

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

May 4, 2023

Kayla Murray
Emily Rogers
Eric Allmon

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:

Please find attached a Proposal for Decision in this case. Any party may, within 20 days after the date of issuance of the PFD, file exceptions or briefs. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the PFD. 30 Tex. Admin. Code § 80.257.

This matter has been designated TCEQ Docket No. 2021-0271-DIS (lead docket); SOAH Docket No. 582-22-0259 (lead docket). 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 and the ALJ shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> 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.

CC: Service List

SOAH Docket Nos. 582-22-0259 (Lead Docket),
582-22-0260, and 582-22-0261 Suffix: TCEQ
TCEQ Docket Nos. 2021-0571-DIS, 2021-0572-DIS, and 2021-0573-DIS

**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**APPLICATIONS FOR CREATION OF LAKEVIEW MUNICIPAL UTILITY
DISTRICT NOS. 2, 1, AND 3 OF ELLIS COUNTY**

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DISTRICT NOS. 2, 1, AND 3 OF ELLIS COUNTY**

PROPOSAL FOR DECISION

I. INTRODUCTION

On October 26, 2020, Finch FP, Ltd. and Brian Edward Finch (collectively, “Applicant”) filed with the Texas Commission on Environmental Quality (TCEQ or Commission) petitions for the creation (Petitions) of Lakeview Municipal Utility District (MUD) Nos. 1, 2, and 3 (Districts).

MUD No. 1 would contain 362.037 acres located within Ellis County, is located approximately 5.2 miles northwest of the City of Waxahachie’s (City)

downtown, and is entirely within the City's extraterritorial jurisdiction (ETJ).¹ MUD No. 2 would contain 209.355 acres located within Ellis County, is located 5.4 miles northwest of downtown City, and is entirely within the City's ETJ.² MUD No. 3 would contain 135.745 acres located within Ellis County, is located approximately 5.45 miles northwest of downtown City, and is entirely within the City's ETJ.³

TCEQ's Executive Director (ED) and the Office of Public Interest Counsel (OPIC) recommend that the Petitions be granted. The City, Ellis County (County), and several individual landowners protest the creation of the Districts.

Based on the evidence presented and the applicable law, the ALJs conclude that Applicant did not meet its burden of proving the Districts' creation meets all applicable requirements. Accordingly, the ALJs recommend that the Commission deny Applicant's petitions for creation of Lakeview MUD Nos. 1, 2, and 3. In the alternative, the ALJ recommends that the Applicant be instructed to provide updated cost estimates, including reasonable wastewater treatment plant costs.

II. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this case; therefore, those matters are addressed solely in the findings of fact and conclusions of law.

¹ ED Ex. 3 at 16.

² ED Ex. 3 at 26.

³ ED Ex. 3 at 36.

Finch FP, Ltd. filed a petition for the creation of Lakeview MUD No. 1.⁴ Finch FP, Ltd. and Brian Edward Finch filed a petition for creation of Lakeview MUD No. 2.⁵ Finch FP, Ltd. filed a petition for creation of Lakeview MUD No. 3.⁶ All three petitions were filed with TCEQ on October 26, 2020, and were declared administratively complete on November 13, 2020. On March 24 and 31, 2021, notice of the District Petitions was published in the *Waxahachie Daily Light*. On March 17, 2021, the County Clerk posted the notice of the bulletin board used for posting legal notices in the County. TCEQ received timely hearing requests, and the Commissioners determined that a number of requestors were affected persons and referred this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

At the preliminary hearing for the creation of MUD No. 2 on November 1, 2021, Applicant, the ED, OPIC, the City, the County, Vickie Dillow, Michelle Hillery, Sharon and John Wesley Tryon, Tammy and Greg Wimbish, Jackie and Carlton Milam, James and Melinda Kocian, and Caroline Taylor were named as parties.

At the preliminary hearing for the creation of MUD No. 1 on November 8, 2021, Applicant, ED, OPIC, the City, the County, Vickie Dillow, Michelle Hillery, Sharon and John Wesley Tryon, Tammy and Greg Wimbish,

⁴ The petition for creation of Lakeview MUD No. 1 is associated with SOAH Docket No. 582-22-0260 and TCEQ Docket No. 2021-0572-DIS.

⁵ The petition for creation of Lakeview MUD No. 2 is associated with SOAH Docket No. 582-22-0259 (lead docket) and TCEQ Docket No. 2021-0571-DIS.

⁶ The petition for creation of Lakeview MUD No. 3 is associated with SOAH Docket No. 582-22-0261 and TCEQ Docket No. 2021-0573-DIS.

Jackie and Carlton Milam, James and Melinda Kocian, Caroline Taylor, Betty and Robert Arwine, Clay Allison, Jim and Mary Kocian, Richard Carrol, and Sherry Radanovic were named as parties.

At the preliminary hearing for the creation of MUD No. 3 on November 15, 2021, Applicant, ED, OPIC, the City, the County, Jackie and Carlton Milam, Richard and Robin Carroll, Sharon and John Wesley Tryon, Sherry Radanovic, Betty and Robert Arwine, James and Melinda Kocian, Jim and Mary Kocian, Vickie and Mike Dillow, Caroline and Christopher Taylor, Clay Allison, Jackie Milam, Tammy and Greg Wimbish, Michelle Hillery, Thomas and Melissa Baker, Jon Hammond, Jerry and Teresa Ann Fisk, Joseph Brooks, and Bart and Lisa Dooley were named as parties.

By SOAH Order No. 3 on December 20, 2021, these three cases were consolidated, with the parties remaining designated only for the application(s) for which they were originally named a party. SOAH Docket No. 582-22-0259 (MUD No. 2) was designated the lead docket of this consolidated matter.

On December 6-7, 2022, Administrative Law Judges (ALJs) Linda Brite and Megan Johnson of SOAH convened a hearing on the merits via videoconference. Applicant was represented by attorney Natalie Scott. The City and County were represented by attorney Emily Rogers. Individual Protestants⁷ were represented by

⁷ “Individual Protestants” are comprised of Sharon and John Wesley Tryon, Thomas and Melissa Baker, Jerry and Teresa Ann Fisk, Bart and Lisa Dooley, Betty and Robert Arwine, Jim and Mary Kocian, Sherry Radanovic, Tammy and Greg Wimbish, Michelle Hillery, Jon and Miriam Hammond, Joseph and Cynthia Brooks, Clay and Sheila Allison, Richard and Robin Carroll, Vickie and Mike Dillow, Jackie and Carlton Milam, Caroline and Christopher Taylor, and James and Melinda Kocian.

attorney Eric Allmon. The ED was represented by attorney Kayla Murray. OPIC was represented by attorney Sheldon Wayne. The record closed after submission of written closing arguments on March 9, 2023.⁸

III. APPLICABLE LAW

The purposes of a MUD include providing water distribution, wastewater collection, and/or drainage facilities.⁹ A MUD may be created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59 of the Texas Constitution, Chapters 49 and 54 of the Texas Water Code, 30 Texas Administrative Code chapter 293, and the procedural rules of TCEQ.

Generally, no land within the corporate limits of a city or within the extraterritorial jurisdiction of a city shall be included in a district unless the city grants its written consent. A request for consent must be signed by a majority in value of the holders of title of the land within the proposed district as indicated by the county tax rolls and shall include a description of the land in metes and bounds or lot and block number, state the general nature of the work proposed to be done, the necessity for the work, and the estimated cost of the project. If the city fails to provide its consent within 90 days after receipt of the written request, a majority of the electors in the area proposed to be included in the district or the owner or owners of 50 percent or more of the land to be included may request the city to

⁸ Although SOAH Order No. 7 required Applicant, the City and County, and Individual Protestants to file proposed findings of fact and conclusions of law, only Individual Protestants filed them.

⁹ Tex. Water Code § 54.012.

make available to the land the water or sanitary sewer service contemplated to be provided by the district. If the city and the requestors fail to execute a mutually agreeable contract providing for the water or sanitary sewer service requested within 120 days after receipt of the petition, the requestors may petition the Commission for creation of the district.¹⁰

The Commission shall grant the petition if it conforms to the requirements of Texas Water Code section 54.015 and the project is feasible, practicable, necessary, and further, would be a benefit to the land to be included in the district.¹¹ The Commission shall deny the petition if it does not conform to the requirements of Texas Water Code section 54.015 or the project is not feasible, practicable, necessary, or a benefit to the land in the district.¹²

In determining if the project is feasible, practicable, necessary, and beneficial to the land included in the district, the Commission shall consider:

- (1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;
- (2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and
- (3) whether or not the district and its system and subsequent development within the district will have an unreasonable effect on the following:
 - (A) land elevation;

¹⁰ Tex. Water Code § 54.016(a)-(d); Tex. Gov't Code § 42.042(a)-(f).

¹¹ Tex. Water Code § 54.021(a).

¹² Tex. Water Code § 54.021(c), (d).

- (B) subsidence;
- (C) groundwater level within the region;
- (D) recharge capability of a groundwater source;
- (E) natural run-off rates and drainage;
- (F) water quality; and
- (G) total tax assessments on all land located within a district.¹³

Applicant may petition the Commission to acquire the power to design, acquire, construct, finance, issue bonds for, operate, maintain, and convey to the state, county, or municipality for operation and maintenance, a road or any improvement in aid of the road.¹⁴ If the petition includes a request for road powers, it must include:

- evidence that the municipality in whose corporate limits or extraterritorial jurisdiction that any part of the district is located has consented to the creation of the district with road powers or has consented to the district having road powers subsequent to creation, or that the provisions of Texas Water Code § 54.016 have been followed;
- a preliminary layout showing the proposed location for all road facilities to be constructed, acquired, or improved by the district;
- a cost analysis and detailed cost estimate of the proposed road facilities to be designed, acquired, constructed, operated, maintained, or improved by the district with a statement of the amount of bonds estimated to be necessary to finance the proposed design, acquisition, construction, operation, maintenance, and improvement; and

¹³ Tex. Water Code § 54.021(b).

¹⁴ Tex. Water Code § 5.234(a).

- a narrative statement that will analyze the effect of the proposed facilities upon the district's financial condition and will demonstrate that the proposed construction, acquisition, and improvement is financially and economically feasible for the district.¹⁵

Applicant carries the burden of proof by a preponderance of the evidence.¹⁶

IV. DISCUSSION

Applicant had 57 exhibits admitted and presented the testimony of Brian Finch; Nathaniel V. Thompson, P.E.; Cassie Gibson; and Ryan Nesmith. The City and County had 18 exhibits admitted and presented the testimony of Gary Hendricks, P.E.; Tim Osting, P.E.; and Michael Scott. Individual Protestants had 13 exhibits admitted and presented the testimony of John Wesley Tryon, Clay Allison, and Callie Taylor. The ED had four exhibits admitted and presented the testimony of Daniel Harrison.

A. REQUEST FOR SERVICE

As an initial matter, Applicant must demonstrate that it complied with the requirements of Texas Water Code section 54.016 and 30 Texas Administrative Code section 293.11(a)(2) to submit a request for service where, as here, a proposed municipal utility district would be located within the extraterritorial jurisdiction of a city. Applicant was required to submit a request to the City asking

¹⁵ 30 Tex. Admin. Code §§ 293.11(d)(11), .202(b), (a)(4), (7)-(9).

¹⁶ 30 Tex. Admin. Code § 80.17(a).

it to consent to the creation of the Districts.¹⁷ Then, if the City did not grant permission for creation of the Districts within 90 days, the Applicant could submit a request for water or sewer service to the City.¹⁸ If the City and the Applicant fail to execute a mutual agreeable contract providing for the water or sewer service within 120 days, Applicant may petition TCEQ for district creation.¹⁹

1. Evidence and Arguments

Protestants²⁰ argue that Applicant failed to comply with these statutes because it unreasonably refused to negotiate with the City for any contract for the water and wastewater services to the Districts. The Protestants posit that Applicant admits it did not attempt to negotiate with the City during the 120-day timeframe.²¹ Protestants also argue that Applicant's petitions provided no information to assess whether the provision of services was feasible and, as such, the City neither granted nor denied consent to the creation of the Districts.²² The City and County contend that they would need information about the proposed development, such as a lot plan demonstrating proposed density, a utilities plan, a description of uses, phasing of the development, information regarding the timing of service, and other similar information, to determine whether the provision of service would be feasible.²³ Finally, Protestants allege that Applicant (through "a

¹⁷ Tex. Water Code § 54.016(a).

¹⁸ Tex. Water Code § 54.016(b)-(c).

¹⁹ Tex. Water Code § 54.016(c)-(d).

²⁰ In their closing argument, the Individual Protestants adopted the arguments made by the City and County on this issue.

²¹ Transcript (Tr.) at 33-34.

²² City and County (CC) Ex. 1 at 4-5.

²³ CC Ex. 1 at 4-5.

representative”) stated that it would not agree to any service by the City without the creation of the Districts, thereby admitting it had no intention of negotiating a contract in good faith.²⁴ However, City Manager Michael Scott testified that the City was unwilling to provide sewer service to the development at its proposed density but that the City would be willing to serve the development if it were constructed at a “reasonable” density.²⁵

Applicant maintains that it met the requirements relating to a request for service. Applicant delivered its request for consent to the creation of the Districts to the City on February 14, 2020, and did not receive a written response.²⁶ Applicant understood this to mean that the City opposed the Districts.²⁷ Applicant then petitioned the City for water and sewer services on June 2, 2020, and did not receive a written response.²⁸ In addition, Applicant is of the understanding that the City is unwilling to provide these services.²⁹ Thereafter, Applicant filed petitions with the TCEQ.³⁰

The ED’s position is that the Applicant submitted petitions to the City pursuant to Local Government Code section 42.042 and Texas Water Code section 54.016, requesting the City’s consent to the creation of the Districts. After more than 90 days without consent, Applicant submitted petitions to the City to

²⁴ CC Ex. 1 at 6.

²⁵ Tr. at 199, 201, 203-04.

²⁶ App. Ex. 14 at 5-6; Tr. at 198-99; App. Exs. 1, 28, 44.

²⁷ App. Ex. 14 at 6-7.

²⁸ App. Ex. 14 at 6; App. Exs. 2, 29, 45.

²⁹ Tr. at 55.

³⁰ App. Ex. 14 at 7.

provide water and sewer services to the District.³¹ Then, the 120-day period for reaching a mutually-agreeable contract expired without contracts for service (as confirmed by the application materials provided to the ED).³² The ED therefore concluded that pursuant to Texas Water Code section 54.016(d), the failure to execute such an agreement constituted authorization for Applicant to initiate proceedings with the TCEQ to include the land within the proposed Districts.³³ Similarly, OPIC concluded that the greater weight of the evidence shows that Applicant complied with the statutory and rule requirements.

2. ALJs' Analysis

The ALJs conclude that Applicant has met its burden with respect to this issue. Applicants submitted the petitions for the creation of the Districts and then for water and sewer service to the City—this is not disputed. The dispute arises around whether the Applicant negotiated (or even would negotiate, in good faith or otherwise) with the City for any contract or provided sufficient information (or any, according to Protestants) to assess whether the provision of services was feasible. The ALJs find no statutory or rule guidance regarding the burden or duty on any one party to negotiate for a contract under these circumstances. The Applicant submitted the required petitions and requests to the City and received no response to either set of petitions. Furthermore, if the City required more information to assess feasibility, it could have requested more information from Applicant during the 120-day period provided for in the statute. In addition,

³¹ ED Ex. 3 at 16.

³² ED Ex. 3 at 17.

³³ ED Closing Argument at 2; Tr. at 293-94.

according to the City Manager, the City is not willing to provide the development with service at the current proposed density. Therefore, the preponderance of the evidence demonstrates that Applicant complied with the statutory and rule requirements to submit a request for service in accordance with Texas Water Code section 54.016 and 30 Texas Administrative Code section 293.11(a)(2).

B. FEASIBLE, PRACTICABLE, NECESSARY, AND WOULD BE A BENEFIT TO THE LAND

1. Availability of Comparable Service from Other Systems

In determining whether a project is feasible, practicable, necessary, and would be a benefit to the land included in the district, the Commission shall consider the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities.³⁴ A creation application shall contain an investigation and evaluation of the availability of comparable service from other systems, including, but not limited to, water districts, municipalities, and regional authorities.³⁵

a) Evidence and Arguments

The ED outlined in its technical memoranda that the Districts' land is within Sardis-Lone Elm Water Supply Corporation's (Sardis) water Certificate of Convenience and Necessity (CCN) and the City's wastewater service area, but the City did not respond to water or wastewater requests. As such, Sardis will provide

³⁴ Tex. Water Code § 54.021(b)(1).

³⁵ 30 Tex. Admin. Code § 293.11(d)(5)(G).

water service once the infrastructure is built, and the Districts will provide wastewater treatment from facilities to be jointly built amongst the three Districts.³⁶

Mr. Thompson, on behalf of Applicant, testified that no other entity was willing to construct or fund any of the public water, sewer, or drainage services.³⁷ Mr. Finch testified that Applicant had discussions with the City regarding provision of water and sewer service to the Districts; however, as a condition of provision, the City proposed the land be annexed into the corporate limits of the City, be developed with less density, and that the wastewater service be provided by connecting to a City sewer line located approximately two miles from the property.³⁸ Applicant proffers that water service will be provided by Sardis pursuant to an Interlocal Government Co-Operation Agreement entered into between Sardis and Applicant that will be assigned to the Districts upon creation.³⁹

The City and County first contend that Applicant did not meet its burden on this issue because it did not sufficiently investigate and evaluate the availability of comparable systems. Second, the City states that it has comparable wastewater services available.⁴⁰ The City has sewer facilities approximately 2.2 miles from the proposed development with adequate capacity (after some upgrades) to provide

³⁶ ED Ex. 3 at Bates 18, 28, 38.

³⁷ App. Ex. 15 at 11.

³⁸ App. Ex. 14 at 7.

³⁹ App. Ex. 19.

⁴⁰ CC Ex. 3 Bates 23.

service.⁴¹ The Districts are in the City’s Wastewater Master Plan and the City intends to serve the area through its planned Long Branch Trunk Sewer and the extension of the Waxahachie Creek Trunk Sewer.⁴² Moreover, the City confirmed it has planned to provide wastewater services to the proposed Districts, has wastewater facilities existing or planned for it, and has capacity to serve the proposed Districts in all phases.⁴³ The provision of these services would require some improvements, including a sewer line extension and expansion of a lift station.⁴⁴ Mr. Scott, however, testified that a representative for Applicant stated it would not agree to any service by the City without the creation of the Districts.⁴⁵ Finally, the City and County maintain that comparable water service is also available because Sardis is intending to provide retail water service to customers within the Districts and is not requiring Applicant to create the Districts in order to provide that service.⁴⁶

Individual Protestants maintain that creation of the Districts is unnecessary because both water and wastewater services are available from alternate providers. Moreover, Individual Protestants contend that Applicant offered no expert testimony or evidence that comparable water service is not available from another water system—a failure that would, they argue, justify finding Applicant has failed

⁴¹ CC Ex. 1 at Bates 9; CC Ex. 3 at Bates 31-32.

⁴² CC Ex. 3 at Bates 22.

⁴³ CC Ex. 1 at Bates 9-10; CC Ex. 3 at Bates 21-23.

⁴⁴ CC Ex. 3 at Bates 23. Mr. Hendricks testified that it would cost the Districts, in his estimation, approximately \$6,000,000 plus impact fees to connect to the City’s wastewater system but approximately \$50,000,000 to construct the wastewater treatment system and on-site improvements. CC Ex. 3 at Bates 33. He also acknowledged, however, that it would be impossible to know what the impact fees would be at this point. Tr. at 232.

⁴⁵ CC Ex. 1 at Bates 9.

⁴⁶ Tr. at 156-57.

to meet its burden of proof. Even so, Individual Protestants point out that the evidence demonstrates comparable water service is, in fact, available from Sardis—indeed, the Districts are wholly within Sardis’s CCN (which gives Sardis the exclusive right, capability, and obligation to provide water service within that area).⁴⁷ Individual Protestants argue that because Sardis is willing to provide water service to the area if the infrastructure is paid for by the developer, the creation of the Districts does not benefit the land and only serves to impose additional property taxes and a layer of government bureaucracy. The Individual Protestants also maintain that comparable wastewater service is available, as demonstrated by the City and County.

OPIC concluded that the Applicant met its burden with regard to this issue. OPIC determined that it is unclear from the record whether the City is willing to provide wastewater service to Applicant without conditioning the provision of service on annexation or placing density restrictions on the development. However, OPIC did find it significant that the City has no currently existing infrastructure to serve the development. Given both points above, it concluded that there is presently no comparable service available to the Districts. OPIC also notes that although the City took the position that Applicant did not provide it with enough information to respond to its requests for services, the City did not request more information or otherwise respond in writing to Applicant’s request.

⁴⁷ App. Ex. 17 at 88; App. Ex. 36 at 84; App. Ex. 52 at 99.

b) ALJs' Analysis

The ALJs conclude that Applicant has met its burden on this issue. As to water service, the Districts are within Sardis's CCN and, pursuant to Applicant's agreement with Sardis, it will provide water service to the Districts upon construction of the water system infrastructure. Because of the CCN, the City and County are unable to provide the Districts with water service at this time. As to wastewater service, there is no comparable service in existence presently. The City has no currently existing infrastructure to serve the development; to serve the Districts, a lift station would need to be upgraded and a sewer line would have to be extended. Moreover, during its discussions regarding provision of services with the Applicant, the City included conditions on any potential service through annexation requirements and density restrictions. Finally, the City failed to respond to the Applicant's petitions, and, therefore has not agreed to provide water or wastewater services.

2. Reasonableness of Projected Construction Costs, Tax Rates, and Water and Sewer Rates

In determining whether the project is feasible and practicable and if it is necessary and would be a benefit to the land included in the district, the Commission shall consider the reasonableness of projected project construction costs, tax rates, and water and sewer rates.⁴⁸

⁴⁸ Tex. Water Code § 54.021(b)(2).

a) Evidence and Argument

(i) Wastewater Treatment Plant Cost

Protestants⁴⁹ contend that Applicant has not established the reasonableness of projected construction costs, tax rates, and water and sewer rates. Protestants argue that the project wastewater treatment plant costs are significantly undervalued and unreasonable for the projected capacity needs of the Districts. Applicant estimates that the wastewater treatment facilities will cost approximately \$1,750,000, equating to \$1.51 per gallon for a 1.1 million gallons per day (MGD) plant.⁵⁰ However, Mr. Hendricks, a professional engineer specializing in municipal engineering and design of infrastructure projects in North Texas, testified that current construction cost of such facilities is between \$19.00 and \$24.00 per gallon to construct.⁵¹

Additionally, the actual capacity of the wastewater treatment plant needed to serve the Districts is approximately 1.56 MGD (rather than the 1.1 MGD indicated in Applicant's cost estimates) because the wastewater load of each District is: 0.602 MGD for MUD No. 1; 0.295 MGD for MUD No. 2; and 0.69 for MUD No. 3.⁵² Mr. Hendricks testified that the cost of a 1.56 MGD plant would cost

⁴⁹ In their closing argument, the Individual Protestants adopted the arguments made by the City and County on this issue.

⁵⁰ ED Ex. 4 at 71, 112, 152; CC Ex. 3 at Bates 25.

⁵¹ CC Ex. 3 at Bates 25.

⁵² ED Ex. 4 at 56, 96, 135; CC Ex. 3 at Bates 24-25. Although Mr. Hendricks revised his testimony to 1.59 MGD instead of 1.56 MGD, his cost estimate for the wastewater facilities is based on the slightly-lower capacity of 1.56 MGD. Tr. at 215. Applicant witness Mr. Thompson and ED witness Mr. Harrison confirmed that the sum of the estimated average flows from each District equaled 1.587 MGD. Tr. 139-41, 268-70.

between \$29,640,000 and \$37,440,000, rather than Applicant's cost estimate of \$1,750,000. Therefore, Protestants contend that Applicant grossly underestimated its wastewater treatment plant construction costs by \$27,890,000 to \$35,690,000, which is a "15 to 20 times error" that bears on the feasibility of the proposed project and tax rate.⁵³

Applicant's construction cost estimates are included in the Preliminary Engineering Reports (Reports) drafted by Mr. Thompson.⁵⁴ Mr. Thompson is a registered professional engineer with over 20 years' experience in land development.⁵⁵ Mr. Thompson acknowledged that the higher wastewater plant capacity and the more stringent treatment level will increase the cost of the wastewater treatment plant.⁵⁶ He stated that the costs were evaluated in October 2021 and have not been updated, despite a recent rise in construction costs, explaining that the Reports are preliminary in nature and expected to change over the 20 years it will take the development to reach final buildout.⁵⁷ According to Mr. Thompson, phasing of the development, including the wastewater treatment plant, reduces up-front capital costs and increases the project's feasibility.⁵⁸

⁵³ Tr. at 224.

⁵⁴ App. Ex. 17 at 103-05, 108-09; App. Ex. 36 at 99-101, 104-05; App. Ex. 52 at 116-18, 121-22.

⁵⁵ App. Ex. 15 at 12.

⁵⁶ Tr. at 141-46 (Mr. Thompson stating that the draft wastewater permit includes more stringent final effluent limits than anticipated at the time Applicant's cost estimates were prepared).

⁵⁷ Tr. at 157, 172.

⁵⁸ Tr. at 173.

ED witness Mr. Harrison stated that the most reasonable explanation for the 1.59 versus 1.1 MGD discrepancy was that 1.1 MGD did not include any capacity for commercial use, so at TCEQ's request, Applicant increased its expected capacity to 1.59 MGD.⁵⁹ The ED did not independently verify whether Applicant's stated construction costs of its proposed wastewater treatment plant were correct.⁶⁰

(ii) Stormwater Facilities Cost

Protestants also contend that Applicant's Reports failed to adequately consider the costs of the stormwater drainage system. The Reports state that all of the stormwater from the proposed development will be directed to Long Branch Creek through a combination of curb and gutter inlets, detention ponds, and stormwater drainage pipes.⁶¹ Mr. Hendricks testified that stormwater facilities, including necessary off-site drainage facilities, are typically included in cost modeling for a district and can have a significant impact to the financial analysis of a district; however, Applicants' Reports do not show any detention or off-site drainage facilities and do not provide cost estimates for those facilities.⁶²

The ED posits that the improvements' costs appear reasonable. Mr. Harrison testified that construction costs appear to be reasonable for similar projects and the tax rates and water and sewer rates are comparable to other taxing

⁵⁹ Tr. at 281-82.

⁶⁰ Tr. at 265.

⁶¹ App. Ex. 17 at 91; App. Ex. 36 at 87; App. Ex. 52 at 104.

⁶² CC Ex. 3 at Bates 29.

and service providers in the area. According to Mr. Harrison, the improvements appear to be reasonable based on the information submitted regarding the proposed residential development, roadways, water lines, wastewater lines, wastewater treatment plant, and drainage system in relation to similar districts.⁶³

(iii) Tax Rate

Protestants also argue that the wastewater rates proposed by Applicants are not reasonable and are over-recovering. Mr. Hendricks testified that the Reports show 10% of the \$1.00 tax rate is to be utilized for maintenance and operation (M&O) cost, an unknown portion of which will be utilized for the wastewater system.⁶⁴ Mr. Hendricks opined that if 25% of the MUD tax M&O revenue was dedicated to the wastewater system, the total annual M&O revenue would top \$4.4 million, which significantly exceeds the normal cost to maintain and operate a 1.5 MGD wastewater plant.⁶⁵

Mr. Hendricks testified that the Districts' proposed tax rate of \$1.00 per \$100 valuation is not reasonable because it does not cover the cost of utilities and would only support \$69,896,000 total utility debt service.⁶⁶ According to Mr. Hendricks, the total utility cost will be at least \$130,000,000 considering the true cost of a wastewater treatment plant, and the resulting tax rates would need to be at least \$1.67 per \$100 valuation to cover the cost of the utilities.⁶⁷

⁶³ ED Ex. 1 at Bates 8-9.

⁶⁴ CC Ex. 3 at Bates 27.

⁶⁵ CC Ex. 3 at 27-28.

⁶⁶ CC Ex. 3 at Bates 26 (assuming 98% collection rates and 90% of the tax revenue available for debt service).

⁶⁷ CC Ex. 3 at Bates 26; *see* CC Ex. 11.

Applicant posits that the tax rates are reasonable. Mr. Thompson and Mr. Harrison testified that the Districts' tax rates, construction costs, and water and wastewater rates appear reasonable.⁶⁸ Mr. Thompson reviewed the maximum tax rate allowable for a MUD in Ellis County and calculated the rate required to repay the total debt service on the bonds the MUDs plan to issue to finance its improvements. Mr. Thompson calculated the project debt service tax rate to be \$0.90 per \$100 of assessed valuation, with a proposed maintenance tax rate of \$0.10, for a projected total tax rate for each MUD of \$1.00 per \$100 of assessed valuation.⁶⁹ This combined projected tax rate complies with the TCEQ requirement that it must not exceed \$1.00 in Ellis County.⁷⁰ Ms. Gibson and Mr. Nesmith testified that upon each MUD levying a \$1.00 tax rate, the total overlapping tax rate on land within the Districts will range from \$2.75 to \$2.85 per \$100 valuation, which is comparable to the common tax rates in other districts in North Texas, with the goal of keeping the overlapping tax rate below \$3.00 per \$100 valuation.⁷¹ Because the Districts cannot have an ad valorem tax rate above \$1.00 per \$100 valuation, any facilities costing more than what the tax rate can pay for will be covered by the developer.⁷²

City and County witness Mr. Hendricks agreed that the developer pays all upfront costs of the capital improvements, including the cost of the wastewater

⁶⁸ App. Ex. 15 at 12; ED Ex. 1 at 5.

⁶⁹ App. Ex. 15 at 13.

⁷⁰ 30 Tex. Admin. Code § 293.59(k)(3)(C).

⁷¹ App. Ex. 23 at 5; App. Ex. 20 at 4; Tr. at 86 (overlapping tax entities include the County, the school district, and any emergency services).

⁷² Tr. at 142.

treatment plant, and can only be reimbursed at a maximum tax rate of \$1.00 per \$100 valuation as set by TCEQ rules.⁷³

Mr. Harrison explained, regardless of the cost of the wastewater treatment plant (and other utilities), the developer will only be reimbursed for the amount that can be collected up to the \$1.00 tax rate cap, and, additionally, each bond will be evaluated on its own merits by TCEQ for economic feasibility before issuance.⁷⁴ Mr. Harrison stated that the tax rates for each particular bond issue would be reviewed and justified on their own economic feasibility merits prior to issuance of any bonds by the Districts.⁷⁵ Mr. Harrison reviewed the Reports; market studies; proposed water, wastewater, drainage, and road facilities; a combined projected tax rate of \$1.00 per \$100 assessed value; the proposed District obtaining a 4.5% bond coupon interest rate; and other supporting data, and determined the proposed Districts are considered feasible under 30 Texas Administrative Code section 293.59.⁷⁶

OPIC posits that the projected construction costs, tax rates, and water and sewer rates are reasonable. Although OPIC finds the rise in projected construction cost of the wastewater treatment plant troubling, OPIC is satisfied that the developer will pay all up-front utility costs and can only be reimbursed up to what is allowed under the \$1.00 maximum tax rate.

⁷³ Tr. at 227.

⁷⁴ Tr. at 287.

⁷⁵ ED. Ex. 1 at Bates 8-9.

⁷⁶ ED Ex. 1 at Bates 7-8.

(iv) Water and Sewer Rates

Protestants also argue that the wastewater rates proposed by Applicants are not reasonable and are over-recovering. Mr. Hendricks testified that the Reports show 10% of the \$1.00 tax rate is to be utilized for M&O cost, an unknown portion of which will be utilized for the wastewater system.⁷⁷ Mr. Hendricks opined that if 25% of the MUD tax M&O revenue was dedicated to the wastewater system, the total annual M&O revenue would top \$4.4 million, which significantly exceeds the normal cost to maintain and operate a 1.5 MGD wastewater plant.⁷⁸

Applicant contends the proposed water and sewer rates are reasonable. The water rates in the Reports reflect the water rates that customers within the Districts will be charged by Sardis.⁷⁹ The wastewater rates in the Reports indicate that the customers in each District will be charged a monthly flat rate of \$53 for up to and including 10,000 gallons of water used and a monthly flat rate of \$57 for water usage over \$10,000 gallons of water used.⁸⁰

b) ALJs' Analysis

The reasonableness of projected construction costs, tax rates, and water and sewer rates must be considered in determining whether the project is feasible and

⁷⁷ CC Ex. 3 at Bates 27.

⁷⁸ CC Ex. 3 at 27-28.

⁷⁹ App. Ex. 17 at 96; App. Ex. 36 at 92; App. Ex. 52 at 109; App. Ex. 19.

⁸⁰ App. Ex. 17 at 96-97; App. Ex. 36 at 92-93; App. Ex. 52 at 109-10.

practicable and if it is necessary and would be a benefit to the land included in the district.⁸¹

Protestants argued that the Reports do not provide cost estimates for any stormwater detention or off-site drainage facilities. However, Applicant's Reports include stormwater costs in the amounts of \$7,757,000 for MUD No. 1; \$5,380,000 for MUD No. 2; and \$2,684,000 for MUD No. 3.⁸² Although the record is unclear as to what exact stormwater facilities are covered by those estimates, the evidence establishes that Applicant's stormwater cost estimates are reasonable.

Protestants primarily challenge the construction costs of the proposed wastewater treatment plant, alleging that the costs were underestimated by a significant degree. Mr. Hendricks credibly testified that the low-end cost estimate for a 1.56 MGD wastewater treatment plant was \$29,640,000, instead of Applicant's estimated cost of \$1,750,000 for a 1.10 MGD wastewater treatment plant.⁸³ Applicant witness Mr. Thompson confirmed that the sum of the estimated average flows from each District equaled 1.587 MGD. Mr. Hendricks's cost estimate for the 1.56 MGD wastewater treatment plant is more than 15 times Applicant's cost estimate in the Reports, which he attributes to the higher construction cost (\$19.00 per gallon versus \$1.51 per gallon) and higher capacity of the plant (1.56 MGD versus 1.1 MGD).⁸⁴ Applicant presented no competing cost

⁸¹ Tex. Water Code § 54.021(b)(2).

⁸² App. Ex. 36 at 99; App. Ex. 17 at 103; App. Ex. 52 at 116.

⁸³ CC Ex. 3 at Bates 25.

⁸⁴ $\$29,640,000 / \$1,750,000 = 16.94$.

estimates that accounted for the increased costs Mr. Hendricks referenced. Moreover, incorporating Mr. Hendricks's minimum estimated cost increase of \$27,890,000 into Applicant's cost estimates would increase the total net project cost of the three MUDs by 23.14%.⁸⁵

The statutory requirement that the Commission consider the reasonableness of projected construction costs must bear some weight separate from consideration of the tax rates on the landowners, which are limited by TCEQ rule. The reasonableness of cost estimates remains important because if the developer vastly underestimates the construction costs, it must pay the difference; and if the developer runs out of money, there is a risk that a development could remain partially built with no services. An underestimation of the wastewater treatment plant cost to this magnitude is unreasonable. Based on the significant discrepancy between wastewater treatment cost estimates, the ALJs find that insufficient evidence was presented to establish that Applicant's construction costs are reasonable.

The record establishes that the developer will pay all up-front utility costs and can only be reimbursed up to what is allowed under the \$1.00 maximum tax rate. Based on compliance with TCEQ's rule, the ALJs find that the tax rates will be reasonable. The preponderance of evidence establishes that the proposed water and sewer rates are reasonable; but the record is unclear on how or whether the

⁸⁵ $\$29,640,000 - \$1,750,000 = \$27,890,000$ cost increase. $\$27,890,000 / (\$56,404,810 + \$37,302,590 + \$26,824,130$ net project costs) = 23.14% increase in total net project costs. ED Ex. 4 at 69, 110, 150.

sewer rates would change based on the increased cost of the wastewater treatment plant.

Applicant met its burden to show that its tax rates and water and sewer rates were reasonable. However, Applicant failed to establish that the projected construction costs were reasonable.

3. Effect on Groundwater Levels and Recharge Within the Region

In determining whether a project is feasible, practicable, necessary, and would be a benefit to the land included in the district, the Commission shall consider whether the district and its system and subsequent development within the district will have an unreasonable effect on groundwater levels within the region and recharge capability of a groundwater source.⁸⁶

a) Evidence and Argument

Applicant asserts that because the primary source of water to serve the land in the Districts will be surface water, supplying of water to serve the development will have no effect on groundwater levels.⁸⁷ The proposed development consists of mostly single-family residential lots that are 40, 50, and 60 feet wide. According to Applicant, the resulting impervious cover will not have any greater effect on groundwater levels or recharge capacity of groundwater in the region than any

⁸⁶ Tex. Water Code § 54.021(b)(3)(C)-(D).

⁸⁷ App. Ex. 15 at 17; App. Ex. 17 at 8, 19; App. Ex. 36 at 8, 19; App. Ex. 52 at 8, 19.

other typical single-family development.⁸⁸ Therefore, Applicant posits that the Districts’ systems and development will not have an unreasonable effect on groundwater levels or recharge in the region.⁸⁹

Protestants contend that the Reports submitted with Applicant’s Petitions state that the Districts will obtain treated water from Sardis.⁹⁰ The Reports state that the Districts “will utilize surface water and [do] not anticipate using groundwater” and “the [Districts do] not anticipate any impact on recharge capabilities.”⁹¹ However, Sardis’s water supply sources include groundwater from the Trinity and Woodbrine Aquifers.⁹² Protestants point out that the Applicant did not conduct an analysis to determine what impact the Districts and development would have on groundwater levels, given the fact that Sardis relies on groundwater as a source for its water supply.⁹³

The ED determined that groundwater use is not expected, because the Districts will obtain their water supply from surface water sources.⁹⁴ The ED posits that there is no evidence in the record that groundwater levels, groundwater recharge capacity, and land subsidence will be impact by development of the proposed Districts.

⁸⁸ App. Ex. 17 at 19; App. Ex. 36 at 19; App. Ex. 52 at 19.

⁸⁹ See ED Ex. 1 at Bates 10.

⁹⁰ ED Ex. 4 at 65, 106, 146.

⁹¹ App. Ex. 17 at 19; App. Ex. 36 at 19; App. Ex. 52 at 19; see ED. Ex. 4 at 65, 106, 146.

⁹² Individual Protestants (IP) Ex. 1.

⁹³ Tr. at 151.

⁹⁴ ED Ex. 3 at 19, 29, 39.

OPIIC noted that there was minimal evidence presented on this issue but ultimately determined that Applicant carried its burden of showing that the proposed Districts and their subsequent development will not have an unreasonable effect on groundwater levels and recharge within the region.

b) ALJs' Analysis

Protestants suggest that the Districts *may* use groundwater sources because one of Sardis's supply sources is groundwater. Protestants offer no evidence regarding what amount of water, if any, serving the Districts would be from groundwater. Applicant represents that none of the water serving the Districts would be groundwater. The generalized statement that Sardis uses groundwater as one of its sources does not outweigh Applicant's representation that the water specifically serving the proposed Districts would be surface water. The preponderance of the evidence establishes that the Districts will use surface water rather than groundwater as its water supply source. Therefore, the ALJs find that the proposed Districts and subsequent development will not have an unreasonable effect on groundwater levels and recharge capability.

4. Effect on Natural Run-off Rates and Drainage

In determining whether a project is feasible, practicable, necessary, and would be a benefit to the land included in the district, the Commission shall consider whether the district and its system and subsequent development within the district will have an unreasonable effect on natural run-off rates and drainage.⁹⁵

⁹⁵ Tex. Water Code § 54.021(b)(3)(E).

a) Evidence and Argument

The land in the Districts is intended to be developed as a typical single-family residential development, served by storm sewers, drainage ditches, and if required, detention facilities.⁹⁶ Mr. Thompson, a professional engineer experienced in land development, testified that the development will not have an unreasonable effect on drainage or natural run-off rates.⁹⁷ Mr. Thompson's Reports reflect that the storm sewer and drainage system will be constructed in accordance with design criteria established by the City.⁹⁸ According to Mr. Thompson, the internal drainage system and other drainage improvements will conform to "generally acceptable practices for the design of stormwater systems in the Dallas/Fort Worth metropolitan area, including mitigation of increased stormwater runoff rates, if necessary."⁹⁹

The City and County argue that the Reports contain very little substantive information—only conclusory statements that there will be adequate drainage.¹⁰⁰ The Reports do not provide: (1) information about the natural run-off rates before and after development;¹⁰¹ (2) an evaluation of what the local regulations related to drainage will require;¹⁰² or (3) information about whether offsite drainage facilities

⁹⁶ App. Ex. 15 at 15, 17-18.

⁹⁷ App. Ex. 17 at 11, 19.

⁹⁸ App. Ex. 17 at 11; App. Ex. 35 at 11; App. Ex. 52 at 11.

⁹⁹ App. Ex. 15 at 17-18

¹⁰⁰ ED Ex. 4 at 65, 106, 146.

¹⁰¹ CC Ex. 3 at Bates 14; *see* ED Ex. 4 at 69, 110, 150 (Table 2) and 86, 126, 166 (Exhibit H).

¹⁰² Tr. at 148.

are required and what the associated costs may be.¹⁰³ Applicant's engineer stated it was their intention to maintain the drainage system on-site, but there are no identified detention facilities in the Reports.¹⁰⁴ The City and County contend that the inclusion of such facilities changes the analysis the costs of construction, which will impact debt, rates, and tax estimates.¹⁰⁵ The City and County argue that the ED's analysis is also conclusory by stating that the system will be constructed in accordance with City design criteria, without reviewing whether the proposed drainage facilities, capacities, and proposed costs were sufficient or correct to meet the City design standards.¹⁰⁶

The City and County assert that Applicant should have conducted a preliminary evaluation of downstream and offsite storm water conveyance capacity to determine whether downstream and offsite drainage improvements are required, whether offsite easements are necessary, and whether detention ponds are required to mitigate offsite storm water capacity, conveyance, land rights, and permit issues.¹⁰⁷ Mr. Hendricks noted the absence of detention areas or downstream improvements and the preliminary nature of the plans.¹⁰⁸ Mr. Hendricks testified that if Applicant proceeds with the storm drainage system layout and un-detained point discharges as shown in the Reports, run-off rates will likely increase, and the

¹⁰³ Tr. at 148; CC Ex. 3 at Bates 29.

¹⁰⁴ Tr. at 148-49; CC Ex. 3 at Bates 28-29.

¹⁰⁵ Tr. at 149; CC Ex. 3 at Bates 29.

¹⁰⁶ ED Ex. 3 at 19, 29, 39; Tr. at 266.

¹⁰⁷ CC Ex. 3 at Bates 29.

¹⁰⁸ CC Ex. 3 at Bates 29.

point discharges will be impactful on natural drainage courses on the adjacent Soil Conservation Services (SCS) lakes.¹⁰⁹

The City and County also contend that the drainage basins within Lakeview MUD Nos. 1 and 2 are partially within the South Grove Creek/Red Oak Creek basin.¹¹⁰ However, the Reports indicate that all of the storm water will be directed to Long Branch Creek.¹¹¹ Mr. Osting testified that as a result, Long Branch Creek will experience an increased flow from the proposed districts and subsequent development.¹¹² Neither Applicant or TCEQ assessed the impacts of redirecting the stormwater that would have gone to the South Grove Creek/Red Oak Creek basins to the Long Branch watershed.¹¹³ Mr. Osting testified that the development will change the natural course of drainage and opined that Applicant failed to provide TCEQ with adequate information about drainage impacts.¹¹⁴ The City and County posit that without these addressing the run-off rates and redirection of stormwater to Long Branch basin, it is not possible to assess the impacts of the proposed districts on natural run-off rates and drainage.¹¹⁵

Individual Protestants point out that the waterways downstream of the proposed Districts are sensitive to flooding. SCS Reservoir No. 10 is downstream of the area within proposed MUD No. 3 and is adjacent to property owned by

¹⁰⁹ CC Ex. 3 at Bates 30.

¹¹⁰ CC Ex. 13 at Bates 133; CC Ex. 18 at Bates 609.

¹¹¹ ED Ex. 4 at Bates 57, 97, 137.

¹¹² CC Ex. 13 at Bates 133.

¹¹³ CC Ex. 13 at Bates 133; Tr. at 147-48.

¹¹⁴ CC Ex. 13 at Bates 133.

¹¹⁵ CC Ex. 3 at Bates 30.

Sharon and Wesley Tryon.¹¹⁶ Mr. Tryon testified that under current conditions, rainfall events result in the reservoir level rising to inundate the lower six acres of their 11-acre property, and flooding on the property reaches depths of 12 to 15 feet.¹¹⁷ Mr. Tryon further stated that during current rainfall events, flooding results in accumulation of water over Black Champ Road to a depth of approximately three feet, and a consequent closure of that road for up to two months.¹¹⁸ Due to flooding, Mr. Tryon had to rebuild the fences on his property multiple times and clean up fallen trees, limbs, roadside trash, and discarded furniture washed onto his property.¹¹⁹ Similarly, Mr. Allison has also rebuilt fences and cleaned up debris as a result of flooding.¹²⁰ Ms. Taylor testified that there has been more frequent flooding in the last decade as development nearby has increased, and the water from the creek comes out of the 15- to 18-foot vertical banks into her backyard.¹²¹ Individual Protestants contend that Applicant has not demonstrated that this alteration of drainage patterns will not have an unreasonable effect on natural drainage patterns.

The ED determined that creation of the proposed Districts is expected to have minimal effects on run-off rates and drainage.¹²² Mr. Harrison acknowledged that the Applicant's engineering reports contain no design plans, but noted that they do contain a description of a system that includes detention ponds and

¹¹⁶ IP Ex. 100 at 3; CC Ex. 18.

¹¹⁷ IP Ex. 100 at 5-6.

¹¹⁸ IP Ex. 100 at 6; *see* IP Ex. 200 at 4.

¹¹⁹ IP Ex. 100 at 6.

¹²⁰ IP Ex. 200 at 4.

¹²¹ IP Ex. 300 at 4-5.

¹²² ED Ex. 4 at 19, 29, 39; Tr. at 149.

drainpipes to be constructed “in accordance with applicable design criteria established by the City.”¹²³ According to Mr. Harrison, stormwater drainage normally falls under the jurisdiction of local authorities; consequently, TCEQ considers it sufficient if an application contains a reference to review and approval by local jurisdictions such as the one in Applicant’s reports.¹²⁴ The ED asserts that it is not the role of the ED to review design standards that are ultimately under local jurisdiction. The proposed Districts will include curb and gutter streets, storm sewer lines, and detention ponds to maintain appropriate stormwater drainage.¹²⁵ According to the ED, adequate drainage will be provided via the proposed internal drainage system, detention, and major drainage improvements without adversely affecting surface water quality or adjacent landowners.

OPIC determined that although the Reports do not contain design plans or other detailed information with respect to its stormwater drainage system, Applicant has represented that its system will conform to the City’s applicable design criteria. OPIC asserts that this provides sufficient assurance that the system will perform in a comparable fashion to other systems under the City’s jurisdiction and will not have an unreasonable effect on runoff rates and drainage. OPIC points out that the City may evaluate any potential impacts of the proposed redirection of surface water away from Red Oak Creek and into Long Branch Creek when the Applicant submits the design of the stormwater drainage system to the City for approval.

¹²³ ED Ex. 1 at Bates 10.

¹²⁴ ED Ex. 1 at Bates 10.

¹²⁵ ED Ex. 3 at 19.

b) ALJs' Analysis

Although details were not available, the Districts' drainage systems will include storm sewers, drainage ditches, and if required, detention facilities. Applicant indicated that the stormwater, sewer, and drainage system will be constructed in accordance with design criteria established by the City. Because stormwater drainage falls under the jurisdiction of local authorities, TCEQ defers to the local authorities and Applicant's representation that it will comply with local requirements. The ALJs agree with the ED that requiring TCEQ to review and apply the City's drainage design criteria is not practical. Therefore, the ALJs find that the Districts, their systems, and subsequent development will not have an unreasonable effect on natural run-off rates and drainage.

5. Effect on Water Quality

In determining whether a project is feasible, practicable, necessary, and would be a benefit to the land included in the district, the Commission shall consider whether the district and its system and subsequent development within the district will have an unreasonable effect on water quality.¹²⁶

a) Evidence and Argument

Applicant posits that the development will occur after all plans for the water, sewer, drainage, and roads are approved by all the applicable governmental entities, including the City, the County, and TCEQ. According to Applicant, these regulatory entities ensure the development will not have an unreasonable effect on

¹²⁶ Tex. Water Code § 54.021(b)(3)(F).

water quality.¹²⁷ The development will be served by a wastewater treatment plant owned and operated by the Districts in accordance with a permit issued by the TCEQ. The plant will be operated by an operator licensed by TCEQ and will be inspected by TCEQ regularly.¹²⁸ Applicant contends that if the City had a valid concern regarding discharge from the plant affecting water quality, the City could agree to provide wastewater service to the development. Applicant argues that the development will not have an unreasonable effect on water quality.

The City and County argue that water quality could be impacted by the point source discharges from the proposed wastewater treatment plant for the development and the stormwater runoff from the development. The Reports simply state that the wastewater treatment plant will operate pursuant to a permit,¹²⁹ but do not include information about what treatment level will be required or whether the applicants considered the fact that the Long Branch Creek segment discharges into Waxahachie Creek, which is listed in the TCEQ 2022 Water Quality Assessment Report as an impaired water body.¹³⁰

Individual Protestants contend that the receiving waters downstream of the proposed Districts provide critical support for recreational, domestic, and wildlife uses. Mr. Tryon, Mr. Allison, and Ms. Taylor testified that their animals, including cattle, horses, and goats drink from the downstream waters.¹³¹ Mr. Allison and his

¹²⁷ App. Ex. 17 at 11, 19; App. Ex. 15 at 15, 17-18.

¹²⁸ App. Ex. 17 at 10, 20; App. Ex. 36 at 10, 20; App. Ex. 52 at 10, 20.

¹²⁹ ED Ex. 4 at Bates 66, 107, 147.

¹³⁰ CC Ex. 15 at Bates 197.

¹³¹ IP Ex. 100 at 2; IP Ex. 200 at 2; IP Ex. 300 at 4-5.

grandchildren catch bass and catfish in the downstream waters.¹³² Mr. Tryon explained that Canadian geese, cranes, egrets, indigenous ducks use SCS Reservoir No. 10, which is full of fish, frogs, and turtles.¹³³

Protestants contend that the ED's analysis does not address stormwater quality sufficiently, as no stormwater quality controls are proposed or were evaluated for the districts.¹³⁴ Mr. Osting testified that development would increase runoff of nutrients into the receiving waters, in part from non-point sources that are not regulated by the domestic wastewater permit.¹³⁵ According to Mr. Osting, without stormwater quality controls to maintain the water quality of runoff, an increase is expected in concentration of nitrate, phosphorus, sediment, and other constituents in runoff after the property within the proposed districts is fully developed, as compared to the existing open space condition.¹³⁶ He also stated that higher concentration of nutrients such as nitrogen and phosphorus in stormwater runoff will also promote the growth of nuisance vegetation and a reduction in dissolved oxygen in the receiving waters, which can negatively impact aquatic life.¹³⁷ The receiving water bodies, including Long Branch Creek and Waxahachie Creek and the two SCS reservoirs, are barely meeting state water quality standards. Mr. Osting opined that it is likely one or more of the receiving waters will violate the water quality standards more often and with more intensity than previously

¹³² IP Ex. 200 at 2.

¹³³ IP Ex. 100 at 4.

¹³⁴ Tr. at 255; CC Ex. 13 at Bates 139.

¹³⁵ CC Ex. 13 at Bates 133.

¹³⁶ CC Ex. 13 at Bates 134-35; *see* CC Ex. 16 at Bates 292, CC Ex. 17 at Bates 588.

¹³⁷ CC Ex. 13 at Bates 136, 138.

assessed.¹³⁸ Further, Applicant and TCEQ have not analyzed the cumulative effects of the proposed wastewater discharge and the increased stormwater runoff.¹³⁹ Mr. Osting testified that because the receiving water body, SCS Reservoir No. 10, is small, the additional nutrients will not be quickly assimilated.¹⁴⁰

The ED does not anticipate any adverse effects on water quality because wastewater treatment and disposal will be through the Districts' proposed wastewater treatment facility. The Districts' drainage will be subject to the local jurisdiction's review, and will not adversely affect surface water quality or adjacent landowners.¹⁴¹

OPIIC notes that the wastewater treatment plant will be required to meet TCEQ rules and requirements and will be subject to a separate permitting process, where effluent limits will be set to ensure that the plant's discharge will meet state water quality standards and ensure existing uses of downstream waterbodies are protected. OPIIC determined that Applicant sufficiently represented that the proposed Districts and subsequent development will not have an unreasonable effect on water quality.

¹³⁸ CC Ex. 13 at Bates 137.

¹³⁹ CC Ex. 13 at Bates 136-37. Upon cross-examination, Mr. Osting conceded that if the development's drainage system meets state water quality standards, as is proposed, it would not have an unreasonable effect on water quality. Tr. at 257.

¹⁴⁰ CC Ex. 13 at Bates 138.

¹⁴¹ ED Ex. 4 at 19, 29, 39; Tr. at 149.

b) ALJs' Analysis

The Districts propose to own and operate a wastewater treatment plant pursuant to a permit issued by TCEQ. The concerns raised by Protestants regarding the level of treatment required to protect a potentially impaired water body will be addressed by TCEQ while processing the wastewater permit application. Similarly, the recreational, domestic, and wildlife uses of the downstream waters are also addressed during the wastewater permitting process. Protestants' concerns regarding stormwater quality controls are again subject to local jurisdiction requirements, and Applicant has indicated it will construct its stormwater facilities in accordance with local requirements. Therefore, the ALJs find that the Districts, their systems, and subsequent development will not have an unreasonable effect on water quality.

6. Effect on Total Tax Assessments on All Land Located Within the Districts

In determining whether a project is feasible, practicable, necessary, and would be a benefit to the land included in the district, the Commission shall consider whether the district and its system and subsequent development within the district will have an unreasonable effect on total tax assessments on all land located within a district.¹⁴²

¹⁴² Tex. Water Code § 54.021(b)(3)(G).

The petitions for each of the Districts contemplate a District tax rate of \$1.00 per \$100 valuation, which falls within the limits set by the TCEQ under its economic feasibility rules.¹⁴³

a) Evidence and Arguments

Protestants¹⁴⁴ argue Applicant has not met its burden because it has not provided adequate information to make such a determination. In addition, as discussed above, Protestants contend that Applicant's utility costs were inaccurate and that if accurate costs were used (which are unable to be determined upon present evidence), the resulting tax rate would need to be at least \$1.67 per \$100 valuation, rather than the \$1.00 that is proposed.¹⁴⁵ Protestants also argue that, in addition to the undervalued wastewater treatment plant construction costs, the Applicant has failed to conduct a preliminary evaluation of downstream and offsite storm water conveyance capacity to determine whether improvements are required, whether easements are necessary, and whether detention ponds are required (especially given the redirection of storm water).¹⁴⁶

The Applicant argues that the overlapping tax rates in the Districts are projected to range from \$2.73 and \$2.83 per \$100 valuation, which is reasonable and comparable to other districts in North Texas.¹⁴⁷ Moreover, each of the Districts is projected to have a tax rate within the limits required under the TCEQ

¹⁴³ App. Ex. 15 at 13:18-19; 30 Tex. Admin. Code § 293.59(k)(3).

¹⁴⁴ The Individual Protestants agree with, and adopt, the arguments of the City and County.

¹⁴⁵ CC Ex. 3 at 12:20-23; CC Ex. 11.

¹⁴⁶ CC Ex. 3 at 15:3-15.

¹⁴⁷ App. Ex. 15 at 14; Tr. at 179.

rules, which will result in a total overlapping tax rate below what is considered the top threshold in the market area.¹⁴⁸

The ED takes the position that the tax rates for each particular bond issue will be reviewed and justified on its own economic feasibility merits prior to the issuance of any bonds by the Districts.¹⁴⁹ OPIC echoes this position and contends that because the Districts' tax rate is constrained by the \$1 tax rate cap, any inaccuracies regarding the Applicant's total cost of utilities do not render the overlapping tax rates calculated by Applicant inaccurate. As such, OPIC concluded that Applicant met its burden.

b) ALJs' Analysis

While the ALJs share concern over the construction cost estimates, the ALJs conclude that the Applicant has met its burden with respect to whether total tax assessments will have an unreasonable effect on all land located within the Districts. The petitions for each of the Districts contemplate a District tax rate of \$1.00 per \$100 valuation, which falls within the limits set by the TCEQ under its economic feasibility rules and is the tax rate cap for this development. Moreover, any bond that may be issued will undergo an economic feasibility process prior to issuance, which provides further assurances of avoiding an unreasonable effect on the total tax assessments.

¹⁴⁸ App. Ex. 20 at 4-5.

¹⁴⁹ ED Ex. 1 at 6.

7. Justification for Creation of the Districts Supported by Evidence that the Project is Feasible, Practicable, Necessary, and Will Benefit All of the Land to be Included in the District.

TCEQ’s rules also require that the Reports include “complete justification for creation of the district supported by evidence that the project is feasible, practicable, necessary, and will benefit all of the land to be included in the district.”¹⁵⁰

a) Evidence and Arguments

The Protestants primarily focus on the feasibility aspect of the proposed project. The City and County emphasize the aforementioned cost analysis and underestimations. They argue that the fact that the cost estimates in the Reports are based only on a 1.10 MGD wastewater treatment plant but will require average daily flow rates of 1.56 million gallons, is not a reasonable discrepancy or within the tolerance of normal engineering practices.¹⁵¹ The City and County also challenge the Reports’ estimate of the cost of the wastewater treatment plant—contending that the actual cost to build the plant will be at least 17 times the Reports’ estimate, which affects the reasonable outcome of the financial model for this development.¹⁵² Moreover, the City and County take issue with the Reports’ failure to include the costs associated with any offsite drainage facilities, capacities, and

¹⁵⁰ 30 Tex. Admin. Code § 293.11(d)(5)(J).

¹⁵¹ CC Ex. 3 at Bates 24-25.

¹⁵² CC Ex. 3 at Bates 25.

easements for the proposed project, maintaining that these elements can lead to significant added costs and impact the viability of the project.¹⁵³ Finally, the City and County argue that the Applicant has not demonstrated the project, as proposed, is necessary because the Districts will receive water service from Sardis and could obtain wastewater service from the City.

Individual Protestants argue that, in addition to the other deficiencies discussed, Applicant has failed to demonstrate that the roadways in the area have sufficient capacity to make the project feasible. Individual Protestants maintain that FM 644 will need to be resized and other roads will need to be expanded and/or improved; yet no traffic analysis or other evidence was presented to show whether the roadways can handle the traffic or will require improvements. Thus, Individual Protestants argue that the roadway improvements are speculative and the roads in the current state are inadequate.

Applicant submits that it has met its burden with regard to this issue and that the infrastructure proposed to be constructed and financed by the Districts is the typical infrastructure needed to serve a single-family development.¹⁵⁴ Applicant engaged Peloton Land Solutions, Inc. to prepare the Reports for the District, which include development plans that describe the size and nature of the proposed development, and conclude that it is feasible, practicable, and will benefit the land within the Districts.¹⁵⁵ Applicants further maintain that creation of the Districts will

¹⁵³ CC Ex. 3 at Bates 29.

¹⁵⁴ App. Closing Brief at 19.

¹⁵⁵ App. Ex. 14 at 10.

allow Applicant to utilize the lowest cost financing tool to deliver lots and homes at the lowest possible price to homeowners.¹⁵⁶ Mr. Nesmith testified that the Districts are feasible based on the development's assessed valuation, the proposed facilities, and the projected tax rate.¹⁵⁷

The ED asserts that this requirement is satisfied by the findings in the Report and application materials by relying upon the proposed facilities, proposed costs, and the Petitioner's receipt of all necessary project and plan reviews.¹⁵⁸ Mr. Harrison also testified for the ED that the Districts are feasible and practicable and that the evidence appears sufficient to support a reasonable tax rate.¹⁵⁹ Mr. Harrison concluded that the Districts are necessary and will be a benefit to the land.¹⁶⁰

OPIC points out Applicant's market study and concluded that strong demand exists for the proposed development.¹⁶¹ OPIC also cites Mr. Thompson's testimony that the Districts are necessary to provide needed services to the development because there are no nearby alternative sources.¹⁶² Nonetheless, OPIC did not take a position on this particular element.

¹⁵⁶ Tr. at 29; App. Closing Brief at 19.

¹⁵⁷ App. Ex. 23 at 5.

¹⁵⁸ ED Closing Argument at 5.

¹⁵⁹ ED Ex. 1 at 4.

¹⁶⁰ ED Ex. 1 at 4-5.

¹⁶¹ App. Ex. 20 at 4.

¹⁶² App. Ex. 15 at 18.

b) ALJ Analysis

The ALJs conclude that the Reports include evidence that the project is necessary and will benefit all of the land to be included in the Districts. However, the ALJs do not conclude that the Reports include evidence that the project is feasible and practicable, and thereby completely justified, because of the underestimation of the wastewater treatment plant cost. The Reports fail to include cost estimates that accounted for increased costs of a 1.56 MGD wastewater treatment plant, and Mr. Hendricks' cost estimate for the wastewater treatment plant (which was not effectively rebutted) is more than 15 times Applicant's cost estimate in the Reports.

C. PETITION SIGNATURE OF A MAJORITY IN VALUE OF THE LANDOWNERS

The Texas Water Code requires the petition requesting creation of districts be signed by a majority in value of the holders of title of the land within the proposed district, as indicated by the tax rolls of the central appraisal district.¹⁶³

1. Evidence and Arguments

Here, the petitions for the creation of the Districts were signed by Eleanor M. Finch, as president of FP Management LLC, general partner of Finch FP, Ltd. and Brian Finch, as a landowner in District No. 2.¹⁶⁴ And the

¹⁶³ Tex. Water Code § 54.014.

¹⁶⁴ App. Exs. 1, 5, 28, 32, 44, and 48; App. Ex. 14 at 4.

affidavits of the Chief Appraiser for the Ellis County Appraisal District certified that Finch FP, Ltd. and Brian Finch owned 100 percent of the appraised value of the land within the Districts.¹⁶⁵ Moreover, Mr. Finch testified that the entities he is authorized to act on behalf of currently own the 707 acres of land to be included with the Districts: Finch FP, Ltd. owns 579 acres, BEF Trust owns 105 acres, 15 acres have been set aside for directors' lots, and LVTP Holdings, LLC owns eight acres related to the proposed wastewater discharge permit.¹⁶⁶ Mr. Finch also testified that he is the president of Finch FP Management Company, LLC, who is the general partner of Finch FP, Ltd., and is also the trustee of BEF Trust and the president of LVTP Holdings, LLC.¹⁶⁷

Protestants contend that Applicant has failed to meet its burden with regard to this requirement. Protestants believe that the tax roll records are no longer accurate because Brian Finch testified that other persons and entities hold title to the properties (that is, BEF Trust, LVTP Holdings, LLC, and the 15 proposed Temporary Directors).¹⁶⁸ Based upon these representations, Protestants argue that there is not evidence that Finch FP, Ltd. and Brian Finch own at least 50 percent of the value.

Applicants rely on the recitations in the petitions (more specifically, the statements next to the signature blocks) as well as Brian Finch's and Nathan Thompson's testimony to establish that Applicant owns 100% of the land in the

¹⁶⁵ App. Exs. 1, 5, 28, 32, 44, and 48.

¹⁶⁶ App. Ex. 14 at 2.

¹⁶⁷ App. Ex. 14 at 2-3.

¹⁶⁸ App. Ex. 14 at 2; Tr. at 24-28.

applicable Districts.¹⁶⁹ The ED similarly relies upon the representations made by Applicant in the petitions in concluding that this requirement has been satisfied and maintains that it has seen no evidence that refutes this representation. The ED also points out that the tax rolls, which were part of the applications, reflected the holders of title to land at the time of the petitions.

Mr. Finch did clarify, upon cross-examination, that at the time the petitions were submitted, Finch FP, Ltd. owned approximately 292 acres of District No. 1, and LVTP Holdings owned eight acres.¹⁷⁰ District No. 2 was owned by Brian Finch (89 acres) and Finch FP, Ltd. (209 acres), and, at some point, BEF Trust was conveyed approximately 89 acres of District No. 2. District No. 3 was 100 percent owned by Finch FP, Ltd.¹⁷¹

OPIC concluded that the Applicant carried its burden with respect to this issue. It points out that all of the Petitions state that the Applicant constitutes a majority of value of the holders of title as indicated by the tax rolls and that, at the time the petitions were executed, they were signed by authorized persons.

2. ALJs' Analysis

The ALJs conclude that Applicant met its burden with respect to this issue. First, both sets of petitions asking for consent to creation of the Districts (one sent to the City and one to TCEQ) state that “the Petitioner constitutes a majority of

¹⁶⁹ App. Exs. 2, 24, 29, 38, 45, and 54; App. Ex. 14 at 2-5; Tr. 170-71.

¹⁷⁰ Tr. at 25-26.

¹⁷¹ Tr. at 26; 32.

the value of the holders of title of the land within the proposed District, as indicated by the tax rolls of the central appraisal district of Ellis County, Texas, and by conveyances of record since the date of preparation of said tax rolls.”¹⁷² Additionally, the preponderance of the evidence demonstrates that Finch FP, Ltd. was the holder of title to majority in value of land to be included within the proposed Districts. And, at least at the time the petitions were signed, Eleanor Finch was authorized to sign them as president of FP Management, LLC, which is the general partner of Finch FP, Ltd. The language of the statute does not indicate that any post-filing ownership is relevant to this requirement. Therefore, although there is evidence of some conveyance of property within the Districts since the time of the filing, the evidence does not demonstrate that the conveyances affect the holder of title to majority in value of land such that signatures other than Eleanor Finch or Brian Finch would be required.

D. REQUEST FOR ROAD POWERS: TEX. WATER CODE § 54.234 AND 30 TEX. ADMIN. CODE §§ 293.11(D)(11), .202(B)

Each of the Petitions requests the TCEQ grant the District the authority to provide roads, as allowed by Texas Water Code section 54.234.¹⁷³ As previously set out, a district’s application for road powers must provide the information described by 30 Texas Administrative Code section 293.202(a)(4), (7), (8), and (9).¹⁷⁴

¹⁷² App. Exs. 1, 5, 28, 32, 44, 48.

¹⁷³ App. Ex. 5 at 6; App. Ex. 32 at 6; App. Ex. 48 at 6.

¹⁷⁴ 30 Tex. Admin. Code § 293.202(b) makes some requirements of (a) applicable to the Petitions.

1. Evidence and Argument

Protestants argue that Applicants failed to comply with the requirements to establish road powers for the proposed districts because Applicant did not provide a layout of the proposed location for all road facilities within the proposed districts, as required by 30 Texas Administrative Code section 293.202(a)(7). Protestants contend that Applicant's September 2020 Proposed Development Plan (Exhibit E in the Reports) for each proposed district references rights of way but does not specifically identify them as actual roadways, and there are no references or depictions of any internal road facilities.¹⁷⁵ For MUD No. 1, the Report includes a proposed development plan that only includes a proposed 120-foot right-of-way, and a single collector road.¹⁷⁶ The cost summary provides that MUD No. 1 will include one arterial roadway and three collector roadways, in addition to commercial road improvements, for a total street length of 83,250 feet, which far exceeds what was depicted in the Proposed Development Plan.¹⁷⁷ Similarly, the Petition for MUD No. 2 provides a Proposed Development Plan depicting one collector road within the proposed District,¹⁷⁸ while the cost summary represents that MUD No. 2 will include 900 single-family residential lots with a total street length of 29,400 feet.¹⁷⁹ Likewise, the Proposed Development Plan depicts two collectors within MUD No. 3,¹⁸⁰ however, the cost summary for MUD No. 3

¹⁷⁵ ED Ex. 4 at Bates 83, 116, 123, 156, 163.

¹⁷⁶ App. Ex. 36 at 113.

¹⁷⁷ App. Ex. 36 at 99.

¹⁷⁸ App. Ex. 36 at 113.

¹⁷⁹ App. Ex. 36 at 99.

¹⁸⁰ App. Ex. 52 at 39.

represents that it will include 1,477 single-family residential lots with a total street length of 21,800 feet.¹⁸¹ Individual Protestants argue that for the numbers of single-family residential lots in each of the proposed Districts, local streets will be required in addition to the arterials and collectors depicted.

Protestants posit that Applicant has not met its burden to support the grant of road powers because Applicant provided a general plan of the development referencing rights of way for major thoroughfares but did not provide a layout of the “proposed location for all road facilities” within the proposed districts as required by 30 Texas Administrative Code section 293.202(a)(7), as incorporated by 30 Texas Administrative Code section 293.202(b). According to Protestants, Applicant cannot provide a “detailed cost estimate” for roads within the proposed districts with an estimate of necessary bonds to fund these roads, when Applicants have not determined what road facilities are needed for the development.¹⁸² As such, one would not be able to determine whether the proposed road construction, acquisition, and improvements costs are financially and economically feasible for the Districts.¹⁸³

According to Applicant, compliance with Texas Water Code section 54.016 fulfills 30 Texas Administrative Code section 293.202(a)(4). Applicant provided a preliminary layout as to the known roads, in support of subsection (a)(7).¹⁸⁴ Applicant’s engineering reports included detailed cost estimates, in compliance

¹⁸¹ App. Ex. 52 at 24.

¹⁸² See ED Ex. 4 at Bates 75, 116, 156.

¹⁸³ See 30 Tex. Admin. Code § 293.202(b), (a)(9).

¹⁸⁴ App. Ex. 17 at 117; App. Ex. 36 at 114; App. Ex. 52 at 130.

with subsection (a)(8).¹⁸⁵ The engineering reports discuss the \$1.00 total ad valorem tax rate and tax rate allocation between bonds for water, sewer, and drainage bonds for roads, and the tax assessments. According to Applicant, these establish that funding of these improvements is financially and economically feasible, fulfilling subsection (a)(9).

The ED points out that road powers was not an issue raised in pre-filed testimony or during the hearing on the merits. After reviewing the preliminary layouts of the roads, the ED determined that they appear to benefit the Districts and the land included within the Districts. The Petitions included requests for road powers, and the ED recommends that the creation Order recognize that the districts have road powers. OPIC did not take a position with respect to road powers.

2. ALJs' Analysis

Although Applicant and ED point out that the road powers issue was not raised in pre-filed testimony or during the hearing, the ALJs will still address this issue, as this law is applicable to Applicant's Petitions with requests for road powers. The Interim Orders referring these matters to SOAH did not delineate particular issues to be addressed at the SOAH hearing.¹⁸⁶

Applicant's petition with a request for road powers must include evidence that the provisions of Texas Water Code § 54.016 have been followed. The ALJs

¹⁸⁵ App. Ex. 17, at 109; App. Ex. 36 at 105; App. Ex. 52 at 122.

¹⁸⁶ See Interim Orders, TCEQ Docket Nos. 2021-0571-DIS, 2021-0572-DIS, 2021-0573-DIS (September 2, 2021).

conclude that Applicant's Petitions comply with Texas Water Code § 54.016, which the ALJs addressed in detail in section IV.A of this Proposal for Decision.¹⁸⁷ TCEQ rules also require Applicant's requests for road powers to include: a preliminary layout showing the proposed location for all road facilities to be constructed, acquired, or improved by the district; cost analysis and estimate of the proposed road facilities and statement of the amount of bonds estimated to be necessary to finance the roads; and an analysis of the proposed facilities upon the district's financial condition and demonstration that they are financial and economically feasible for the district.¹⁸⁸

Protestants' primary contention is that Applicant only provided the layout of major thoroughfares rather than providing the layout of *all* road facilities, as required. In Individual Protestants' closing briefs, they suggest that for each MUD, the length of road listed in the cost estimates does not match the Proposed Development Plan's depiction. However, no evidence in the form of testimony or exhibits was presented to support such a contention. No testimony was elicited to explain approximately what length in feet was depicted in the Proposed Development Plan, versus the amount represented in the cost summary. Protestants' challenges to the cost analysis and financial and economic feasibility also rely on the unproven discrepancy regarding whether all facilities are depicted in the Proposed Development Plan.

¹⁸⁷ 30 Tex. Admin. Code §§ 293.11(d)(11), .202(b), (a)(4).

¹⁸⁸ 30 Tex. Admin. Code §§ 293.11(d)(11), .202(b), (a)(7)-(9).

Applicant provided preliminary layouts of the roads, detailed cost estimates, and reports on the tax rate allocation for bonds, which established that the funding of the road improvements are financially and economically feasible. No evidence was presented to refute Applicant's representations regarding road facilities.

Therefore, the ALJs conclude that Applicant's requests for road powers within the Petitions meet the requirements set forth in Texas Water Code section 54.234 and 30 Texas Administrative Code sections 293.11(d)(11) and .202(b).

V. ALLOCATION OF TRANSCRIPT COSTS

The Commission may assess reporting and transcription costs to one or more of the parties participating in a proceeding, and when doing so, must consider the following factors:

- the party who requested the transcript;
- the financial ability of the party to pay the costs;
- the extent to which the party participated in the hearing;
- the relative benefits of the various parties of having a transcript; . . . [and]
- any other factor which is relevant to a just and reasonable assessment of costs.¹⁸⁹

¹⁸⁹ 30 Tex. Admin. Code § 80.23(d)(1).

Additionally, the Commission will not assess reporting or transcription costs against the ED or OPIC because they are statutory parties who are precluded by law from appealing the Commission's decision.¹⁹⁰

Applicant proposes that the transcript costs should be allocated equally among the parties. Protestants request that the transcript costs be assessed to Applicant, as the entity seeking to create the proposed districts and the entity that would benefit financially if the MUDs are created. Conversely, the most that Protestants can gain from the current proceedings is maintenance of the status quo. ED and OPIC take no position on cost apportionment.

With respect to the factors in 30 Texas Administrative Code section 80.23(d)(1), the ALJs find that no party requested the transcript, because it was required by SOAH. The City and County are local governmental entities; and Individual Protestants are individual landowners. Applicant consists of (1) Finch FP, Ltd., a company, owning approximately 579 acres of the approximately 707 acres in the proposed Districts; and (2) Brian Finch, the president of Finch FP Management Company, LLC, the general partner of Finch FP, Ltd. The company Finch FP, Ltd. "exists to own and maintain such lands, as well as to subdivide it for sale and/or develop it."¹⁹¹ It is reasonable to infer that Applicant has more ability than Protestants to pay for transcript costs. Applicant is in the business of subdividing, selling, and developing land for profit, whereas Protestants seek only to maintain the status quo. All parties fully participated in the

¹⁹⁰ 30 Tex. Admin. Code § 80.23(d)(2); *see* Tex. Water Code §§ 5.228, .273, .275, .356.

¹⁹¹ App. Ex. 14 at 2-3.

hearing and benefitted from the transcript. By participating in the hearing, Protestants pointed out deficiencies in Applicant's Petitions. Based on these factors, the ALJs recommend that the Commission assess the transcription costs as follows: 70 percent to the Applicant; 15 percent to the City and County; and 15 percent to Individual Protestants.

VI. CONCLUSION

The ALJs conclude that Applicant did not meet its burden of proving the Petitions meet all applicable requirements. Therefore, the ALJs recommend that the Commission deny Applicant's petitions for creation of Lakeview MUD Nos. 1, 2, and 3. In the alternative, the ALJ recommends that the Applicant be instructed to provide updated cost estimates, including reasonable wastewater treatment plant costs.

Signed May 4, 2023.

ALJ Signatures:



Linda Brite,
Presiding Administrative Law Judge



Megan Johnson,
Presiding Administrative Law Judge

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER DENYING PETITIONS FOR CREATION OF LAKEVIEW MUNICIPAL UTILITY DISTRICT NOS. 2, 1, AND 3; TCEQ DOCKET NOS. 2021-0571-DIS, 2021-0572-DIS, AND 2021-0573-DIS; SOAH DOCKET NOS. 582-22-0259, 582-22-0260, AND 582-22-0261

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the petitions for creation of Lakeview Municipal Utility Districts Nos. 2, 1, and 3. A Proposal for Decision (PFD) was issued by Linda Brite and Megan Johnson, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings, and considered by the Commission.

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. On October 26, 2020, Finch FP, Ltd. and Brian Edward Finch (collectively, “Applicant”) filed petitions (Petitions) for creation of Lakeview Municipal Utility Districts (MUDs) Nos. 1, 2, and 3 (Districts) with the Commission.
2. The Petitions were declared administratively complete on November 13, 2020.

3. Finch FP, Ltd. filed a petition for the creation of Lakeview MUD No. 1.
4. Finch FP, Ltd. and Brian Edward Finch filed a petition for creation of Lakeview MUD No. 2.
5. Finch FP, Ltd. filed a petition for creation of Lakeview MUD No. 3.
6. On March 24 and 31, 2021, notice of the Petitions was published in the *Waxahachie Daily Light*.
7. On March 17, 2021, the Ellis County Clerk posted the notice of the bulletin board used for posting legal notices in Ellis County.
8. On September 2, 2021, the Commissioners referred these matters to the State Office of Administrative Hearings (SOAH) for a contested case hearing.
9. At the preliminary hearing for the creation of MUD No. 2 on November 1, 2021, Applicant, the Executive Director (ED) of TCEQ, the Office of Public Interest Counsel (OPIC), the City of Waxahachie (City), Ellis County (County), Vickie Dillow, Michelle Hillery, Sharon and John Wesley Tryon, Tammy and Greg Wimbish, Jackie and Carlton Milam, James and Melinda Kocian, and Caroline Taylor were named as parties.
10. At the preliminary hearing for the creation of MUD No. 1 on November 8, 2021, Applicant, ED, OPIC, the City, the County, Vickie Dillow, Michelle Hillery, Sharon and John Wesley Tryon, Tammy and Greg Wimbish, Jackie and Carlton Milam, James and Melinda Kocian, Caroline Taylor, Betty and Robert Arwine, Clay Allison, Jim and Mary Kocian, Richard Carrol, and Sherry Radanovic were named as parties.
11. At the preliminary hearing for the creation of MUD No. 3 on November 15, 2021, Applicant, ED, OPIC, the City, the County, Jackie and Carlton Milam, Richard and Robin Carroll, Sharon and John Wesley Tryon, Sherry Radanovic, Betty and Robert Arwine, James and Melinda Kocian, Jim and Mary Kocian, Vickie and Mike Dillow, Caroline and Christopher Taylor, Clay Allison, Jackie Milam, Tammy and Greg Wimbish,

Michelle Hillery, Thomas and Melissa Baker, Jon Hammond, Jerry and Teresa Ann Fisk, Joseph Brooks, and Bart and Lisa Dooley were named as parties.

12. By SOAH Order No. 3, the Petitions were consolidated. Each party remained designated for only the petition(s) for which they were originally named a party.
13. SOAH ALJs Linda Brite and Megan Johnson convened the hearing via videoconference on December 6-7, 2022. Applicant was represented by attorney Natalie Scott. The City and County were represented by attorney Emily Rogers. Individual Protestants were represented by attorney Eric Allmon. The ED of the Texas Commission on Environmental Quality (Commission) was represented by attorney Kayla Murray. The Office of Public Interest Council (OPIC) was represented by attorney Sheldon Wayne. The record closed after submission of written closing arguments on March 9, 2023.

Request for Service

14. The Districts are proposed to be located within the extra-territorial jurisdiction of the City.
15. Applicant delivered its request for consent to the creation of the Districts to the City on February 14, 2020, and did not receive a written response within 90 days.
16. Applicant petitioned the City for water and sewer services on June 2, 2020, and did not receive a written response.
17. The 120-day period for reaching a mutually-agreeable contract expired without contracts for service.
18. Thereafter, Applicant filed its Petitions for the creation of the Districts with the Commission.

19. The City did not grant written consent, by resolution or ordinance, to the inclusion of the land within the Districts.
20. Applicant complied with the requirements to submit a request for service where a proposed municipal utility district would be located within the extraterritorial jurisdiction of a city.

Availability of Comparable Service from Other Systems

21. The Districts are located within Sardis-Lone Elm Water Supply Corporation's (Sardis) Certificate of Convenience and Necessity. Sardis has agreed to provide water service to the Districts once the developer constructs the necessary infrastructure.
22. The City has sanitary sewer facilities approximately 2.2 miles from the land within the Districts with capacity to provide sanitary sewer service if upgrades are made to the facilities.
23. The City has no currently existing infrastructure to provide wastewater services to the Districts. No other wastewater service system is available.

Reasonableness of Projected Construction Costs, Tax Rates, and Water and Sewer Rates

24. Applicant's preliminary engineering reports provided a construction cost estimate of \$1,750,000 for a 1.10 million gallons per day (MGD) wastewater treatment plant to serve the Districts.
25. Based on Applicant's representation of the wastewater capacity needed for each District, the total wastewater capacity needed to serve the Districts is approximately 1.56 MGD.
26. Applicant's cost estimate for the wastewater treatment plant did not account for the higher capacity needed and higher construction costs.

27. A 1.56 MGD wastewater treatment plant will cost at least \$29,640,000, compared to Applicant's cost estimate of \$1,750,000.
28. Insufficient evidence was presented to establish that Applicant's projected construction costs are reasonable.
29. The developer will pay all up-front utility costs and can only be reimbursed in the amount allowed by a MUD tax rate of \$1.00 per \$100 assessed value.
30. The proposed tax rates are reasonable.
31. The proposed water and sewer rates are reasonable.

Effect on Groundwater Levels and Recharge Within the Region

32. The Districts will use surface water rather than groundwater as its water supply source.
33. The Districts, their systems, and subsequent development will not have an unreasonable effect on groundwater level within the region and recharge capability of a groundwater source.

Effect on Natural Run-off Rates and Drainage

34. The Districts' drainage systems will include storm sewers, drainage ditches, and if required, detention facilities.
35. The Districts' stormwater, sewer, and drainage systems will be constructed in accordance with the City's design criteria.
36. The Districts, their systems, and subsequent development will not have an unreasonable effect on natural run-off rates and drainage.

Effect on Water Quality

37. The Districts will own and operate a wastewater treatment plant pursuant to a permit issued by TCEQ, which entails its own permitting process.
38. The Districts, their systems, and subsequent development will not have an unreasonable effect on water quality.

Effect on Total Tax Assessments on All Land Located Within the Districts

39. The total overlapping rates in the Districts are projected to range between \$2.73 and \$2.83 per \$100 valuation, which is reasonable and comparable to other districts in North Texas.
40. The combined projected tax rate for the Districts must not exceed \$1.00 per \$100 valuation pursuant to 30 Texas Administrative Code section 293.59(k)(d)(C).
41. The Districts and their systems and subsequent development within the Districts will not have an unreasonable effect on total tax assessments on all land located within the Districts.

Feasible, Practicable, Necessary, and Will Benefit All of the Land to be Included in the District

42. Due to the discrepancy in the cost estimate for the wastewater treatment plant, insufficient evidence was presented to establish the Districts are feasible, practicable, necessary and will benefit all of the land included in the Districts.

Petition Signature of a Majority in Value of the Landowners

43. The petitions for the creation of the Districts were signed by Eleanor M. Finch, as president of FP Management LLC, general partner of Finch FP, Ltd. and Brian Finch.
44. The petitions state that Applicant constitutes a majority of value of the holders of title as indicated by the tax rolls.
45. Finch FP, Ltd. and Brian Finch owned 100 percent of the appraised value of the land within the Districts at the time the petitions were submitted.

Request for Road Powers

46. Each of the Petitions request the TCEQ grant the District the authority to provide roads.
47. Applicant provided a preliminary layout as to the known roads and major thoroughfares and a cost estimate of the proposed road facilities.
48. Applicant established that the funding of the road improvements is financially and economically feasible.

Allocation of Transcript Costs

49. No party requested the transcript because SOAH required a transcript.
50. All parties fully participated in the hearing and benefitted from the transcript.
51. Applicant consists of a company that owns, maintains, subdivides, and develops land.

52. By participating in the hearing, Protestants pointed out deficiencies in Applicant's Petitions.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter. Tex. Water Code ch. 49 and 54; Texas Constitution, article XVI, section 59.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this hearing, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
3. Applicant and TCEQ have satisfied all applicable public notice requirements. Tex. Water Code § 49.011; 30 Tex. Admin. Code § 293.12.
4. Applicant carries the burden of proof by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(a).
5. Applicant satisfied the requirements related to requests for service when a MUD is proposed to be located within the extraterritorial jurisdiction of a city. Tex. Water Code § 54.016(a)-(d); Tex. Gov't Code § 42.042(a)-(f).
6. Applicant satisfied the requirements related to availability of comparable service from other systems. Tex. Water Code § 54.021(b)(1) and 30 Tex. Admin. Code § 293.11(d)(5)(G).
7. The Districts and their systems and subsequent developments will not have an unreasonable effect on: groundwater levels and recharge within the region, natural run-off rates and drainage; water quality; or total tax assessments on all land located within the districts. Tex. Water Code § 54.021(b)(3).
8. Applicant's requests for road powers meets all applicable requirements. Tex. Water Code § 54.234; 30 Tex. Admin. Code §§ 293.11(d)(11), .202(a), (b).

9. If the Commission finds that the petition conforms to the requirements of Texas Water Code section 54.015 and that the project is feasible and practicable and is necessary and would be a benefit to the land to be included in the district, the Commission shall find so by its order and grant the petition. Tex. Water Code § 54.021(a).
10. If the Commission finds that the project is not feasible, practicable, necessary, or a benefit to the land in the district, the Commission shall so find by its order and deny the petition. Tex. Water Code § 54.021(d).
11. In determining if the project is feasible and practicable and if it is necessary and would be a benefit to the land included in the district, the Commission shall consider: the availability of comparable service from other systems; the reasonableness of projected construction costs, tax rates, and water and sewer rates; and whether the district and its system and subsequent development within the district will have an unreasonable effect on land elevation, subsidence, ground water level within the region, recharge capability of a groundwater source, natural run-off rates and drainage, water quality, and total tax assessments on all land located within a district. Tex. Water Code § 54.021(b).
12. Insufficient evidence was presented to establish the reasonableness of projected construction costs. Tex. Water Code § 54.021(b)(2).
13. Insufficient 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 § 54.021; 30 Tex. Admin. Code § 293.11(d)(5)(J).
14. No transcript costs may be assessed against the ED or OPIC because the TCEQ's rules prohibit the assessment of any cost to a statutory party who is precluded by law from appealing any ruling, decision, or other act of the Commission. Tex. Water Code §§ 5.275, .356; 30 Tex. Admin. Code § 80.23(d)(2).
15. Factors to be considered in assessing transcript costs include: the party who requested the transcript; the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the relative benefits to

the various parties of having a transcript; the budgetary constraints of a state or federal administrative agency participating in the proceeding; and any other factor which is relevant to a just and reasonable assessment of the costs. 30 Tex. Admin. Code § 80.23(d)(1).

16. Considering the factors in 30 Texas Administrative Code section 80.23(d)(1), an appropriate allocation of transcript costs is: 70 percent to Applicant, 15 percent to the City and County, and 15 percent to Individual Protestants.
17. Applicant's Petitions should be denied.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The Petitions for Creation of Lakeview Municipal Utility District Nos. 1, 2, and 3 are denied.
2. The transcript costs are allocated 70 percent to the Applicant, 15 percent to the City and County, and 15 percent to the Individual Protestants.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted, are denied.
4. The effective date of this Order is the date the Order is final as provided by 30 Texas Administrative Code § 80.273 and Texas Government Code § 2001.144.
5. The Commission's Chief Clerk shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

**TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY**

Jon Niermann, Chairman for the Commission