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

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

PROTESTANTS' EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Comes now the City of Waxahachie, Texas (City) and Ellis County, Texas (County, and collectively Protestants) files these Exceptions to the Proposal for Decision (PFD) and, in support thereof, would show the following:

I. INTRODUCTION

Protestants agree with the Administrative Law Judges' (ALJs) proposed recommendation that the proposed applications (Applications) for creation of the Lakeview Municipal Utility Districts Nos. 1, 2 and 3 (Districts) should be denied. The ALJs properly recommend that the permits should be denied because the Applicant, Finch FP, Ltd. (Applicant), did not meet its burden of proving that the Districts' creation meets all applicable requirements, namely that the Applicant failed to properly assess the applicable cost estimates. However, Protestants except to certain Findings of Fact and proposed Conclusions of Law in the PFD, as detailed below. Specifically, in addition to its failure to properly assess construction cost estimates, the Applicant failed to make a proper request for service, failed to demonstrate the that Districts are feasible, practicable, necessary, and would be a benefit to the land, failed to prove that the petitions were

signed by a majority in value of landowners, and did not properly request road powers pursuant to applicable Texas law.

II. EXCEPTIONS AND CORRECTIONS

A. Exceptions to the PFD's analysis and recommendations regarding the request for service.

The ALJs correctly state that the Applicant submitted the applicable petitions to the City requesting service and requesting consent to the District creations, respectively. (PFD pgs. 8-9). Further, the PFD correctly reflects that those petitions did not contain information about the proposed development that would allow the City to assess whether the provision of service was feasible. However, the ALJs reached the incorrect conclusion – they simply stated that they "find no statutory or rule guidance regarding the burden or duty of any one party to negotiate for a contract under these circumstances." Texas Local Government Code § 42.0425(c) states that an "owner of land in the area proposed to be added to the political subdivision *may not unreasonably refuse* to enter into a contract for water or sanitary sewer services with the municipality under [Texas Local Government Code] Section 42.042(c)." Tex. Local Gov't Code § 42.0425(c) (emphasis added). It is unreasonable to submit petitions for service which on their face provide no meaningful information that would allow the City to make a determination as to whether it could serve the proposed development and to make no attempts to negotiate with the City. (PFD pg. 11). The burden is on the Applicant, not the City, to prove that the Districts' creation meets all requirements, and as a matter of public policy, the Applicant seeking the privilege of creating a municipal utility district should have a higher duty than simply to pay lip service to the requirement that it seek service from the City.

Therefore, the Protestants except to and recommend rejection of Finding of Fact No. 20 which states that:

> "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."

The Protestants also except to and recommend rejection of Conclusion of Law No. 5 which states that:

> "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)."

B. Exceptions to the PFD's analysis and recommendations regarding whether Districts are feasible, practicable, necessary, and would be a benefit to the land proposed to be included in the Districts.

1. Availability of comparable wastewater service

Protestants except to the ALJs' conclusion that the Applicant met its burden on the issue of whether comparable wastewater service is available for the Districts. The ALJs correctly note that the City has comparable wastewater services available and has adequate capacity, with some upgrades, to serve the developments. (PFD pgs. 13-14). Similarly, the ALJs state that Sardis-Lone Elm Water Supply Corporation can provide water service to the development, upon construction of the water system infrastructure pursuant to a contract. (PFD pg. 16). However, the ALJs conclude that – although the water service issue is apparently satisfied despite the fact that infrastructure construction and updates are needed – there is no wastewater service available from the City, or comparable service, "in existence presently." (*Id.*). Practically, the development in question currently consists of uninhabited land, and any infrastructure capable of serving the future development will need to be constructed. It is unreasonable to hold the City to the standard that it must have "currently existing infrastructure to serve the development." While the City does not have currently existing infrastructure to serve the development, such infrastructure could be

constructed. The City has available capacity to serve the Districts, and the Applicant failed to engage in meaningful negotiations to explore the availability of comparable systems. (PFD pg. 13). Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 23 which states that:

> "23. The City has no currently existing infrastructure, but does have nearby facilities and existing capacity, to provide wastewater services to the Districts. No other wastewater service system is available.

The Protestants also except to and recommend rejection of Conclusion of Law No. 6 which states that:

> "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)."

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

The Protestants agree with the ALJs' conclusion that Applicant's construction cost estimate for the water treatment plant is significantly understated, and therefore the construction costs presented are unreasonable. (PFD pg. 25). However, the Protestants except to the fact that – in light of the finding that the cost increase due to the underestimation of the wastewater costs amounts to an overall increase of at least $27,890,000 – the ALJs nevertheless find that the proposed tax rates and sewer rates are reasonable. The costs and tax rates needed to generate the funds to build this infrastructure are interrelated. The ALJs accepted Protestants' witness Mr. Hendricks' conclusion that total utility cost was significantly higher than estimated, and acknowledged that Mr. Hendricks testified that the resulting tax rate for the Districts, taking into account the increased utility costs, would need to be at least $1.67 per $100 valuation. (PFD pg. 20). The ALJs seemed to acknowledge that the tax rate would likely not support the cost of the

infrastructure needed to serve the development, but assumed that the developer will be able to pay any amount not covered by the statutorily allowed $1.00 tax rate. (PFD pg. 21, 25). By this logic, any applicant could simply state that they will charge the maximum statutorily allowed tax rate – regardless of whether such a rate is sufficient for the development, and regardless of their actual infrastructure expenses. Rather than reach a circular conclusion that the tax rate must be reasonable if it is proposed at $1.00 per $100 valuation in an application, the ALJs should have concluded that the tax rate is unreasonable because the Applicant did not meet its burden of showing that this project is economically feasible. Similarly, the Applicant listed wastewater rates that are not accurately based on reasonable construction costs for the proposed Districts. (PFD pg. 23, 2-26). The ALJs acknowledged that the sewer rates may change based on the increased cost of the wastewater treatment plant, but nevertheless concluded that the sewer rates were reasonable. Instead, the ALJs should have concluded that the Applicant did not meet its burden of establishing that the wastewater rates are reasonable in light of the underestimated construction costs.

Lastly, the ALJs should have concluded that the proposed stormwater facilities cost put forth by the Applicant was unreasonable. The ALJs apparently concluded that because the Applicant allotted some amount of money for drainage and detention, their cost estimates must be reasonable: "Although the record is unclear as to what exact stormwater facilities are covered by those estimates, the evidence establishes that the Applicant's stormwater cost estimates are reasonable." (PFD pg. 24). On the contrary, if the Applicant has not provided enough detail in the application to establish basic information about the future drainage, the Applicant has not met its burden regarding stormwater costs. There is no record evidence to support the ALJs' conclusion that the Applicant established reasonableness because the Applicant allotted an amount of money – which could be any amount of money – that is not tied to substantive engineering plans.

Therefore, the Protestants except to and recommend the rejection of Findings of Fact No. 30 and 31, which state that:

> "30. The proposed tax rates are reasonable.
>
> 31. The proposed water and sewer rates are reasonable."

The Protestants also except to and recommend rejection of Conclusion of Law No. 7, which states that:

> "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)."

3. Effect on Groundwater Levels and Recharge within the Region

The Protestants except to the ALJs' conclusion that the proposed Districts and the subsequent development will not have an unreasonable effect on groundwater and recharge. As the ALJs acknowledged, the Protestants put forth evidence that Sardis obtains water from groundwater sources. (PFD pg. 27). The Applicant did not conduct any analysis to determine the impact of the Districts and development on groundwater and recharge in the region, but rather make the unsupported point that the proposed development will not have any greater effect on groundwater levels than any other typical single-family development in the region. (PFD pg. 26-27). However, this is not the standard, and this is not a typical single-family development. This developer/landowner seeks the privilege of creating a municipal utility district to serve a high-density development, which will provide the developer a significant financial benefit. The Applicant did not meet its burden of proof regarding groundwater and recharge. Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 32 as follows and the rejection of Finding of Fact No. 33, which state that:

> “32. The Districts will use surface water from a water supply company that in part obtains water from groundwater sources ~~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.”

The Protestants also except to and recommend rejection of Conclusion of Law No. 7, which states that:

> “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).”

4. Effect on Natural Run-off Rates and Drainage

The Protestants except to the ALJs’ conclusion that the Districts, their systems, and the subsequent development will not have an unreasonable effect on natural run-off rates and drainage. The ALJs again acknowledge that the Applicant did not provide detailed information about the Districts’ proposed drainage facilities, run-off rates before and after development, and information about whether stormwater will be redirected from its basin of origin. (PFD pgs. 31, 34). Despite this, the ALJs accept the TCEQ’s assertion that it can defer to local authorities and accept a cursory statement that the Applicant will comply with local regulation. (PFD pg. 34).

On the contrary, simply stating that the Applicants must comply with the City’s applicable design criteria for storm drainage improvements is not sufficient to meet Applicants’ burden under the Water Code. The Commission – not a local authority – is tasked with considering whether the proposed districts and subsequent development will have an unreasonable effect on natural run-off rates and drainage. The Executive Director and the TCEQ should not abdicate their responsibility to local authorities. Nevertheless, the Applicant has failed to provide enough

detailed information for any authority, state or local, to assess the impacts. Thus, the Applicants have failed to meet their burden of proof to show that the proposed Districts and subsequent development will not have an unreasonable effect on the natural run-off rates and drainage. Therefore, the Protestants except to and recommend rejection of Finding of Fact No. 36, which states that:

> "36. The Districts, their systems, and subsequent development will not have an unreasonable effect on natural run-off rates and drainage."

The Protestants also except to and recommend rejection of Conclusion of Law No. 7, which states that:

> "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)."

5. Effect on Water Quality

The Protestants except to the ALJs' finding that the Applicant met its burden to show that the proposed Districts and subsequent development will not have an unreasonable effect on water quality. As the ALJs acknowledge, the Protestants put forth evidence that the stormwater run-off and other non-point sources of pollutants from the development will likely impact the downstream water quality. (PFD pgs. 36-37). However, similar to the argument in the preceding section, the ALJs base their conclusions on the Executive Director's assertion that either a different permitting process or a wholly different authority should assess impacts to water quality. (PFD pg. 38). On the contrary, the *Commission* is tasked with considering whether the proposed districts and subsequent development will have an unreasonable effect on water quality. The Executive Director and the TCEQ should not abdicate their responsibility to other permit processes or to local authorities. The Applicants have failed to meet their burden of proof to show that the proposed

Districts and subsequent development will not have an unreasonable effect on the water quality. Therefore, the Protestants except to and recommend rejection of Finding of Fact No. 38, which states that:

> "38. The Districts, their systems, and subsequent development will not have an unreasonable effect on water quality."

The Protestants also except to and recommend rejection of Conclusion of Law No. 7, which states that:

> "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)."

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

The Protestants except to the ALJs' conclusion that the proposed Districts and the subsequent development will not have an unreasonable effect on total tax assessments on all land located within the Districts. For the same reasons set forth in section 2 above regarding the reasonableness of construction costs and rates, the Protestants assert that the costs, rates, and tax assessments are interrelated. Considering the ALJs "share concern over the construction cost estimates," it is not reasonable to then conclude that the Applicant has met its burden on this issue. The vast underestimation of construction costs – and the lack of many necessary substantive details about the development – affects the entire financial model for this proposed development. Therefore, the Protestants except to and recommend rejection of Finding of Fact No. 41, which states that:

> "41. The Districts, their systems, and subsequent development will not have an unreasonable effect on total tax assessments on all land located within the Districts."

The Protestants also except to and recommend rejection of Conclusion of Law No. 7, which states that:

> "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)."

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

The Protestants agree with the ALJs' conclusion that the Applicant did not meet its burden to show that the project is feasible and practicable, and therefore justified, based on the underestimation of the wastewater treatment plant cost. (PFD pg. 44). The Protestants except to that conclusion solely to expand the scope – for all of the reasons detailed above, the Applicant failed to meet its burden to show that the proposed Districts are feasible, practicable, necessary or a benefit to the land. Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 42 as follows, which states that:

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

The Protestants also except to and recommend rejection of Conclusion of Law No. 7, which states that:

> "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)."

C. Exceptions to the PFD's analysis and recommendations regarding whether the petition properly contained the signature of a majority value of the landowners.

The Protestants except to the ALJs' conclusion that the Applicant met its burden with respect to this issue. Section 293.11(d)(1) of the TCEQ's rules specifically requires that a petition for the creation of a MUD be "signed by persons holding title to land representing a total value of more than 50% of the value of all land in the proposed district *as indicated on tax rolls of the central appraisal district*." 30 Tex. Admin. Code § 293.11(d)(1) (emphasis added). The certifications regarding the ownership from the Chief Appraiser are no longer accurate, and without a new certification from the Chief Appraiser, there is no evidence that Finch FP, Ltd. and Brian Finch own at least 50 percent of the value of all land in the proposed districts. (PFD pg. 45). Contrary to the ALJs' conclusion, pursuant to the statute, there is no evidence in the record for Applicant to meet its burden on this issue without the certification from the appraisal district. Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 45 as follows, which states that:

> "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. <u>There is insufficient evidence in the record to establish that Finch FP, Ltd. and Brian Finch now own at least 50 percent of the value of all land in the proposed districts.</u>"

D. Exceptions to the PFD's analysis and recommendations regarding whether or not the Applicant's request for road powers meets the applicable requirements of Tex. Water Code § 54.234, and 30 TAC §§ 293.11(d)(11) and 293.202(b).

The Protestants except to the ALJs' conclusion that the Applicant met its burden with respect to this issue. The ALJs seemingly acknowledge that the Applicant did not meet its burden, by recitation of the Protestants' argument: "Protestants' primary contention is that Applicant only provided the layout of major thoroughfares rather than providing the layout of *all* road facilities, *as required*." (PFD pg. 51) (emphasis added). But, the ALJs conclude that no evidence was

presented or solicited to refute the Applicant's representations regarding the road facilities, so they must find for the Applicant. (PFD pg. 52). However, the ALJs miss the point with their focus on evidence presented to refute the Applicant's estimates – this is not a question of evidence, it is a question of law. It is unreasonable to accept the Applicant's preliminary report for the proposed developments because it clearly contains errors and/or omissions; for instance, it is unreasonable to assume that a development of this size will contain only major thoroughfares and not internal road facilities. The layout therefore does not show *all* road facilities to be constructed. 30 Tex. Admin. Code § 293.202(a)(7). As a matter of law, the Applicant did not carry its burden with respect to the road power issue. Therefore, the Protestants except to and recommend rejection of Finding of Fact No. 48, which states that:

> "48. Applicant established that the funding of the road improvements is financially and economically feasible.

The Protestants also except to and recommend rejection of Conclusion of Law No. 8, which states that:

> "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)."

E. Exceptions to the recommended actions.

The Protestants agree with the PFD's recommendation to deny the Applications based on the construction cost underestimation. However, the Protestants disagree with the above listed Findings of Fact and Conclusions of Law because the Applicant has not met its burden of proof in this case on these statutory requirements as well, in that the Applicant failed to make a proper request for service, failed to demonstrate the that Districts are feasible, practicable, necessary, and would be a benefit to the land, failed to prove that the petitions were signed by a majority in value of landowners, and did not properly request road powers pursuant to applicable Texas law. Based

on the reasons cited above, the Protestants assert that the Applications to create the proposed districts should not be granted.

III. CONCLUSION AND PRAYER

The Protestants respectfully request that the Commission grant their exceptions and recommend the PFD with the corrections as set out above. The Protestants respectfully request any other relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2023, a true and correct copy of the above and foregoing document was served on all parties on the mailing list via electronic or regular mail.

Emily W. Rogers