section 51.021(a)(3) of the Texas Water Code requires the TCEQ to grant a petition for the creation of a district if it finds, among other things, that "there is a public necessity or need

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<sup>8</sup> Wylie's Closing, pg. 1.

for the district.” The parties disagree on whether Applicant has met its burden to prove this requirement.

### 1. Applicant’s Position

Applicant contends that the facilities and services to be provided by the District are necessary, since utility services are not currently available in the area within the District. Further, Applicant argues that services cannot be obtained from another provider without the infrastructure the District would finance and construct. Applicant also presented evidence that there will be a need for additional housing in the vicinity of the District in the foreseeable future, and therefore, a corresponding need for the District to provide the needed infrastructure and services. Applicant’s expert, Edward L. Wilson, prepared a market study in September 2008,<sup>9</sup> and supplemented that study in June 2010 in light of the recent economic downturn.<sup>10</sup> In the June 2010 supplement, he confirmed his original, September 2008 opinion that there will be a need for developed lots in the area, but changed the timeframe for delivery of those lots.<sup>11</sup>

Mr. Wilson examined the housing “submarkets” in communities near the proposed District and concluded that “[t]hese submarkets provide a finite amount of current and future supply of residential lots, and there will be a need for additional supply in the future.”<sup>12</sup> In his opinion, there will be a shortage of residential homes and lots in the “competitive market area” within the next two to three years.<sup>13</sup> Mr. Wilson also stated on cross-examination that the housing market had recently shown some improvement.<sup>14</sup> He further testified that “[w]e’re still absorbing housing in the Dallas/Fort Worth market and in the competitive submarket.”<sup>15</sup> He recommended that the new lots be made available by late 2011 or 2012.<sup>16</sup>

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<sup>9</sup> App. Ex. 11.

<sup>10</sup> App. Ex. 12.

<sup>11</sup> App. Ex. 9, pg. 5-6; App. Ex. 12, pg. 4.

<sup>12</sup> App. Ex. 9, pg. 5.

<sup>13</sup> App. Ex. 9, pg. 6.

<sup>14</sup> Tr. pg. 83-84.

<sup>15</sup> Tr. pg. 87.

<sup>16</sup> Tr. pg. 73; App. Ex. 12. The pages in Applicant’s Exhibit 12 are not numbered.

Further, Applicant maintains that the District will provide the facilities necessary for centralized, comprehensive water, wastewater, and drainage services.<sup>17</sup> It is Applicant's position that it would not be feasible to provide these facilities in the absence of the District, and that the land would either be developed with individual septic tanks or not developed at all.<sup>18</sup> According to Applicant, the District would allow development of a higher quality community if the District is created to provide the infrastructure. With the District in place, Applicant would be able to keep the lot prices lower while at the same time providing a greater level of amenities, thereby providing residents in the District with "an overall better value package."<sup>19</sup>

## 2. Wylie's Position

Wylie contends that Applicant has failed to meet its burden of proof to show that there is a public necessity or need for the District. Wylie points out that neither chapter 51 of the Texas Water Code nor chapter 293 of 30 TAC defines the terms "public necessity." Therefore, as support for its position, Wylie relies on the definition of "public necessity" set out in *State Banking Bd. v. First State Bank of Gainesville*.<sup>20</sup> This case stated that "public necessity" is "a substantial or obvious community need for the proposed [district] in light of the attendant circumstances, as distinguished from a mere convenience on the one hand and an absolute or indispensable need on the other."<sup>21</sup> Wylie contends that Applicant's evidence only proved that the creation of the District would increase a private developer's profitability and give it a competitive edge. Wylie argues that Applicant's evidence "ignores the public portion of the 'public necessity' equation."<sup>22</sup>

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<sup>17</sup> App. Ex. 1, pg. 5.

<sup>18</sup> Tr. pg. 216-17 & 231.

<sup>19</sup> Tr. pg. 214.

<sup>20</sup> 618 S.W.2d 905 (Tex. Civ. App.—Austin 1981, no writ).

<sup>21</sup> *First State Bank of Gainesville*, 618 S.W.2d at 908, quoting *Gerst v. Nixon*, 411 S.W.2d 350, 358 (Tex. 1966).

<sup>22</sup> Wylie's Closing, pg. 12.

Wylie also maintains that Applicant's evidence only showed that there was a belief that communities with more amenities, such as parks and walking trails, are superior to those communities without them.<sup>23</sup> Since Applicant conceded that it could develop its property with septic tanks on one-acre lots, Wylie contends that this proves that the District is not necessary for development of the property. The denial of the District creation would only mean that the developer could not develop its property as densely as it has proposed to do. Wylie further contends that the market for vacant, developed lots is already oversaturated; therefore, there is no market for the proposed development and no corresponding public need for the District. It is Wylie's position that all Applicant has shown by its evidence is that the District would simply allow a private developer to increase its profitability and gain a competitive advantage in a market where there is currently a glut of developed lots.

### **3. ED's Position**

The ED contends that Applicant has shown that there is a public necessity or need for the District. According to the ED, Applicant provided signatures from the holders of more than 50 percent of the value of land in the proposed district, showing that the landowners desire water and wastewater service to the property. Further, the ED contends that Applicant's market study demonstrated how the proposed subdivision would be built and sold and was revised to push back the build-out date because of the recent economic downturn. The ED also points out that Applicant's evidence shows that there has been a general improvement in the market, and that housing in the submarket is still being absorbed, despite a regional decline in demand for developed lots.

The ED points out that Wylie cross-examined Applicant's real estate expert regarding the assumptions and conclusions in his market study. However, the ED contends that this questioning fell short of showing that the market study was somehow incorrect or flawed. The ED concludes that Applicant's evidence supports the conclusion that a market exists in this specific area for the proposed development that would be served by the District.

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<sup>23</sup> Wylie's Closing, pg. 12.

Regarding whether there are other wastewater options available, the ED acknowledged that using an alternative wastewater provider might decrease costs by \$2 to \$3 million. Nevertheless, according to the ED, an applicant is not required to choose the cheapest option to demonstrate a need for the District. Also, the ED maintains that an applicant does not need to prove that the proposed facilities are the bare minimum or that the proposed tax rate is as low as possible. Rather, it is the ED's position that the public necessity or need requirement means the property lacks water or wastewater collection and treatment services, and development requiring those services is imminent in the area.

#### 4. Analysis

After reviewing the law, the parties' arguments, and the evidence in this record, the ALJ concludes that Applicant has met its burden of proof to show that there is a public necessity or need for the District. Wylie argues that there is no public necessity because there is no market for the proposed lots, and the District would simply make development more profitable and more convenient for the private developer. Further, Wylie argues that Applicant conceded that the property could be developed less densely than proposed with the use of septic systems instead of a central wastewater collection system. Wylie contends that this disproves that the District is a public necessity. The ALJ does not find this reasoning persuasive.

Wylie argues that the definition of "public necessity" found in *State Banking Board v. First State Bank of Gainesville*, should be applied to this application. In the *State Banking Board* opinion, the court of appeals considered whether the Board's decision to approve a charter application for a proposed bank was supported by substantial evidence.<sup>24</sup> The Board had found that growth and development had reached the stage where it was in the public interest to establish a new bank in the area. Further, the Board had determined that population growth and the job market indicated a healthy economic future. The court of appeals held that these findings constituted substantial evidence to support the Board's ultimate finding of public necessity.

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<sup>24</sup> 618 S.W.2d at 908-09.

In this case, the record contains similar evidence. The market study in the record indicates that market conditions have improved enough to warrant additional developed lots in the “competitive market area” where the District would be located. Applicant’s witness, Mr. Wilson, prepared the study in September 2008, which he supplemented in June 2010. Mr. Wilson analyzed the market conditions in the DFW metro area and in the “submarket”<sup>25</sup> where the District would be located. Applicant’s market study indicated that there is a 45.9 month supply of vacant, developed lots in the submarket, although a two year supply of lots would represent equilibrium in the market, as a rule of thumb. The market study also stated:

[T]he potential for growth in demand in the competitive market area has thus far been concentrated at the low and moderate price points, focusing on the \$300,000 and below market, and this price segment is also planned to be the primary area of focus for the subject property. With additional demand coming within this price segment through the remainder of 2010 and 2011, the month supply of lots will continue to dwindle and is likely to become relatively tight in the next 12 to 18 months.<sup>26</sup>

There is little evidence rebutting or disputing these or other statements contained in Applicant’s September 2008 market study or its June 2010 supplement. Although Wylie questioned Mr. Wilson about the apparent oversupply of developed lots, there is no evidence refuting Mr. Wilson’s expert opinion that the supply of these lots will become tighter in the near future. Mr. Wilson further testified that some home builders are aggressively looking for positions, and they are currently acquiring lots for future construction.<sup>27</sup>

It is the ALJ’s opinion that, as in *First State Bank of Gainesville*, there is substantial evidence to support a finding of public necessity or need in this case. In fact, the preponderance of the evidence shows that there will be a need for additional lots in the next one to two years in

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<sup>25</sup> The ALJ assumes that the terms “competitive market area” and “submarket” are interchangeable in this case. Applicant defined “competitive market area” as “the combined area of Wylie, Sachse, Lavon, and the areas to the west such as Lucas, Parker, and St. Paul.” App. Ex. 11, pg. 5. A definition of the term “submarket” does not appear in the record.

<sup>26</sup> App. Ex. 12, Tab I, second page (June 2010 supplement to 2008 market study).

<sup>27</sup> Tr. pg. 88.

the price range of the proposed development that would be served by the District. Furthermore, no entity is currently providing utility service to the area within the District. This evidence is sufficient to demonstrate that there is a public necessity or need for the District.

Regarding its argument that the land could be developed at a lower cost, Wylie cites to no legal requirement that a district can only be created if the development offers the bare minimum in amenities and the district will use the cheapest methods to provide services. The ALJ agrees with the ED's position that the public need requirement "means that the property lacks water and/or wastewater collection and treatment services and development that will require these services is imminent in the area."<sup>28</sup>

The ALJ concludes that the fact that a developer may benefit from the creation of District does not destroy the public necessity or need that the District will serve. In this case, the evidence reflects that there is a need for the proposed development and no entity is providing utility service to the area. Therefore, Applicant has met its burden of proof that there is a public necessity or need for the District.

## **B. Benefit to the Land and Residents Within Wiley's ETJ**

Another requirement that Applicant must prove is that the land and the residents within the proposed District will be benefitted by the creation of the District.<sup>29</sup> Wylie argues that Applicant's evidence does not establish this necessary requirement as to its ETJ.

### **1. Wylie's Position**

Wylie presented the testimony of its City Engineer, Chris Holsted, P.E., on this issue. Mr. Holsted testified that Wylie has an existing 18-inch sanitary sewer line within an existing subdivision called Creekside Estates. Mr. Holsted stated that this sewer line has a 2.35 million

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<sup>28</sup> ED's Closing, pg. 6.

<sup>29</sup> TEX. WATER CODE § 51.021(a)(2).

gallons per day (MGD) capacity. Based on Wylie's planned uses for that line, Mr. Holsted stated there is about 1.65 MGD of excess capacity immediately available for use by "the residents of the proposed District."<sup>30</sup> He opined that even with the need for a lift station, the use of this sewer line would be a more cost effective alternative than the construction of a WWTP as proposed for the District.<sup>31</sup> He also testified that the Creekside Estates sewer line is approximately three miles away from the proposed District.

Regarding whether Wylie would be interested in serving the proposed District, Mr. Holsted stated that the decision to serve would have to be made by the Wylie City Council. However, according to Mr. Holsted, Wylie has not received an application for utility services or a request to negotiate a contract for such services.<sup>32</sup> He argued that Wylie has the capacity to manage the wastewater load from the proposed District on a retail or wholesale level, but that Applicant failed to explore this alternative.<sup>33</sup>

## 2. Applicant's Position

According to Applicant, the District will benefit the land and residents, in addition to furthering the public welfare, by providing the necessary infrastructure for centralized, comprehensive water, wastewater, and drainage facilities. In response to Wylie's argument that it is capable of serving the land within its ETJ, Applicant argues that Wylie's two witnesses have no authority to make such a statement in light of a policy adopted by the Wylie City Council. Wylie's city ordinance provides that Wylie will "not extend sewer lines or construct sewer mains to provide new sewer services to properties within the city's ETJ."<sup>34</sup> Therefore, Applicant maintains that the assertions of Wylie's City Manager, Mindy Manson, and Mr. Holsted that Wylie has the ability to serve the proposed District are against the policy of the City Council. Further, Applicant argues that it is unknown whether the City Council would make an exception

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<sup>30</sup> Wylie Ex. 1, pg. 8

<sup>31</sup> Wylie Ex. 1, pg. 8.

<sup>32</sup> Wylie Ex. 1, pg. 11.

<sup>33</sup> Wylie Ex. 1, pg. 11-12.

<sup>34</sup> App. Ex. 37, pg. 5 § 114-27; *see also*, App. Ex. 36, pg. 1.

in this case since the issue has not been brought before the council. In addition, Applicant points out that Ms. Manson testified that Wylie does not currently provide retail sewer service to any customers within its ETJ, and does not currently provide wholesale sewer service to any customers at all.<sup>35</sup>

Regarding whether Applicant requested service, Applicant disputes Mr. Holsted's testimony that Applicant did not submit an application to Wylie. According to Applicant, on October 10, 2008, it submitted a request to Wylie, asking that Wylie consent to the creation of the District.<sup>36</sup> Wylie's witness conceded that it received that request but did not respond.<sup>37</sup> Applicant maintains that if a city does not consent to the creation of a WCID within its ETJ, Texas Water Code section 42.042(b) allows an applicant to file a "petition" with a city requesting that it provide utility service to its ETJ. On January 30, 2009, Applicant submitted a "Petition for Water and Sanitary Sewer Services" (Petition for Services).<sup>38</sup> According to Applicant, its Petition for Services included a land development plan that showed the details of the proposed development. Applicant asserts that Wylie received the Petition for Services and again, did not respond.<sup>39</sup> Applicant contends that the Petition for Services requested water and sewer service from Wylie, and met the requirements of section 42.042(b). Since Wylie failed to enter in a contract for service within 120 days of the Petition for Services, Applicant argues that Wylie is deemed to have consented to the creation of the District, pursuant to section 42.042(c) of the Texas Water Code.

Regarding the Creekside Estates line, Applicant maintains that Wylie did not intend for that sewer line to serve the area in the proposed District. According to Applicant, Wylie designed the Creekside Estates line to serve the area shown in Wylie's capital improvements plan. Since the area within the proposed District was not included in that plan,<sup>40</sup> Applicant

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<sup>35</sup> Tr. pg. 180 & 185.

<sup>36</sup> App. Ex. 7.

<sup>37</sup> Tr. pg. 179.

<sup>38</sup> App. Ex. 8.

<sup>39</sup> Tr. pg. 178-79.

<sup>40</sup> Tr. pg. 136-37.

asserts that this contradicts Mr. Holsted's testimony that Wylie can provide sewer service through this line.

From a legal perspective, Applicant argues that Wylie's position is contrary to section 42.042 of the Texas Local Government Code. According to Applicant, this section recognizes that a landowner is entitled to utility service to its land. Applicant argues that section 42.042(f) creates an either/or requirement that the TCEQ must apply: the TCEQ must allow the creation of the proposed district if it finds *either* that the respective city does not have the ability to serve *or* the city has not made a binding commitment to do so.<sup>41</sup> In this case, Applicant takes the position that Wylie has no ability to serve and has not made any type of commitment to provide utility service to the area, despite receiving a petition from Applicant requesting such service.

### **3. ED's Position**

The ED argues that there is compelling evidence that the creation of the District will benefit the land and residents within Wylie's ETJ. Furthermore, the ED asserts that there is insufficient evidence that Wylie has the ability to provide service to the area.

Regarding whether Wylie can provide sewer service to its ETJ, the ED points out that Wylie's witnesses relied on a single-page memorandum for their assertion that Wylie stands ready and willing to provide service.<sup>42</sup> This memo was prepared on June 28, 2010, after the hearing process in this case had begun and long after Applicant submitted its petition to Wylie in January 2009. According to the ED, there are no engineering studies showing that Wylie's Creekside Estates line has the capacity to handle the sewer needs from the ETJ. Furthermore, the ED points out that Wylie's City Council has not had opportunity to vote on or even hear this proposal of serving the area through the Creekside Estates line, and has adopted a written policy that contradicts the very proposal Wylie's witnesses now advocate.

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<sup>41</sup> Applicant's Response to Closing, pg. 8.

<sup>42</sup> App. Ex. 34.

A significant factor for the ED is that Wylie failed to respond to the notice and Petition for Services it received from Applicant. The ED argues that the alternative notice process under the Texas Local Government Code contemplates that a city will either contract to serve an area or consent to the creation of the district. According to the ED, this process is not intended to be a mechanism by which a city may prevent or control development in its ETJ by simply failing or refusing to respond to a developer.

Furthermore, the ED concludes that the District would be a benefit to the land because of the environmental preference for centralized sewer service over less reliable septic systems. This is a true benefit repeatedly cited for district creations, according to the ED.

#### **4. Analysis**

The ALJ agrees with Applicant and the ED that the creation of the proposed District would benefit both the land and residents within the entire District, including the land and residents within Wylie's ETJ. Wylie does not have the ability to provide wastewater service to the District as a whole or even to the land within its ETJ. Also, it is undisputed that Wylie has not made a legally binding commitment to provide sewer service to the development. In addition, Wylie makes no argument that it has the ability to provide water and drainage services to the area, services that would also be provided by the District.

Section 42.042(f) of the Texas Local Government Code states that the Commission shall create a WCID if it finds either that a municipality does not have the reasonable ability to serve the area or the municipality has not agreed to provide water or wastewater services to the proposed development. The evidence clearly demonstrates that Wylie does not have the reasonable ability to provide wastewater service to its ETJ, let alone the entire District. The City Council has adopted an ordinance that prohibits construction of sewer facilities to serve the ETJ.<sup>43</sup> Also, Wylie cannot provide retail water service within its ETJ since the Wylie Northeast

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<sup>43</sup> App. Ex. 37, pg. 5, § 114-27.

SUD has the water CCN to that area. Wylie simply does not have the reasonable ability to provide water or sewer service to its ETJ within the District.

Even in the absence of the city ordinance, Wylie's evidence and argument are contradictory on the issue of whether it has the capacity in the Creekside Estates line to provide sewer service. Mr. Holsted testified that the Creekside Estates line has about 1.65 MGD in excess capacity that would be immediately available for the residents of the proposed District.<sup>44</sup> However, in its closing argument, Wylie admits that it has insufficient capacity in the Creekside Estates line, stating that it "[would] not belabor the point that [Applicant's] purported peak flow requirement is greater than the remaining excess capacity in Wylie's Creekside sewer line."<sup>45</sup> Further, the only evidence that Wylie has any ability at all to provide sewer service is a one-page memorandum prepared by an engineer for Mr. Holsted.<sup>46</sup> This memorandum states that serving the "WCID areas" through the Creekside Estates line is an alternative to construction of a WWTP, a statement contradicted in Wylie's Closing Arguments. For these reasons, it is clear to the ALJ that Wylie does not have a reasonable ability to provide sewer service to the District.

Also, the ALJ does not agree with Wylie's witnesses that Applicant failed to submit an "application" for sewer service because these witnesses are putting form over substance. On January 30, 2009, Applicant requested utility service from Wylie by submitting a document entitled "Petition for Water and Sanitary Sewer Services."<sup>47</sup> Wylie did not inform Applicant that it needed to submit an "application" with additional information or that the Petition for Services was inadequate in any way. In fact, Wylie never responded to Applicant's Petition for Services at all. The ALJ concludes that Applicant complied with the statutory requirements in section 42.021(f) of the Texas Water Code by requesting service from Wylie in its Petition for Services.

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<sup>44</sup> Wylie Ex. 1, pg. 8.

<sup>45</sup> Wylie's Closing, pg. 13.

<sup>46</sup> App. Ex. 34.

<sup>47</sup> App. Ex. 8.

The ALJ finds that Wylie does not have the reasonable ability to provide any type of utility service to the area, and that Wylie has not entered into a legally binding commitment to provide services to the area. The creation of the District will allow for the provision of services to the area, thereby benefitting the land and residents in the entire District, as well as in Wiley's ETJ.

### **C. The District's Financial Feasibility**

Section 51.021(a)(1) of the Texas Water Code requires the TCEQ to determine whether the "organization of the district as requested is feasible and practicable." Wylie argues that Applicant has failed to prove that it meets this statutory requirement.

#### **1. Wylie's Position**

Applicant proposes that the District would finance and construct a WWTP with a capacity of 0.9 MGD. Wylie argues that Applicant's expert only accounted for the construction and operational costs of a 0.746 MGD plant when calculating its projected tax rate. Therefore, since Applicant proposes that the District will issue bonds for the construction of the WWTP, Wylie contends that the only evidence of financial feasibility is incorrect and fails to account for the total cost of constructing and operating a larger WWTP. Wylie maintains that the estimated tax rate must go up to account for this error, but the amount of that increase would be based on speculation.

#### **2. Applicant's Position**

Applicant proposed a tax rate for the District of \$1.00 per \$100 of valuation in property for the District, with \$0.92 to be used to repay the bonds issued by the District and \$0.08 to be used for maintenance and operational costs.<sup>48</sup> Applicant argues that the evidence demonstrates that this tax rate is reasonable and within the feasibility standards of the TCEQ.

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<sup>48</sup> App. Ex. 15, pg. 13.

According to Applicant, 30 TAC § 293.59(k)(3)(B) provides that a district located within Collin County may have a total tax rate of up to \$1.20 per \$100 of assessed valuation and the District's proposed tax rate is less than the maximum rate allowed by the TCEQ. Furthermore, Applicant's expert testified that the District's proposed tax rate is comparable to other districts in North Texas.

Applicant also alleges that Mr. Holsted's testimony on the feasibility issue is not creditable because of deficiencies in his experience and knowledge. For example, Mr. Holsted has never prepared an application to create a district; is unfamiliar with TCEQ's rules regarding districts and tax rates; has never prepared a district bond application; and prior to this hearing, was unaware that the Commission had rules establishing a maximum tax rate for a district.<sup>49</sup>

Applicant contends that Wylie's attempt to challenge the feasibility of the District is based on a single number in the entire creation application. In the section regarding bond issuance, the application included the cost of a 0.746 MGD WWTP.<sup>50</sup> Applicant's expert witness, Nathaniel Thompson, testified that the plant capacity was based on TCEQ requirements at the time the creation application was submitted. Afterwards, the TCEQ adopted 30 TAC ch. 217, and changed the requirements for the sizing of WWTPs. After this change in TCEQ's rules, Applicant determined that a 0.9 MGD plant would be needed, which would increase construction costs by \$1.5 million.<sup>51</sup> In its response to Wylie's argument that this calls into question the feasibility of the District, Applicant states:

Even if this \$1,500,000 is added to the District's total bond issuance . . . basic math shows the minimal impact on the District's debt service tax rate. Adding \$1,500,000 to the bond issuance requirement shown in the Preliminary Engineering Report, \$45,700,000, is an increase of approximately 3.28%. A corresponding change to the original debt service tax rate, \$0.92, results in an increase of \$0.03. Added to the proposed maintenance tax rate of \$0.08, the total

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<sup>49</sup> Tr. pg. 122-23 & 132-33.

<sup>50</sup> App. Ex. 15, Tables 7 and 10.

<sup>51</sup> Tr. pg. 62 & 65.

tax rate would be only \$1.03 and therefore, still well under the maximum tax rate of \$1.20 allowed by the TCEQ's feasibility rules. . . . In fact, although Applicant foresees no need to do so, the District's total bond issuance could be increased as much as 22% (\$10,054,000), and a corresponding increase to the debt service tax rate would result in a total tax rate (\$1.12 for debt service and \$0.08 for maintenance) still within the TCEQ standard.<sup>52</sup>

Applicant further argues that Wylie is mistaken by assuming that the higher operational and maintenance costs associated with a larger WWTP would be paid by District taxes. According to Applicant, once the District constructs the WWTP, it will be conveyed to the Wylie Northeast SUD, pursuant to the contract between Applicant and the SUD. Then, Wylie Northeast SUD would be responsible for maintaining and operating the wastewater treatment plant, not the District.<sup>53</sup> Therefore, Applicant argues that any operation and maintenance costs will be a cost of service to Wylie Northeast SUD and recovered through its service rates, not District taxes.

### **3. The ED's Position**

The ED stated that it would have been preferable to have the calculations related to the change in tax rate amended to reflect the change in WWTP capacity. However, based on the testimony regarding the change in the tax rate due to the increase of \$1.5 million in construction costs, the ED is comfortable that the District meets the requirements for financial feasibility.

### **4. Analysis**

The ALJ agrees with the ED and Applicant that the proposed District is financially feasible. The sole basis for Wylie's position is that after Applicant submitted its application, the TCEQ's rules regarding WWTP capacities changed and the corresponding change in construction costs is not reflected in its application. The Preliminary Engineering Report for the creation of the District estimates that the District will have to issue \$47.5 million in bonds,

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<sup>52</sup> Applicant's Response to Closing, pg. 9-10.

<sup>53</sup> App. Ex. 39, pg. 8.

including \$7.5 million to construct a WWTP with a capacity of 0.746 MGD.<sup>54</sup> The record reflects that an additional \$1.5 million in construction costs may need to be added to the District's bond requirement.<sup>55</sup> This represents an approximate three per cent increase to the total bond requirement. It is the ALJ's conclusion that the proposed tax rate and the increase in construction costs do not call into question the financial feasibility of the District. The proposed tax rate is well below the combined projected tax rate allowed by 30 TAC § 293.59(k)(3)(B). Therefore, for these reasons, the ALJ recommends that the Commission find that the District is financially feasible, as required by section 51.021(a)(1) of the Texas Water Code.

#### **D. Transcription Costs**

In its closing arguments, Applicant requests that Wylie pay one-half of the transcription costs, based on 30 TAC § 80.23. Applicant included an invoice from Kennedy Reporting Service, Inc. that shows the attorney for Applicant was billed \$1,820 for the transcript for the proceeding. Neither Wylie nor the ED responded to Applicant's request.

Section 80.23(d)(1) of the TCEQ's rules provides:

Upon the timely filed motion of a party or upon its own motion, the commission may assess reporting and transcription costs to one or more of the parties participating in the proceeding. The commission shall consider the following factors in assessing reporting and transcription costs:

- (A) the party who requested the transcript;
- (B) the financial ability of the party to pay the costs;
- (C) the extent to which the party participated in the hearing;
- (D) the relative benefits to the various parties of having a transcript;
- (E) the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- (F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- (G) any other factor which is relevant to a just and reasonable assessment of costs.

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<sup>54</sup> App. Ex. 15, Table 7 and 10.

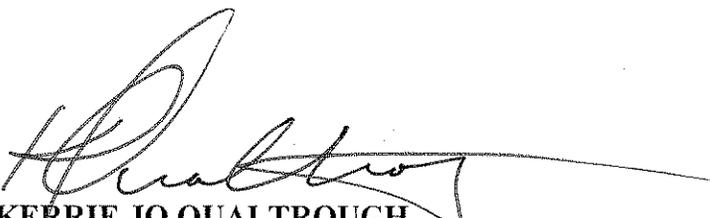
<sup>55</sup> Tr. pg. 62.

The ALJ agrees with Applicant that Wylie should share equally in the costs of the transcript. Wylie participated fully in the hearing, presented its own witnesses, and cross-examined others. Wylie received a benefit by citing to the transcript in its closing arguments. Wylie did not present any argument against paying half of the transcription costs. For these reasons, the ALJ recommends that the TCEQ order Wylie to pay \$910 for its share the \$1,820 transcription invoice.

**E. Summary**

The ALJ recommends that the Commission grant the application to create the Collin County WCID No. 3. Applicant has met its burden of proving that creation of the District would meet the requirements of section 51.021 of the Texas Water Code and the Commission's rules, including 30 TAC § 293.11. Further, Applicant filed a petition with Wylie requesting service to the area, and Wylie failed to respond. Pursuant to section 42.042(c) of the Texas Local Government Code, Wylie's failure to enter into a contract for the provision of services to the District is deemed consent to the creation of the District.<sup>56</sup> Further, Wylie does not have the reasonable ability to serve the area. For the reasons stated in the PFD, the ALJ recommends that the Commission grant Applicant's petition to create the proposed District.

**Signed December 10, 2010.**



**KERRIE JO QUALTROUGH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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<sup>56</sup> TEX. LOC. GOV'T CODE § 42.042(f).

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**



**AN ORDER Granting Petition of Lavon 593 Land Investment Partners, L.P. Petition to Create Creation of the Collin County Water Control and Improvement District No. 3, in Collin County Texas, TCEQ DOCKET NO. 2009-1573-DIS; SOAH DOCKET NO. 582-10-2631.**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Application of Lavon 593 Land Investment Partners, L.P. for Creation of Collin County Water Control and Improvement District No. 3. Administrative Law Judge (ALJ) Kerrie Jo Qualtrough with the State Office of Administrative Hearings (SOAH), presented a Proposal for Decision (PFD), which recommended that the Commission grant the Application.

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

## I. FINDINGS OF FACT

1. Lavon 593 Land Investment Partners, L.P. (Applicant) filed an application to create Collin County Water Control and Improvement No. 3 (District) with the Texas Commission on Environmental Quality (TCEQ or Commission).
2. The application was declared administratively complete on November 11, 2008.
3. On June 28, 2009, and July 5, 2009, notice of the application was published in the *McKinney-Courier Gazette*, a newspaper regularly published or circulated in Collin County, Texas.
4. On June 30, 2009, notice of the application was posted on the bulletin board used for posting legal notices at the Collin County Courthouse.
5. After completing the technical review of the application, the Executive Director recommended that the creation of the District be approved.
6. On January 27, 2010, the Commission considered the application, the request for a contested case hearing on the matter submitted by the City of Wylie (Wylie), the responses to the request for hearing, and the reply to the responses. In an interim order dated February 4, 2010, the Commission referred the case to SOAH for a hearing, where it was assigned SOAH Docket No. 582-10-2631.
7. Notice of the hearing was issued by the TCEQ Chief Clerk on March 3, 2010.
8. A preliminary hearing was held on March 29, 2010. Applicant, the Executive Director, the Office of Public Interest Counsel, and Wylie were named as parties.
9. The hearing on the merits was held on September 8, 2010. The record closed on October 27, 2010, after the submission of written closing arguments and responses.

10. The District is proposed to encompass approximately 592.744 acres in Collin County, located approximately eight miles east of the intersection of FM 2514 (Parker Road) and U.S. Highway 75, with approximately one quarter of a mile of frontage on Parker Road before it turns south. Applicant owns the majority of the land proposed to be included in the District.
11. The District is proposed to provide a water supply system, a wastewater treatment and collection system, and drainage facilities and services.
12. The proposed District is not within the corporate limits of any municipality.
13. The proposed District is located partially within the extraterritorial jurisdiction (ETJ) of the City of Lucas (Lucas), partially within the ETJ of the Town of St. Paul (St. Paul), and partially within the ETJ of Wylie.
14. Applicant separately petitioned Lucas, St. Paul, and Wylie for consent to the creation of the District. Each city failed or refused to give its consent within 90 days.
15. Applicant separately petitioned Lucas and St. Paul for water and sewer services. Both cities failed to enter into a contract with Applicant for the requested services within 120 days.
16. Neither Lucas nor St. Paul has opposed the creation of the District in this proceeding.
17. On January 30, 2009, Applicant petitioned Wylie for utility service by submitting a document entitled "Petition for Water and Sanitary Sewer Services" (Petition for Services). Wylie did not enter into a contract with Applicant for the requested service within 120 days.
18. The total cost of the capital improvements to be provided by the District is reasonable and based on the cost of improvements in other similar projects. Construction of the

improvements is practicable in light of the characteristics of the area within the proposed District.

19. In its application, the total District tax rate was projected to be \$1.00 per \$100 of assessed valuation, comprised of a debt service tax rate of \$0.92 and an operations and maintenance tax rate of \$0.08.
20. After submitting its application, the TCEQ changed its requirements for the average daily flows for wastewater treatments plants (WWTP). This change required an increase in the capacity of the WWTP that would serve the District and an increased construction cost of \$1.5 million. Including this increase, the total District tax rate is now projected to be \$1.03 per \$100 of assessed valuation, comprised of a debt service tax rate of \$0.95 and an operations and maintenance tax rate of \$0.08.
21. The amended total District tax rate is reasonable and comparable to the tax rates of other districts in the North Texas area and within the TCEQ feasibility standard for districts in Collin County, which is \$1.20 per \$100 of assessed valuation. The total tax assessment applicable to the land within the District is reasonable and comparable to that in other districts in North Texas.
22. The rates proposed to be charged for water and sewer service in the District are reasonable.
23. No entity currently provides water, sewer, or drainage services in the area proposed to be included in the District.
24. Wylie Northeast Special Utility District (Wylie Northeast SUD) is willing to provide retail water and sewer service to the area within the District.

25. Wylie Northeast SUD has the water certificate of convenience and necessity (CCN) that will give it the exclusive right to provide retail water service to the area within the District.
26. Wylie Northeast SUD has applied for the sewer CCN that would give it the exclusive right to provide retail sewer service to the area within the District.
27. Wylie received written notice of Wylie Northeast SUD's application to obtain a sewer CCNs for the area within the District and did not object.
28. The Wylie City Council has adopted a policy, codified in the Wylie Code of Ordinances, that the City will not extend sewer lines or construct sewer mains to provide new sewer services to properties within the City's ETJ. Wylie does not currently provide retail sewer service to any portion of its ETJ. Wylie does not currently provide wholesale sewer service to any customers.
29. Wylie's Creekside Estates sewer line was designed to serve the area shown on Wylie's capital improvements plan, which does not include the area proposed to be included in the District.
30. The evidence does not establish that there is any sufficient capacity available in the Creekside Estates sewer line to serve the proposed District or that area of the District within Wylie's ETJ.
31. Wylie does not claim or propose that it can provide water or drainage facilities or services to the area proposed to be included in the District.
32. Despite receiving Applicant's Petition, Wylie has not committed to provide sewer service to any portion of the land proposed to be included in the District.

33. There will be a need for additional lots, at the price point proposed for the area within the District, in the competitive market areas within the next two to three years.
34. Development of the District will generate a total assessed valuation of \$423,344,500 at full build-out.
35. The District, its systems, and subsequent development within the District will not have an unreasonable effect on land elevation, subsidence, groundwater level within the region, recharge capability of a groundwater source, natural run-off rates and drainage, or water quality.
36. The District will benefit the land within the District and the residents and further the public welfare by providing comprehensive, centralized water, sewer, and drainage facilities and services.
37. The District will further the public welfare by facilitating lower lot prices for homes in the District and a greater level of amenities, providing homeowners with an overall better value package.
38. Rusty Coffee, Peter Crow, Kristen Mazza, Tommy Thomas, and Jeffrey P. Weyandt are qualified to serve as directors of the District, as each is at least eighteen years old, is a Texas resident, and owns land subject to taxation in the District, and they are not disqualified from serving.
39. The ALJ required a transcript and ordered Applicant to pay for the hearing transcript subject to reimbursement from other parties as appropriate. Reporting and transcription costs for the hearing in this case totalled \$1,820. Of that total amount, Applicant should be assessed one-half, and Wylie should be assessed one-half. Applicant and Wylie should pay \$910 each.

## II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Texas Water Code chapter 51 and the Texas Constitution, article XVI, section 59.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code, chapter 2003.
3. Applicant and TCEQ have satisfied all applicable public notice requirements.
4. Applicant has complied with the requirements of Texas Local Government Code, section 42.042 as to the City of Lucas, the Town of St. Paul, and the City of Wylie.
5. Based on the above Findings of Fact, Wylie does not have the reasonable ability to provide water or wastewater service to the land proposed to be included in the District.
6. Based on the above Findings of Fact, Wylie has failed to make a legally binding commitment with sufficient funds available to provide water and wastewater service adequate to serve the development proposed for the District at a reasonable cost.
7. Based on the above Findings of Fact, Wylie consented to the creation of the District, in accordance with section 42.042(c) of the Texas Water Code.
8. Based on the above Findings of Fact, the proposed District is feasible and practicable, in accordance with section 51.021(a)(1) of the Texas Water Code.
9. Based on the above Findings of Fact, the proposed District will benefit the land to be included in the District and the residents, in accordance with section 51.021(a)(2) of the Texas Water Code.

10. Based on the above Findings of Fact, there is a public necessity or need for the District, in accordance with section 51.021(a)(3) of the Texas Water Code.
11. Based on the above Findings of Fact, the creation of the District will further the public welfare, in accordance with section 51.021(a)(4) of the Texas Water Code.
12. The application meets all requirements for Commission approval as set out in the Texas Water Code, the Texas Government Code, the Texas Local Government Code, and the relevant requirements of the Commission's implementing rules.
13. Based on the above Findings of Fact and Conclusions of Law, the application to create the District should be granted and Rusty Coffee, Peter Crow, Kristen Mazza, Tommy Thomas, and Jeffrey P. Weyandt should be appointed to serve as temporary directors.

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

1. The Application of Lavon 593 Land Investment Partners, L.P. for Creation of Collin County Water Control and Improvement District, No. 3 is granted.
2. Rusty Coffee, Peter Crow, Kristen Mazza, Tommy Thomas, and Jeffrey P. Weyandt are appointed to serve as temporary directors.
3. The City of Wylie shall pay \$920 to Lavon 593 Land Investment Partners, L.P. for the cost of the transcript of the hearing in this case.
4. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to all parties.

5. 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.
6. 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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**Bryan W. Shaw, Ph.D  
Chairman**