

TCEQ DOCKET NO. 2021-1620-DIS

**APPLICATION FOR THE CREATION OF § BEFORE THE TEXAS
CHAMBERS COUNTY MUNICIPAL § COMMISSION ON
UTILITY DISTRICT NO. 4 § ENVIRONMENTAL QUALITY**

MONTGOMERY ESTATES, LLC'S RESPONSE TO HEARING REQUEST

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Montgomery Estates, LLC, applicant for the creation of Chambers County Municipal Utility District No. 4, hereby files this Response to Hearing Request in the above-titled matter.

I. INTRODUCTION

On April 23, 2021, Montgomery Estates, LLC (Applicant) filed the pending application (the Application) with the Texas Commission on Environmental Quality (TCEQ) requesting the creation of Chambers County Municipal Utility District No. 4 (the District). The District would contain approximately 146.15 acres located within Chambers County and wholly within the extraterritorial jurisdiction (ETJ) of the City of Cove, Texas. The Application was deemed administratively complete on April 27, 2021. A minor revision to the Application was made and accepted on September 10, 2021. On October 26, 2021, and November 2, 2021, the Notice of District Petition was published in the Houston Chronicle, a newspaper generally circulated in Chambers County. Additionally, the Applicant posted notice of the Application in the Chambers County Courthouse on the bulletin board used for posting legal notices on November 2, 2021. Accordingly, the period to submit a request a contested case hearing and/or provide public comment with the TCEQ ended on December 2, 2021. Chambers County (County) filed its request for a contested case hearing in this matter on November 30, 2021 (Hearing Request), which included a copy of a Resolution of the Chambers County Commissioners Court passed on November 23, 2021 (Resolution).

The Office of the Chief Clerk issued notice that the Application and the Hearing Request would be considered by the TCEQ Commissioners during TCEQ's February 9, 2022 public hearing. Applicant was instructed to file a written response to the Hearing Request by 5:00 p.m. on January 14, 2022. Therefore, this Response to Hearing Request is timely filed.

II. APPLICABLE LAW

Applicant requests creation of the District pursuant to Article XVI, § 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code (TWC); 30 Texas Administrative Code (TAC) Chapter 293; and the procedural rules of the TCEQ. Under Texas law, a district may be created for the following purposes:

- (1) the control, storage, preservation, and distribution of its storm water and floodwater, the water of its rivers and streams for irrigation, power, and all other useful purposes;
- (2) the reclamation and irrigation of its arid, semiarid, and other land needing irrigation;
- (3) the reclamation and drainage of its overflowed land and other land needing drainage;
- (4) the conservation and development of its forests, water, and hydroelectric power;
- (5) the navigation of its inland and coastal water;
- (6) the control, abatement, and change of any shortage or harmful excess of water;
- (7) the protection, preservation, and restoration of the purity and sanitary condition of water within the state; and
- (8) the preservation of all natural resources of the state.¹

A petition requesting the creation of a district must be filed with the Commission.² The petition must be signed by a majority in value of the holders of title of land within the proposed district, as indicated by the tax rolls of the central appraisal district.³ The petition must (1) described the boundaries of the proposed district by metes and bounds; (2) state the general nature

¹ TWC § 54.012.

² TWC § 54.014.

³ *Id.*

of the work proposed to be done, the necessity for the work, and the cost of the project as then estimated by those filing the petitioner; and (3) include the name of the district which shall be generally descriptive of the locale of the district.⁴

If the proposed district is within the ETJ of a municipality, TWC § 54.016 and Texas Local Government Code (TLGC) § 42.042 require the municipality's consent to creation of the district. If a petitioner is unable to obtain the municipality's consent, TLGC § 42.042 requires the petitioner to take steps to seek service from the municipality. If the petitioner is unable to obtain consent or service from the municipality, TLGC § 42.042(f) then authorizes the submission of a petition for district creation to the TCEQ.

If the proposed district is located outside of the corporate limits of a municipality, TWC § 54.0161 allows the commissioner's court of the county in which the proposed district is located to review the petition and other evidence and information relating to the proposed district. A petitioner must submit any relevant information requested by the commissioner's court. The commissioner's court may submit information to the TCEQ or make a recommendation regarding the creation of the proposed district.⁵ This written opinion must state (1) whether the commissioner's court recommends the creation of the district; and (2) any findings, conclusions, and other information that the commissioner's court thinks would assist the TCEQ in making a final determination on the petition.⁶ According to TWC § 54.0161(c), the TCEQ must consider the written opinion of the commissioner's court.

The TCEQ must grant the petition if it conforms to the requirements of TWC § 54.015, and that the project is feasible, practicable, and necessary and would be a benefit to the land to be

⁴ TWC § 54.015.

⁵ TWC § 54.0161(b).

⁶ *Id.*

included in the district.⁷ In determining whether a project is feasible, practicable, and necessary and would be a benefit to the land, the TCEQ must 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;
 - (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.⁸

The petitioner must publish notice of the petition to create the proposed district once a week for two consecutive weeks in a newspaper regularly published or circulated in the county where the district is proposed to be located not later than the 30th day before the date on which the TCEQ may act on the application.⁹ The petitioner must also post the notice on the bulletin board use for posting legal notices in the county in which the proposed district is to be located.¹⁰ The TCEQ may act on a petition without a public hearing if a public hearing is not requested by the TCEQ, the Executive Director, or an “affected person,” when authorized by law, within this 30-day period according to 30 TAC, Chapter 55.¹¹

A hearing request must be in writing and filed with the Chief Clerk within the time period specified in the notice. A hearing request must substantially comply with the following requirements:

⁷ TWC § 54.021(a).

⁸ TWC § 54.021(b).

⁹ TWC § 49.011(b); 30 TAC § 293.12(b)(1).

¹⁰ 30 TAC § 293.12(b)(2).

¹¹ TWC § 49.011(c); *see also* 30 TAC § 55.250.

(1) give the name, address, and daytime telephone number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group.

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;

(3) request a contested case hearing; and

(4) provide any other information specified in the public notice of application.¹²

An “affected person” is a “person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.”¹³

Governmental entities, including local governments, “with authority under state law over issues contemplated by the application may be considered affected persons.”¹⁴ Factors relevant to determining whether a person is affected include, but are not limited to:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health, safety, and use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.¹⁵

¹² 30 TAC § 55.251(c).

¹³ 30 TAC § 55.103; 30 TAC § 55.256(a).

¹⁴ 30 TAC § 55.256(b).

¹⁵ 30 TAC § 55.256(c).

Under TCEQ rule 30 TAC § 55.255(b)(2), the TCEQ must grant an affected person’s hearing request if (1) it complies with 30 TAC § 55.251; (2) it is timely filed with the Chief Clerk; and (3) is pursuant to a right to hearing authorized by law.¹⁶

Generally speaking, while the County may submit a written opinion to the TCEQ regarding the creation of the District under TWC § 54.0161, this statute does not itself deem the County an affected person for purposes of 30 TAC § 55.251(a). Rather, the County simply has an opportunity to provide a recommendation to the TCEQ on the Application at least 10 days before the date set for action on the Application. Thus, the Texas Legislature has expressly stated the limited scope and weight of a county’s reaction to an application filed at the TCEQ for the creation of a district.

As discussed in more detail, herein, the County’s hearing request fails to meet this TCEQ standard and is not an “affected person.”

III. APPLICANT’S RESPONSE TO THE COUNTY’S HEARING REQUEST

The TCEQ should deny the County’s November 30, 2021 Hearing Request in this matter because its two issues alleging (1) the lack of a sewage outfall, resulting in the District exercising eminent domain powers, and (2) an additional, unwanted tax rate fail to demonstrate that it is an “affected person” entitled to a contested case hearing under 30 TAC §§ 55.251 and 55.256. Specifically, the Hearing Request asserts that the County was opposed to the Application because (1) the Applicant is attempting to build a small-lot subdivision within the proposed District boundaries, which would require an outfall for sewage, and necessitate condemning land; and (2) the proposed District would result in an additional, unwanted taxing entity on the citizens of Chambers County. The Hearing Request states that the location of Requestor’s property is the entirety of Chambers County, which includes the District. As explained, herein, such allegations

¹⁶ 30 TAC § 55.255(b)(2).

by the County do not meet the TCEQ's threshold in 30 TAC § 55.256 to be considered an "affected person."

A. The Alleged Lack of a Sewage Outfall, Resulting in the Use of Eminent Domain Power, Is Not a Personal Justiciable Interest to the County.

The County's contention that the alleged small-lot subdivision within the proposed District boundaries would require an outfall for sewage and necessitate condemning land fails to assert (1) a justiciable interest related to a legal right, duty, privilege, power, or economic interest of the County that is affected by the Application in a manner unique from the general public; (2) an issue that is under the jurisdiction of a county; and (3) an issue that the TCEQ considers in processing a district creation application.

First, the County's allegation contains no justification, explanation, or reasoning as to how needing a sewage outfall and the resulting condemnation of land uniquely affects the County. In fact, the County provides no assertion as to how such allegation has any affect at all. The Hearing Request is void in this regard. Further, to the extent that the County's contention regarding sewage is instead interpreted as a claim regarding drainage, based upon the County Commissioners' Resolution, then the same result occurs, as such Resolution fails to allege what drainage issue would arise and how the County is uniquely impacted by such issue. But, such interpretation would be unreasonable, as the Hearing Request clarifies that the issue raised relates to the discharge of sewage, not stormwater. Ultimately, the issue claimed only asserts that the District would address the outfall issue by condemning land. Either way, the County's allegation is an unsupported, general, and conclusory statement. With respect to the other 30 TAC § 55.256 factors that could be considered as to whether a justiciable interest exists, the Hearing Request, in asserting no alleged interest concerning the need for a sewage outfall and subsequent use of

eminent domain authority, necessarily fails to state an alleged relationship – much less a reasonable relationship – with the creation of the District. Additionally, the Hearing Request is void of any explanation as to how the creation of the District would likely and uniquely impact the health, safety, and use of property of the County. Further, the Hearing Request does not identify any natural resource impacted by the creation of the District, much less the use of any such natural resource by the County. Finally, the County provided no explanation as to how the exercise of eminent domain power would negatively impact the County, much less in a manner unique from the rest of the general public.

Second, the TCEQ’s rules regarding affected persons provide that governmental entities with authority under state law over issues raised by the application may be considered affected persons.¹⁷ Here, however, the County does not have statutory authority over sewage outfall or eminent domain issues.¹⁸ Rather, sewage outfalls are regulated through the Texas Pollutant Discharge Elimination System (TPDES) permitting process for municipal wastewater treatment plants; and, such permitting process has been delegated to the TCEQ, not Texas counties.

Last, the alleged issue regarding the future use of eminent domain power by the District is outside the statutory and regulatory rubric in determining whether to create a district. It is not a factor considered by the TCEQ in TWC § 54.021(b).

For these reasons, this contention does not support the determination that the County is an affected person entitled to a contested case hearing on the Application.

¹⁷ 30 TAC § 55.256(b).

¹⁸ The TCEQ has jurisdiction over sewage and wastewater. *See* TWC § 26.023 (“The commission has the sole and exclusive authority to set water quality standards for all water in the state.”). Additionally, county commissioner’s courts do not have jurisdiction over eminent domain cases. *See* Tex. Prop. Code § 21.001 (stating that district courts and county courts at law have concurrent jurisdiction in eminent domain cases, and that county courts do not have jurisdiction in eminent domain cases).

B. Creating an Additional, Unwanted Taxing Jurisdiction Is Not a Personal Justiciable Interest to the County.

The County's contention that the creation of the District would result in an additional, unwanted taxing jurisdiction on Chambers County citizens fails to assert (1) a justiciable interest related to a legal right, duty, privilege, power, or economic interest of the County that is affected by the Application in a manner unique from the general public and (2) an issue that is under the jurisdiction of a county.

The County was required to include in its Hearing Request a statement explaining in plain language how and why it believes it will be affected by the Application in a manner not common to members of the general public.¹⁹ However, the County's allegation instead accomplishes the opposite, clearly admitting that the taxation issue is not an issue that is unique to the County, itself. Rather, the County's Hearing Request states that the additional tax arising from the creation of the District is unwanted by the citizens of Chambers County. There is no assertion as to how the additional taxing jurisdiction would impact the County itself. Again, the allegation is void of any detail. The Hearing Request, without alleging a unique interest concerning the creation of an additional taxing entity, inescapably fails to state an alleged relationship – much less a reasonable relationship – with the creation of the District. Plus, the County does not own any property within the District and thus the County has no interest that would be impacted. Further, even if the County owns property within the District, it does not pay property taxes. Thus, the imposition of an additional tax with the creation of the District does not uniquely impact the County. Last, in filing the Application, the landowner/Applicant of the land within the proposed District boundaries

¹⁹ 30 TAC § 55.251(c)(2).

supports the creation of the District and imposition of additional taxes. As to the other factors in 30 TAC § 55.256 considering whether a personal justiciable interest exists, the Hearing Request contains no explanation as to how the creation of the District and imposition of an additional tax would likely and uniquely impact the health, safety, and use of property of the County. Further, the Hearing Request does not identify any natural resource impacted by the creation of the District and imposition of a tax, much less the use of any such natural resource by the County.

Second, the TCEQ's rules regarding affected persons provide that governmental entities with authority under state law over issues raised by the application may be considered affected persons.²⁰ Here, the County does not have statutory authority over taxes imposed by other governmental entities, such as a municipal utility district.²¹ Rather, the imposition of a district tax is regulated by the district, itself, subject to the additional regulatory supervision of the TCEQ.²²

For these reasons, the County's allegation that the creation of the District would result in an additional, unwanted tax does not amount to a justiciable interest for the County, and the TCEQ should reject the County's contention that it is an affected person entitled to a contested case hearing on the Application.

IV. CONCLUSION AND PRAYER

The Hearing Request has not identified a personal justiciable interest as required by 30 TAC §§ 55.251 and 55.256. Specifically, the County has not shown how it would be affected by the proposed District in a manner not common to members of the general public or that it has statutory authority over or an interest in the issues relevant to the Application. Therefore, the

²⁰ 30 TAC § 55.256(b).

²¹ County commissioner's courts have authority to levy a county tax, but do not have jurisdiction over other governmental entities' taxes. *See generally*, TLGC, Ch. 81, Subch. B.

²² 30 TAC §§ 293.59(k)(3)(A), 293.59(k)(4)(A), and 293.59(k)(11)(C)(i).

County is not an “affected person” as required by TWC § 49.011(c) and 30 TAC § 55.250. Thus, Applicant requests that the County’s Hearing Request be denied and the Application be granted.

Respectfully submitted,

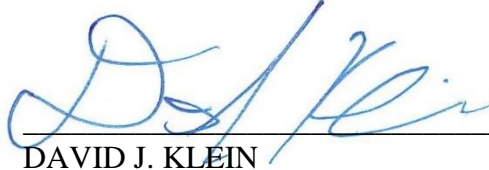
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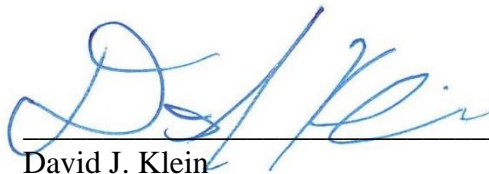
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CERTIFICATE OF SERVICE

I certify that on January 14, 2022, the Applicant's Response to Hearing Request was filed with the Chief Clerk of the TCEQ and a copy was served on the Executive Director, Office of Public Interest Counsel, and all other persons listed on the attached mailing list either via hand delivery, facsimile transmission, electronic mail, and/or deposit in the U.S. Mail.



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