

SOAH DOCKET NO. 582-22-0259 – LEAD DOCKET
SOAH DOCKET NO. 582-22-0260
SOAH DOCKET NO. 582-0261
TCEQ DOCKET NOS. 2021-0571-DIS, 2021-0572-DIS AND 2021-0573-DIS

APPLICATIONS FOR THE CREATION	§	BEFORE THE STATE OFFICE
OF LAKEVIEW MUNICIPAL UTILITY	§	OF
DISTRICT NOS. 2, 1 AND 3 OF ELLIS	§	ADMINISTRATIVE HEARINGS
COUNTY	§	

**APPLICANT’S EXCEPTIONS TO THE PROPOSAL FOR DECISION AND
SUPPORTING BRIEF**

Applicant files its Exceptions to the Proposal for Decision and Supporting Brief and shows as follows:

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On October 26, 2020, Applicant filed its Petitions for creation of Lakeview Municipal Utility Districts (“MUDs”) Nos. 1, 2, and 3 (the “Districts”) with the Texas Commission on Environmental Quality (“TCEQ,” or “Commission”) The three Districts are approximately 362.037 acres, 209.355 acres, and 135.745 acres, respectively, and are located within the extraterritorial jurisdiction (“ETJ”) of the City of Waxahachie (the “City”). After preliminary hearings, the State Office of Administrative Hearings (“SOAH”) consolidated these three matters under SOAH Docket No. 582-22-0259 and designated the application for MUD No. 2 as the lead docket for the Districts.

A contested case hearing was convened by SOAH administrative law judges (“ALJs”) Linda Brite and Megan Johnson on December 6-7, 2022. On May 4, 2023, the ALJs issued a Proposal for Decision (“PFD”) in this matter. The PFD recommends, as an alternative to denial, that the Petitions be approved following the Applicant’s provision of updated estimates relating to wastewater treatment costs. Accordingly, the Applicant, through its engineer, has provided updated cost estimates based upon the capacity/costs referenced in the PFD. Applicants updated

cost considerations do not affect the feasibility of the Districts because the bonds are not expected to cover 100% of the projected development costs. In addition, because proposed residential markets have very strong new home demand and are vibrant submarkets that will result in higher home values (resulting in the MUDs issuing more bonds at the \$1.00 tax rate) and higher lot prices (allowing the developer to recover more of the costs that cannot be reimbursed by the MUDs). Therefore, Applicants request an order consistent with the PFD's recommendation by finding that the Applicant has provided reasonable cost estimates and that the creation of the Districts shall be approved.

II. EXCEPTIONS TO PROPOSAL FOR DECISION

The Applicant agrees with PFD filed on May 4, 2023, in most respects. However, the Applicant does raise exceptions and proposed corrections relating to the finding that the Districts' projected construction costs are not reasonable and that, therefore, the Districts are not feasible or practicable.

a. Whether the Applicant has met its burden in proving that the District meets all requirements relating to a Request for Service.

Applicant does not raise any exceptions or corrections relating to the PFD's finding that Applicant met its burden proving that the Districts meet all requirements relating to a Request for Service. *See* PFD at pp. 8-12.

b. Whether the Applicant has met its burden in proving that the District meets all requirements relating to the availability of comparable service in the area.

Applicant does not raise any exceptions or corrections relating to the PFD's finding that Applicant met its burden proving that the Districts meet all requirements relating to the availability of comparable service in the area. *See id.* at pp. 12-16.

c. Whether the Applicant has met its burden in proving the reasonableness of proposed construction costs, tax rates, and water rates & sewer rates.

Applicant *does* raise exceptions and proposes corrections relating to the PFD's finding that the Applicant failed to meet its burden proving that the projected construction costs of the Districts' wastewater treatment plant are not reasonable. *See id.* at pp. 16-26. These exceptions and proposed corrections will be discussed in detail in a subsequent section of this pleading. Applicant does not, however, raise any exceptions or proposed corrections relating to the PFD's finding that the Applicant has met its burden in proving that all other associated construction costs are reasonable. *See id.*

d. Whether the Applicant has met its burden in proving that the District meets all requirements relating to an effect on groundwater levels and recharge within the region.

Applicant does not raise any exceptions or corrections relating to the PFD's finding that Applicant met its burden proving that the Districts meet all requirements relating to an effect on groundwater levels and recharge within the region. *See id.* at pp. 26-28.

e. Whether the Applicant has met its burden in proving that the District meets all requirements relating to an effect on natural run-off rates and drainage.

Applicant does not raise any exceptions or corrections relating to the PFD's finding that Applicant met its burden proving that the Districts meet all requirements relating to an effect on natural run-off rates and drainage. *See id.* at pp. 28-34.

f. Whether the Applicant has met its burden in proving that the District meets all requirements relating to an effect on water quality.

Applicant does not raise any exceptions or corrections relating to the PFD's finding that Applicant has met its burden in proving that the Districts meet all requirements relating to an effect on water quality. *See id.* at 34-38.

- g. Whether the Applicant has met its burden in proving that the District meets all requirements relating to the total tax assessments on all land located within the District.**

Applicant does not raise any exceptions or corrections relating to the PFD's finding that Applicant has met its burden in proving that the Districts meet all requirements relating to the total tax assessments on all land located within the Districts. *See id.* at 38-40.

- h. Whether the Applicant has met its burden in proving that the District is justified for creation as supported by evidence that the project is feasible, practicable, necessary, and will benefit all of the land to be included in the District.**

Applicant *does* raise exceptions and corrections relating to the PFD's finding that Applicant has failed to meet its burden in proving that the Districts are feasible and practicable as a result of a discrepancy in projected construction costs relating to the wastewater treatment plant in the Districts. *See id.* at 41-44. Applicant does not, however, raise any exceptions or corrections relating to the PFD's finding that Applicant has met its burden in proving that the Districts are necessary and will be a benefit to all of the land to be included in the Districts. *See id.*

- i. Whether the Applicant has met its burden in proving that the Petition was signed by a majority in value of landowners.**

Applicant does not raise any exceptions or corrections relating to the PFD's finding that Applicant has met its burden proving that the Petition was signed by a majority in value of landowners. *See id.* at 44-47.

- j. Whether the Applicant has met its burden in proving that the Petition meets all requirements under Texas Water Code § 54.016 relating to road powers.**

Applicant does not raise any exceptions or corrections relating to the PFD's finding that Applicant has met its burden proving that the Petition meets all requirements under Texas Water Code § 54.016 relating to a request for road powers. *See id.* at 47-52.

III. PROPOSED CORRECTIONS TO PROPOSAL FOR DECISION

Applicant maintains that a 1.56 MGD estimated flow overestimates the true anticipated flow of the system to be built in three or four phases. Rather, Applicant estimates the ultimate wastewater treatment plant will not exceed 1.1 MGD. In response to the PFDs request, Applicant has provided cost estimates assuming a 1.56 MGD wastewater treatment plant and incorporated an analysis of the \$18/gallon cost estimate provided by Gary Hendricks on behalf of the Protestants. Specifically, Applicant utilized the 1.56 MGD projected volume identified in the PFD at a cost of \$18/gallon for the full plant in a non-phased build out, which provides a total projected plant cost of approximately \$28,080,000.

Protestant's estimated flow/cost lowers the reimbursement percentages for the Districts based on the home values contained within the Preliminary Engineering Report dated October 2020 as follows: (1) MUD No. 1 is reduced from an original 67.91% to an updated 55.56%; (2) MUD No. 2 is reduced from an original 62.59% to an updated 52.87%; and (3) Mud No. 3 is reduced from an original 55.56% to an updated 36.74%.

Specifically, the revised calculations of the total eligible reimbursements for MUD No. 1 are: (1) \$54,610,565 for utilities with a Bond Issue Requirement ("BIR") of \$38,470,000; and (2) \$26,480,500 for roads with a paving BIR of \$22,510,000. The total eligible reimbursements for MUD No. 2 are: (1) \$31,205,730 for utilities with a BIR of \$21,560,000; and (2) \$20,762,597 for roads with a paving BIR of \$14,045,000. The total eligible reimbursements as follows for MUD No. 3 are: (1) \$39,766,530 for utilities with a BIR of \$18,745,000; and (2) \$10,080,039 for roads with a paving BIR of \$4,665,000. These percentages do not take into account the increased sales price of the homes which have occurred between October of 2020 and late 2022. Likewise, the numbers do not take into account that Applicant will be able to recover more of the cost of the

wastewater treatment facilities as the sales price of the lots will increase proportionately with the sales price of the homes.

The revised cost estimates for the wastewater treatment facilities do not affect the feasibility of the Districts. Applicant is not required at any point in the MUD creation process to submit a binding cost estimate for the creation of proposed districts, and preliminary cost estimates can change over time. *See* Tr. Transcript at pp. 178:2-15. Moreover, any facilities costs which remain non-reimbursed will be borne solely by the developer. There is also no question that the developer of the Districts will *only* be reimbursed if the TCEQ subsequently finds that the Commission's bond feasibility requirements are met. Therefore, such considerations do not yet appear ripe or capable of being deemed fatal for a Petition to authorize the creation of a MUD.

Any increased costs do not affect the feasibility of the project. In support, Applicant provides a letter demonstrating its recognition of the financial considerations relating to increased costs of the wastewater treatment facilities as alleged by Protestants. *See* Exhibit "A." Exhibit A also provides explicit acknowledgment that the Applicant is willing and able to bear any associated, non-reimbursed costs. *Id.* Applicant, therefore, maintains that the Districts remain feasible, practicable, necessary and a benefit to all land to be included in the Districts.

A material portion of any increased costs that may be realized as the Districts are eventually developed will be offset by an increase in the sales price of homes in a strong and vibrant submarket sales. *See* Gibson Redirect, Tr. Transcript at pp. 69-70. Moreover, these favorable conditions are projected to remain in place for the Districts for the foreseeable future, as the relevant housing submarket remains among the most attractive in the entire country for developers. *See id.* This high demand for homes within the submarket will be capable of

absorbing any increased costs. Further, any increased costs of development would not be unique to the Districts, but would be equally borne by any similarly situated developers competing within the same submarket. This favorable market reality and Applicants costs adjustments indicate that there is ample room to absorb the potential increased costs associated with the wastewater treatment facilities. For these reasons, the increased costs should not be deemed to have a material impact on the feasibility of the Districts. As a result, the Districts should be approved by the Commission. Such approval is consistent with the PFD's recommendation.

For these reasons, and consistent with the PFD's recommendation, Applicant respectfully requests that the following language be substituted for Findings of Fact Nos. 26 through 28 in the PFD:

- 26. Applicant provided updated cost estimates to account for higher capacity and higher construction costs.
- 27. A 1.56 MGD wastewater treatment plant will cost approximately \$28,080,000.
- 28. Sufficient evidence has been presented to establish that Applicant's projected construction costs are reasonable.

In addition, Applicant respectfully requests that the following language be substituted for Conclusions of Law Nos. 12, 13, and 17:

- 12. Sufficient evidence was presented to establish the reasonableness of projected construction costs. Tex. Water Code § 25.021(b)(2).
- 13. Sufficient evidence was presented to establish the projects are feasible, practicable, and necessary and would be a benefit to the land included in the districts. Tex. Water Code § 52.021; 30 Tex. Admin. Code § 293.11(d)(5)(J).
- 17. Applicants Petitions should be approved.

Lastly, Applicant respectfully requests that the following language be substituted for Ordering Paragraph No. 1:

1. The Petitions for Creation of Lakeview Municipal Utility District Nos. 1, 2, and 3 are approved.

IV. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Applicant respectfully requests that the Texas Commission on Environmental Quality revise the Proposal for Decision consistent with the PFD's recommendation in the alternative to find that the Applicant provided updated, reasonable projected costs for the Districts' proposed wastewater treatment facilities indicating that the Districts are feasible, practicable, necessary, and a benefit to all land within the Districts.

Respectfully submitted,

COATS | ROSE

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2023, a copy of the foregoing Pleading was served on all person listed either via hand delivery, facsimile transmission, electronic mail, and/or by deposit in the U.S. Mail.

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Natalie B. Scott

Attachment A

Letter from Applicant Addressing Increased Projected Costs of MUDs 1-3

Finch FP, LTD.
4173 Lomita Lane
Dallas, Texas 75220

May 22, 2023

Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711

**Re: Lakeview Municipal Utility District Nos. 1, 2 and 3; SOAH Docket
Number 582-22-0259 (Lead Docket); SOAH Docket No. 582-22-0260; SOAH
Docket No. 582-0261; TCEQ Docket Nos. 2021-0571-DIS, 2021-0572-DIS,
and 2021-0573-DIS**

To Whom It May Concern:

Please be advised that the undersigned are aware of the discrepancy between our consultant, Nathan Thompson, Peloton, Land Solutions, and the City of Waxahachie and Ellis County's expert, Mr. Gary Hendricks, regarding the ultimate size of the wastewater treatment plant to be constructed to serve Lakeview Municipal Utility Districts Nos. 1, 2, and 3 ("MUDs") and the projected cost thereof (approximately \$28,080,000). We are also aware that the sales price of homes in the MUDs has increased materially between 2020 and today. Lastly, we are aware that the cost of the wastewater treatment plant will have to be funded by ourselves, as developer, and then reimbursed by the MUDs within the constraints provided under the rules of the TCEQ.


Please be advised that we are aware of the limits on the amounts to be reimbursed by the MUDs and still believe creation of each of the MUDs is feasible, practicable, necessary and a benefit to the land to be included in each of the MUDs. We believe the additional costs

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projected by Mr. Hendricks, if they come to fruition, can be covered by the increased value of the homes and the money we will recover from increased lot prices.

Very truly yours,



Brian Edward Finch, Individually

Finch FP, Ltd.

By: Finch FP Management Company, LLC
Its General Partner

Name: 

Brian Edward Finch, President

Date: 5/23/2023

BEF/bb