

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

June 12, 2023

Natalie Scott
Emily Rogers
Eric Allmon
Kayla Murray
Sheldon Wayne

VIA EFILE TEXAS

RE: SOAH Docket Numbers 582-22-0259, 582-22-0260, and 582-22-0261; TCEQ Docket Nos. 2021-0571-DIS, 2021-0572-DIS, and 2021-0573-DIS; Applications for Creation of Lakeview Municipal Utility District Nos. 2, 1, and 3 of Ellis County

Dear Parties:

On May 4, 2023, we issued the Proposal for Decision in this case. On May 24, 2023, Finch FP, Ltd. and Brian Edward Finch (collectively, Applicant), the City of Waxahachie (City), Ellis County (County), Individual Protestants, and the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) timely filed exceptions. Applicant, the City and County, and Individual Protestants filed responses to exceptions. The Office of Public Interest Counsel did not file any exceptions or response to exceptions.

Applicant's Exceptions

Applicant reiterated its position that the cost considerations do not affect the feasibility of the Districts because preliminary cost estimates change over time and any facilities costs that are not reimbursed will be borne solely by the developer. According to Applicant, a material portion of any increased costs will be offset by an increase in the sales price of homes in a strong sales market. Applicant also provided

documentation of Applicant's explicit acknowledgement that it will bear any associated non-reimbursed costs.¹

Applicant's exceptions provided updated estimates related to wastewater treatment costs, based on the capacity and costs referenced in the PFD. Applicant's updated cost estimate for the wastewater costs is \$28,080,000, for a 1.56 MGD wastewater treatment plant at a cost of \$18/gallon.² In its exceptions, Applicant also provided revised calculations of reimbursement percentages for the Districts based on home values.³ Applicant argues that 1.56 million gallons per day (MGD) is an overestimation of the true anticipated flow of the system, and Applicant estimates the ultimate wastewater treatment plant will not exceed 1.1 MGD. Applicant seeks an order finding that Applicant provided updated, reasonable projected costs and approving creation of Districts.

Applicant's exceptions are largely based on updated cost estimates and eligible reimbursement amounts provided after the hearing on the merits and outside of the evidentiary record. As such, the ALJs recommend no changes in response to Applicant's exceptions.

ED's Exceptions

The ED argues that the discrepancy between the estimated cost by the Applicant and the Protestants does not render the Applicant's construction costs unreasonable, because updating the future cost estimate for the wastewater plant has no impact on the ED's reasonableness determination. The ED argues that there is no statutory requirement for continual review of cost estimates; instead, the ED's practice is to review the cost estimates provided in the original engineering report submitted with the applications. The ED emphasizes that 30 Texas Administrative Code sections 293.11(d)(1) and (5) only require "estimated," "preliminary" and "tentative" cost estimates. The ED reiterates that a limited amount of construction costs would be funded by bonds and taxes and the remainder would be the

¹ Applicant Exceptions, Attachment A.

² See Applicant Exceptions, Attachment A.

³ Applicant Exceptions at 5.

developer's responsibility. The ED recommends the Commission find that Applicant has met all requirements and grant the petitions for creation.

The ALJs do not imply that the ED should continually review updated cost estimates during the processing of the applications. However, for the ALJs to meaningfully consider "reasonableness of construction costs"⁴ as required, Applicant should provide reasonably accurate cost estimates as of the time of its petition. Applicant did not refute and provided no explanation of why its wastewater plant cost estimate in its preliminary engineering reports (Reports) was underestimated by more than \$27 million.⁵ Thus, the ALJs recommend no changes in response to ED's exceptions.

Protestants' Exceptions

Protestants⁶ reiterate their position with regard to request for service, availability of comparable services from other providers, tax rates, wastewater rates, stormwater costs, groundwater and recharge, run-off rates and drainage, water quality, total tax assessments, necessary and benefit to the land, and majority value of landowners. The ALJs note that City Manager Michael Scott testified that the City was unwilling to provide sewer service to the development at its proposed density.⁷ The ALJs are not persuaded that any unwillingness of Applicant to change the density of its proposed developments constitutes an unreasonable refusal to enter into a contract for service. The ALJ previously considered these arguments in preparation of the PFD and recommends no changes in response to these exceptions.

Individual Protestants emphasize that Applicant bears the burden of proof with regard to groundwater impacts and road powers. According to Individual Protestants, Applicant has not demonstrated that the necessary improvements would be made for roads to handle the increased traffic as a result of the development within the Districts. Individual Protestants contend that the current roads are

⁴ Tex. Water Code § 54.021(b)(2).

⁵ See Proposal for Decision, Finding of Fact 27.

⁶ Individual Protestants concur with City and County's exceptions.

⁷ Tr. at 199, 203.

woefully inadequate to handle additional traffic, specifically FM 664, Bob White Road, Little Branch Road, Black Champ Road, and Long Branch Road.

The ALJs agree that Applicant carries the burden of proof. In this case, Individual Protestants first disputed Applicant's request for road powers in their closing briefs. In their closing briefs and exceptions, Individual Protestants opine that the roads are inadequate. However, aside from Applicant's Reports and the ED's memos, the request for road powers is otherwise not addressed in testimony or exhibits. Thus, Applicant's representations within the Reports are uncontroverted within the evidentiary record. Protestants had the opportunity and chose not to present evidence contesting the adequacy of the current roads as it relates to Applicant's requests for road powers. Therefore, the ALJs do not recommend any changes in response to these exceptions.

After considering the parties' exceptions, the ALJs do not recommend any changes to the PFD and recommend that it be adopted as filed.

ALJ Signatures:



Linda Brite,
Presiding Administrative Law Judge



Megan Johnson,
Presiding Administrative Law Judge

CC: Service List