

State Office of Administrative Hearings

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Chief Administrative Law Judge

June 29, 2023

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VIA EFILE TEXAS

RE: Docket Number 582-22-07138.TCEQ; Texas Commission on Environmental Quality No. 2022-0532-DIS; Application by Highland Lakes Midlothian I, LLC for the Creation of Highland Lakes Municipal Utility District No. 1 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.

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

**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**APPLICATION BY HIGHLAND LAKES MIDLOTHIAN I, LLC FOR THE
CREATION OF HIGHLAND LAKES MUNICIPAL UTILITY DISTRICT
No. 1 OF ELLIS COUNTY**

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No. 1 OF ELLIS COUNTY**

PROPOSAL FOR DECISION

I. INTRODUCTION

On July 23, 2021, Highland Lakes Midlothian I, LLC (Applicant) filed a petition, and on November 19, 2021, Applicant filed an amended petition (Petition), with the Texas Commission on Environmental Quality (TCEQ or Commission) for the creation of Highland Lakes Municipal Utility District No. 1 of Ellis County (District).¹

The proposed District is approximately 2,153.6 acres located in Ellis County, Texas (Property), and approximately 1,270 acres are located in the extraterritorial

¹ App. Exs. 8 and 10.

jurisdiction (ETJ) of the City of Waxahachie (Waxahachie), and approximately 883 acres are in the ETJ of the City of Midlothian (Midlothian).² The proposed District is bounded by FM 875 to the north and east, Baucum Road to the west, and approximately 4,500 feet north of Cox Road on the south.

TCEQ's Executive Director (ED) recommends that the Petition be granted. The Office of Public Interest Counsel (OPIC) does not take a position as to whether or not the Petition should be granted. Waxahachie, Midlothian, and Ellis County (County) (collectively, "Protestants") recommend denial of the Petition.

Based on the evidence presented and the applicable law, the Administrative Law Judge (ALJ) concludes that Applicant did not meet its burden of proving the District's creation meets all applicable requirements. More specifically, Applicant failed to prove the District will not have an unreasonable effect on water quality and that the proposed development will not have an unreasonable effect on the groundwater level in the region.

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.

Shannon Livingston, Vice President of Applicant, filed a petition for creation of the District with the TCEQ on July 23, 2021; and the Petition on

² App. Ex. 10; ED Ex. JW-3 at 0018.

November 19, 2021.³ On January 28, 2022, notice of the Petition was posted in the Ellis County Courthouse, the place where legal notices in Ellis County are posted.⁴ On March 13 and March 20, 2022, notice of the Petition was published in the *Waxahachie Daily Light*, a newspaper regularly published or circulated in Ellis County, the county in which the district is proposed to be located.⁵

TCEQ received timely hearing requests filed by the Protestants. The Commissioners determined that the Protestants were affected persons and referred this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.⁶ On September 21, 2022, the ALJ held a preliminary hearing in this matter, at which time Staff for the ED offered the jurisdictional exhibits and the Applicant, ED, OPIC, and Protestants were named as parties.⁷

The hearing on the merits was held March 23-24, 2023, before ALJ Meitra Farhadi at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Applicant was represented by attorney Natalie Scott. The Protestants were represented by attorney Emily Rogers. The ED was represented by attorney Bobby Salehi. OPIC was represented by attorney

³ App. Exs. 8 and 16 at 2-3, 8, and 10.

⁴ ED Ex. JW-3 at 0020; App. Ex. 12.

⁵ ED Ex. JW-3 at 0020; App. Ex. 11.

⁶ ED Ex. A (Interim Order).

⁷ SOAH Order No. 1.

Eli Martinez. The record closed after submission of written closing arguments on May 5, 2023.⁸

III. APPLICABLE LAW

A municipal utility district (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, and the Commission's administrative rules found at 30 Texas Administrative Code chapter 293. The purposes of a MUD include providing water distribution, wastewater collection, and/or drainage facilities.⁹ For the Commission to grant a petition for a MUD, the petition must be sufficient; the proposed district must be feasible and practicable; the land and the property to be included in the district must be benefited by creation of the district; and there must be public necessity or need for the district.¹⁰

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

⁸ Despite SOAH Order No. 3 requiring Applicant to file proposed findings of fact and conclusions of law, they did not do so.

⁹ Tex. Water Code § 54.012.

¹⁰ Tex. Water Code §§ 54.014-.0161, .021; 30 Tex. Admin. Code § 293.11(a), (d).

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 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.¹¹

A petition requesting creation of a district shall 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, and shall be filed with the Commission.¹² The petition shall:

- 1) describe the boundaries of the proposed district by metes and bounds or by lot and block number, if there is a recorded map or plat and survey of the area;
- 2) state the general nature 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 petition; and
- 3) include a name of the district which shall be generally descriptive of the locale of the district followed by the words Municipal Utility District, or if a district is located within one county, it may be designated “_____ County Municipal Utility District No. _____.” (Insert the name of the county and proper consecutive number.) The

¹¹ Tex. Water Code § 54.016(a)-(d); Tex. Loc. Gov’t Code § 42.042(a), (f).

¹² Tex. Water Code § 54.014.

proposed district shall not have the same name as any other district in the same county.¹³

In addition to the requirements set out in Texas Water Code section 54.015, the petition must include the following: evidence that it was filed with the county clerk; a map, preliminary plan, and preliminary engineering report; a certificate by the central appraisal district indicating the owners and tax valuation of land within the proposed district; and affidavits by those persons desiring appointments by the Commission as temporary directors.¹⁴

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 would be a benefit to the land to be included in the district.¹⁵ 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.¹⁶ If the Commission finds that not all of the land proposed to be included in the district will be benefited by the creation of the district, the Commission shall exclude all land which is not benefited from the proposed district and shall redefine the proposed district's boundaries accordingly.¹⁷

¹³ Tex. Water Code § 54.015.

¹⁴ 30 Tex. Admin. Code § 293.11(d).

¹⁵ Tex. Water Code § 54.021(a).

¹⁶ Tex. Water Code § 54.021(d).

¹⁷ Tex. Water Code § 54.021(c).

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;
 - (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.¹⁸

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.¹⁹ 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,

¹⁸ Tex. Water Code § 54.021(b).

¹⁹ Tex. Water Code § 54.234(a).

- or that the provisions of Texas Water Code section 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
 - 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.²⁰

Applicant carries the burden of proof by a preponderance of the evidence.²¹

IV. DISCUSSION

Applicant had 29 exhibits admitted and presented the testimony of Shannon Livingston, Vice President of Applicant; Paul McCracken, P.E., who prepared the preliminary engineering report included with the application; Cassie Gibson, who prepared the market study included with the application; and Ryan Nesmith, a municipal advisor for MUDs. The Protestants had 13 exhibits admitted and presented the testimony of Chris Dick, Midlothian City Manager; Gary Hendricks, P.E., who provides municipal engineering and surveying services to north Texas area communities; Tim Osting, P.E., Water Resources Engineer; and

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

²¹ 30 Tex. Admin. Code § 80.17(a).

Michael Scott, Waxahachie City Manager, whose testimony was adopted and presented by James Gaertner, the Executive Director of Public Works and Utilities for Waxahachie. The ED had four exhibits admitted and presented the testimony of James Walker, District Application Reviewer on the District Creation Review Team in the Water Supply Division of the TCEQ.

A. WHETHER APPLICANT SUBMITTED REQUESTS FOR CONSENT AND FOR SERVICE (TEXAS LOCAL GOVERNMENT CODE §§ 42.042 AND 42.0425, TEXAS WATER CODE § 54.016, AND 30 TEXAS ADMINISTRATIVE CODE § 293.11(a) AND (d))

As an initial matter, Applicant must demonstrate that it complied with the requirements of Texas Water Code sections 42.024 and 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 ETJ of a municipality. Applicant was required to submit a request to the City asking it to consent to the creation of the District.²² Then, if the City did not grant permission for creation of the District within 90 days, the Applicant could submit a request for water or sewer service to the City.²³ If the City and the Applicant fail to execute a mutually agreeable contract providing for the water or sewer service within 120 days, Applicant may petition TCEQ for district creation.²⁴

²² Tex. Water Code § 54.016(a).

²³ Tex. Water Code § 54.016(b)-(c).

²⁴ Tex. Water Code § 54.016(c)-(d); Tex. Loc. Gov't Code § 42.024(f); 30 Tex. Admin. Code § 293.11(d).

1. Evidence and Arguments

Applicant maintains that it met the requirements relating to a request for service. On August 7, 2020, the Property was owned by Bay Harbor Investment, LLC (Bay Harbor), who sent a petition for consent to the creation of the proposed District to both Waxahachie and Midlothian.²⁵ Bay Harbor did not receive a written response. Bay Harbor then petitioned the cities for water and sewer services on December 1, 2020, and did not receive a written response. Neither Bay Harbor nor Applicant reached out to engage in discussions with Midlothian or Waxahachie in the 120-day period.²⁶ On April 29, 2021, Applicant acquired title to 2,148.6 acres located in the proposed District.²⁷ On July 23, 2021, Applicant filed a petition, and on November 19, 2021, Applicant filed the amended Petition for creation of the District with the TCEQ.²⁸

Protestants assert that in order to evaluate the feasibility of such an agreement to provide wastewater services, an applicant must provide information relating to the service to be provided, as well as negotiate in good faith to determine whether a contract for service is possible. In this case, Bay Harbor provided no information relating to the service request, the proposed development, or any contact information for the party requesting service that could allow the cities to even begin

²⁵ App. Exs. 1, 2, and 16 at 3-4; Tr. Vol. 1 at 18-19.

²⁶ Tr. Vol. 1 at 20-21, 34; Prot. Exs. 1 at 5; 2 at 5-6.

²⁷ App. Exs. 16 at 2; 27; 29. Title to the remaining five acres is held by the five individuals proposed as directors.

²⁸ App. Exs. 8; 10.

an assessment relating to wastewater service feasibility.²⁹ Without such information and meaningful negotiations, a proper evaluation of comparable wastewater service availability was not performed. In addition, Protestants stress that the burden is on the Applicant to meaningfully request service and seek to negotiate a service agreement in good faith—not to shift the burden to the cities to reach an agreement for service with little information provided.³⁰

The ED’s position is that petitions were submitted to the cities pursuant to Local Government Code section 42.042 and Texas Water Code section 54.016, requesting each city’s consent to the creation of the District. After more than 90 days without consent, the landowner submitted petitions to each city to provide water and sewer services to the District. Then, the 120-day period for reaching a mutually-agreeable contract expired and the application materials provided to the ED indicated that a mutually agreeable contract for service was not executed with either Waxahachie or Midlothian. 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 District.³¹

In the same way, OPIC concluded that the greater weight of the evidence shows that Applicant complied with the statutory and rule requirements to initially submit a request for service when a proposed MUD is located within the ETJ of a

²⁹ Tr. Vol. 1 at 20; App. Exs. 6; 7.

³⁰ Protestants’ Closing Argument at 5-6.

³¹ ED Closing Argument at 2.

city. OPIC further noted that while Waxahachie and Midlothian might have reasonably needed more information to assess whether they could provide service, neither city requested information during the 120-day period allowed by statute for the parties to reach a mutually agreeable contract.³²

2. ALJ's Analysis

The ALJ concludes that Applicant has met its burden with respect to this issue. The preponderance of the evidence demonstrates that the majority holder of title of the land within the proposed district submitted the petitions for the creation of the District and then for water and sewer service to Waxahachie and Midlothian. The dispute arises around whether Bay Harbor or the Applicant negotiated with either city for any contract or provided sufficient information to assess whether the provision of services was feasible. The cities both admit to receiving the petition for consent to the creation of the proposed District and the petition for water and sewer service for the District. The evidence also shows that neither Waxahachie nor Midlothian consented nor refused either of the petitions; however, neither did they engage in negotiations with Bay Harbor or the Applicant to provide wastewater services to the District. It is certainly understandable and reasonable that the cities would need additional information to assess feasibility, but they failed to request any information during the 120-day period provided for in the statute. Therefore, the preponderance of the evidence demonstrates that the statutory and rule requirements to submit a request for service in accordance with Texas Water Code

³² OPIC Closing Argument at 8.

sections 42.024 and 54.016 and 30 Texas Administrative Code section 293.11(a)(2) prior to petitioning the TCEQ for the creation of a MUD were met.

B. WHETHER THE PROJECT IS FEASIBLE, PRACTICABLE, AND NECESSARY AND WOULD BE A BENEFIT TO THE LAND INCLUDED IN THE PROPOSED DISTRICT (TEXAS WATER CODE § 54.021(b))

1. Availability of comparable service from other systems (Texas Water Code § 54.021(b)(1), 30 Texas Administrative Code § 293.11(d)(5)(G))

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.³³ 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.³⁴

a) Evidence and Arguments

Based on information Applicant provided to the TCEQ, the ED outlined the following in its technical memorandum:³⁵

³³ Tex. Water Code § 54.021(b)(1).

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

³⁵ ED Ex. JW-3 at 0019.

- Applicant³⁶ submitted a petition to Waxahachie and Midlothian, requesting each city's consent to the creation of the District.
- After more than 90 days passed without receiving consent, Applicant³⁷ submitted a petition to each city to provide water or sewer services to the District.
- The 120-day period for reaching a mutually agreeable contract expired and Applicant and the cities have not executed a mutually agreeable contract for service.
- Failure to execute such an agreement constitutes authorization for the Petitioner to initiate proceedings to include the land within the district.³⁸

According to the District's preliminary engineering report, the District's land is partially within Mountain Peak Special Utility District's (Mountain Peak SUD) water Certificate of Convenience and Necessity (CCN) and partially within Buena Vista-Bethel Special Utility District's (Buena Vista SUD) water CCN.³⁹ Mr. Livingston testified that the District intends to receive water from the CCN holder.⁴⁰ The District plans to construct and dedicate the water distribution system to the CCN holder, and will construct, own, operate, and maintain the wastewater collection and treatment systems, the local storm drainage system, and local roads to serve the District.⁴¹

³⁶ In actuality, Bay Harbor submitted the petitions, not Applicant. *See* App. Exs. 1, 2.

³⁷ These petitions were also submitted by Bay Harbor, not Applicant. *See* App. Exs. 6, 7.

³⁸ Tex. Water Code § 54.016(d).

³⁹ ED Exs. JW-3 at 0020; JW-4 at 0044.

⁴⁰ Tr. Vol. 1 at 35. Mr. Livingston did not specify which CCN holder he was referencing; however, Mr. McCracken testified that the District is planning to receive water from Mountain Peak SUD and he believes that Mountain Peak SUD is negotiating with Buena Vista SUD to be the CCN holder for the entirety of the District. Tr. Vol 1 at 54, 56.

⁴¹ ED Exs. JW-3 at 0020; JW-4 at 0044.

The District is not located within the wastewater CCN of any entity.⁴² Mr. Livingston testified that he asked Bay Harbor to issue a request for consent to the creation of a MUD to both Midlothian and Waxahachie on August 7, 2020.⁴³ To his knowledge, Bay Harbor never received a written response from either city.⁴⁴ On December 1, 2020, he had Bay Harbor sign a petition for water and sewer service and filed it with both Waxahachie and Midlothian. To his knowledge, Bay Harbor never received a written response from either city.⁴⁵

Mr. McCracken, the engineer hired by Applicant to create the preliminary engineering report, testified that the Applicant did not compare what it would cost to connect to Waxahachie's sewer system versus the costs proposed in the preliminary engineering report.⁴⁶ He explained that, because the Waxahachie treatment plant is approximately 10 miles away, and the closest line they could find was about 15,000 feet away, they decided that it "wasn't worth the time" to run the numbers.⁴⁷

Protestants contend that the Applicant did not sufficiently investigate and evaluate the availability of comparable water and wastewater service from other

⁴² App. Ex. 18 at 8.

⁴³ App. Ex. 16 at 3-4.

⁴⁴ App. Ex. 16 at 5.

⁴⁵ App. Ex. 16 at 5-6.

⁴⁶ Tr. Vol 1 at 72-73.

⁴⁷ Tr. Vol. 1 at 88-89.

systems. Noting that the preliminary engineering report fails to provide any information concerning an investigation of comparable services from other systems, Waxahachie asserts that it does in fact have comparable wastewater services available.⁴⁸ Both Mr. Scott, Waxahachie City Manager, and Mr. Hendricks, a professional engineer who has worked for Waxahachie since 1984, testified that with some upgrades, Waxahachie has adequate capacity in the combination of its existing and proposed wastewater collection and treatment systems to provide service to the proposed District.⁴⁹ He stated that Waxahachie's current Wastewater Master Plan envisions providing wastewater collection and treatment to all areas within the city's ETJ.⁵⁰

Mr. Scott, Waxahachie City Manager, and Mr. Dick, Midlothian City Manager, both testified that their respective cities did not consent to or deny the petitions requesting consent to the creation of a MUD by Bay Harbor. Both testified that the petitions did not provide enough information for them to determine if their city should consent or not.⁵¹ They reviewed the petition requesting water and wastewater service from Bay Harbor as well, and stated that neither city could provide water service to the proposed District because the area is within the CCN of another retail public utility. The city managers also explained that, in order to evaluate a request for wastewater service, they would typically need to see information regarding the proposed development, including a lot plan demonstrating

⁴⁸ Prot. Ex. 10 at 7.

⁴⁹ Prot. Ex. 10 at 7; App. Ex. 14 at 7-8.

⁵⁰ Prot. Exs. 10 at 7; 12.

⁵¹ Prot. Exs. 1 at 3-4; 2 at 4; Tr. Vol. 1 at 116-17.

the proposed density, a utilities plan, a description of uses (single-family, commercial, etc.), and information regarding the timing of service in order to determine how much capacity is needed.⁵² None of that information was included in the request for service, and neither city had discussions with Bay Harbor regarding service to the proposed District. Neither city received a request for service or a petition for creation of a MUD from Applicant.⁵³

OPIC concludes that, although Waxahachie has demonstrated a goal to provide wastewater services to all areas in its ETJ, it does not currently have existing infrastructure to serve the proposed District. Therefore, OPIC takes the position that there is presently no comparable service available to the District.⁵⁴

b) ALJ's Analysis

The ALJ concludes that Applicant has met its burden on this issue. As to water service, the District is partially within the CCN of Mountain Peak SUD and partially in the CCN of Buena Vista SUD. Applicant intends to obtain water service from Mountain Peak SUD. Because of the CCNs, Waxahachie, Midlothian, and the County are unable to provide the District with water service.

As to wastewater service, the preponderance of the evidence established that there is no comparable service in existence presently. While the cities argue they

⁵² Prot. Exs. 1 at 4-5; 2 at 5; Tr. Vol. 1 at 128-29.

⁵³ Prot. Exs. 1 at 5-6; 2 at 5-6.

⁵⁴ OPIC Closing Argument at 10-11.

need more information to determine their willingness to serve the proposed District, neither city currently has existing infrastructure to serve the District. Importantly, while the evidence does show that comparable service could be made available from Waxahachie in the future, neither city responded to the petitions for service, nor has either city agreed to provide wastewater services to the District. While Waxahachie and Midlothian may have reasonably needed more information to assess whether they could provide service, the cities did not request more information during the 120-day period allowed by statute for the parties to come to terms on a mutually agreeable contract.

2. Reasonableness of projected construction costs, tax rates, and water and sewer rates (Texas Water Code § 54.021(b)(2))

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 construction costs, tax rates, and water and sewer rates.⁵⁵

a) Evidence and Arguments

Applicant asserts that the projected construction costs contained in the preliminary engineering report are reasonable; that the proposed water and sewer rates are reasonable and competitive with the rates charged by the cities; and that the

⁵⁵ Tex. Water Code § 54.021(b)(2).

contemplated District tax rate of \$1 per \$100 valuation falls within the reasonableness standards set by the TCEQ under its economic feasibility rules.⁵⁶

Mr. McCracken testified that obtaining water service from Mountain Peak SUD will require the Applicant to install infrastructure and improvements to be able to serve the District.⁵⁷ He explained that the District will install and pay for all of the on-site local network and that the major improvements (storage, pumps, wells, and treatment) would either be funded by the developer with recovery of those fees from the builders, or be constructed by the SUD and paid for by a per unit connection fee.⁵⁸ Mr. McCracken stated that the preliminary engineering report does not include any of the costs for off-site facilities for water, because, at the time the report was prepared, Mountain Peak SUD was going to provide those improvements.⁵⁹

Concerning the estimated cost for the wastewater treatment plant, Mr. McCracken explained that the cost estimate used in the preliminary engineering report was based on what was proposed in the TCEQ permit application for the discharge permit. He agreed that if the permit limits end up being more stringent than what was initially proposed by the Applicant, then the cost of the treatment plant would increase.⁶⁰

⁵⁶ See 30 Tex. Admin. Code § 293.59(k)(3).

⁵⁷ Tr. Vol 1 at 57.

⁵⁸ Tr. Vol 1 at 57-58.

⁵⁹ Tr. Vol 1 at 58-59.

⁶⁰ Tr. Vol 1 at 68-70.

In general, Mr. McCracken testified that since preparation of the preliminary engineering report, construction costs have gone up dramatically and that he would estimate overall costs have gone up 35 percent.⁶¹ Concerning impact to the feasibility of the project, he opined that the valuation of the lots has also increased, which would mitigate the cost increase.⁶²

Mr. Nesmith testified that the proposed project meets the requirements of Texas Water Code § 54.021 and that bonds can be issued by the proposed District in accordance with 30 Texas Administrative Code section 293.59. He explained that the projected tax rate is \$1 per \$100 valuation, comprised of \$0.95 for debt and \$0.05 for operation and maintenance.⁶³ The projected total overlapping tax rate for the proposed District for all taxing entities ranges from \$2.61 to \$2.83 per \$100 valuation, which is below the generally accepted \$3.05 threshold for developments in the Dallas-Fort Worth area.⁶⁴ Looking at the assessed valuation shown in the market study and the preliminary engineering report, the facilities proposed to be financed by the District, and the projected tax rate, Mr. Nesmith testified that the District is economically feasible.⁶⁵

Protestants contend that Applicant has not provided reasonable projected costs and a detailed rate analysis based on the actual plans for the proposed

⁶¹ Tr. Vol. 1 at 82-83.

⁶² Tr. Vol. 1 at 83-84.

⁶³ App. Ex.24 at 4.

⁶⁴ App. Ex. 24 at 4.

⁶⁵ App. Ex. 24 at 5.

development, but rather has provided a rough estimate of what is needed to operate and maintain a MUD in general. Protestants argue that the project water and wastewater construction costs are significantly undervalued and unreasonable for the projected capacity needs of the proposed District.

Applicant estimates that the major water supply and distribution systems will cost approximately \$4,946,133.⁶⁶ However, Mr. Hendricks, a professional engineer specializing in municipal engineering and design of infrastructure projects in North Texas, testified that estimate is understated by at least a factor of 50 percent.⁶⁷ In addition, Protestants note that other than the 10 percent contingency fee, the estimate fails to include necessary appurtenances such as valves, fittings, and installation by boring. Nor have costs been included for the offsite water lines required to connect to the existing Special Utility District (SUD) facilities, nor have costs been included for water distribution elements such as elevated storage tanks, ground storage tanks, and pump stations. Therefore, Protestants assert the actual cost of the water facilities is greater than that estimated by Applicant in its calculations.⁶⁸

Applicant also estimates the major sanitary sewer collection and treatment systems will cost approximately \$48,220,664.⁶⁹ The wastewater treatment plant is

⁶⁶ App. Ex. 20 at 0021.

⁶⁷ Prot. Ex. 10 at 10.

⁶⁸ Prot. Ex. 10 at 10.

⁶⁹ App. Ex. 20 at 0022.

estimated at a unit price of \$18.00 per gallon per day for a total of \$50,400,000.⁷⁰ However, Mr. Hendricks testified that such facilities currently cost between \$26.00 to \$28.00 per gallon to construct. Therefore, in his opinion, the correct estimate for the wastewater treatment plant needed to serve the proposed District will actually cost between \$72,800,000 to \$78,400,000, rather than \$50,400,000.⁷¹ He also testified that based on his recent experience and knowledge of current wastewater infrastructure cost, the unit cost for the proposed 12-inch or larger wastewater collection lines are underestimated by at least a factor of 50 percent.⁷² Therefore, Protestants contend Applicant has underestimated its major sanitary sewer collection and treatment systems construction costs by \$37,000,000 to \$43,000,000.⁷³ Mr. Hendricks testified that this increase is not supported by the \$0.95 debt service tax rate proposed.⁷⁴

Protestants further contend that the water rates proposed by Applicant are not reasonable. They note that at full build-out of the proposed project, the number of connections for each SUD would be double the number of their current connections, and therefore will require the SUDs to double their capacity of available water to supply, as well as require significant water distribution system improvements in order to serve the proposed population. These system upgrades are not discussed in

⁷⁰ Prot. Ex. 10 at 11.

⁷¹ Prot. Ex. 10 at 11.

⁷² Prot. Ex. 10 at 11.

⁷³ Protestants' Closing Argument at 10; Prot. Ex. 10 at 13.

⁷⁴ Prot. Ex. 10 at 13.

the preliminary engineering report and not accounted for in the infrastructure cost estimates, therefore the water rates presented are not reasonable.⁷⁵

The ED suggests that the improvements' costs appear reasonable. Mr. Walker testified that construction costs, tax rates and sewer rates appear to be comparable with other recent creation applications in the general area of the proposed District. According to Mr. Walker, 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. Mr. Walker testified that the cost estimates included in the preliminary engineering report are not viewed by the TCEQ as 100 percent accurate—“they are simply estimated costs.”⁷⁶ He explained that the rule requires a petition for creation of a MUD to include a “tentative itemized cost estimates of the proposed capital improvements and itemized cost summary for anticipated bond issue requirement.”⁷⁷ The terms “tentative” and “anticipated” in the rule tell him that the costs are flexible and subject to change.⁷⁸ Regarding bonds, the ED noted that prior to any bond issuance, tax rates for each particular bond issue will be reviewed and justified on their own merits.⁷⁹

⁷⁵ Prot. Ex. 10 at 14.

⁷⁶ ED Ex. JW-1 at 11.

⁷⁷ 30 Tex. Admin. Code § 293.11(d)(5)(E).

⁷⁸ ED Ex. JW-1 at 11.

⁷⁹ ED Ex. JW-1 at 8.

OPIIC notes that the developer must pay all upfront costs of capital improvements and can only be reimbursed to the extent available under the \$1 per \$100 valuation maximum tax rate set by TCEQ rules. Therefore, regardless of the cost of the necessary infrastructure, the developer will only be reimbursed for the amount that can be collected up to the \$1 tax rate cap; and, additionally, each bond will be evaluated on its merits by TCEQ for economic feasibility before issuance.⁸⁰ For these reasons, OPIIC states that they are unable to conclude that Applicant's costs are unreasonable.

b) ALJ's 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 practicable and if it is necessary and would be a benefit to the land included in the district.⁸¹

One of the factors analyzed to ascertain feasibility and practicality of district creation is the reasonableness of the tax rates.⁸² The ED found that a tax rate of \$1 per \$100 assessed property valuation would be adequate to meet the District's costs and also be within the \$1 limit provided by law.⁸³ If the District is created and submits a bond application to the TCEQ, an actual tax rate will then be calculated. Looking

⁸⁰ ED Ex. JJW-1 at 11.

⁸¹ Tex. Water Code § 54.021(b)(2).

⁸² Tex. Water Code § 54.021(b)(2).

⁸³ See 30 Tex. Admin. Code § 293.59(k)(3).

at the assessed valuation shown in the market study and the preliminary engineering report, the facilities proposed to be financed by the District, and the projected tax rate, Mr. Nesmith testified that the District is economically feasible.⁸⁴

Protestants note that the projected cost estimates in the preliminary engineering report for the major water supply and distribution systems and the major sanitary sewer collection and treatment systems are understated.

Based on compliance with TCEQ's rule that all up-front costs of capital improvements will be borne solely by the developer and developer reimbursement will be meted out through the \$1 tax rate cap, the ALJ finds that the tax rates will be reasonable.

The preponderance of evidence also establishes that the proposed water and sewer rates and construction costs are reasonable. Mr. McCracken noted that the wastewater rates will be set to be competitive with Waxahachie and Midlothian, and that the water rates will be set by Mountain Peak SUD and therefore should be competitive with the surrounding developments.⁸⁵ The ED agrees that the proposed rates are reasonable compared to other taxing authorities in the area and meet the requirements of 30 Texas Administrative Code section 293.59. While Protestants identified that the costs of the facilities are greater than estimated in the preliminary engineering report, the evidence in this case does not show that it will impact the

⁸⁴ App. Ex. 24 at 5.

⁸⁵ App. Exs. 18 at 13; 20 at 0013.

feasibility of the proposed District. Mr. McCracken explained that since the preliminary engineering report was issued, the valuation of the lots has increased which mitigates the cost increase of the facilities.⁸⁶ In addition, Mr. McCracken stated that in this case, 97 percent of the eligible costs will fit in the \$1 tax rate, and any costs above that will be borne by the developer.⁸⁷

3. Whether or not the proposed district and the systems and subsequent development within the proposed district will have an unreasonable effect on groundwater level within the region and recharge capability of a groundwater source (Texas Water Code §§ 54.021(b)(3)(C) & (D))

a) Evidence and Arguments

Applicant asserts that it has met its burden through expert testimony that the District's systems and subsequent development will not have an unreasonable effect on groundwater levels and recharge within the region. The primary source of water to serve the land in the District will be surface water, and groundwater will be used mainly for early phases and long-term redundancy; as such, Applicant contends the supplying of water to serve the development will have no effect on groundwater levels.⁸⁸ Furthermore, Mr. McCracken testified that re-use of treated effluent from the wastewater treatment plant is contemplated for irrigation of public open space, which will reduce the demand on any existing and proposed groundwater pumping.⁸⁹

⁸⁶ Tr. Vol. 1 at 84.

⁸⁷ Tr. Vol. 1 at 85.

⁸⁸ App. Exs. 20 at 0014; 18 at 15-16.

⁸⁹ App. Ex. 18 at 16.

The preliminary engineering report states that when fully developed, the total population of the district is estimated to be 19,620 persons. The ultimate average daily demand of the population is estimated to be 2.9 million gallons per day (MGD). The District will obtain treated water from Mountain Peak SUD and Buena Vista SUD.⁹⁰ Mr. McCracken testified that Mountain Peak SUD is pursuing new sources for water with a goal to predominantly use surface water; however he also stated that Mountain Peak SUD would like to drill two or three wells on the Property. Mr. McCracken explained that in drafting the preliminary engineering report, he relied on Mountain Peak SUD's experience and their lack of concern in stating that there will not be any adverse impacts to groundwater levels.⁹¹ With regard to recharge capability, Mr. McCracken testified that the District will be comprised of approximately 70 percent pervious cover at full buildout, including natural drainage ways. Therefore, no unusual effect on the recharge capability of any groundwater source is anticipated.⁹²

Protestants contend that the statement in the preliminary engineering report that “[n]o facilities are proposed that will contribute to adverse impacts of groundwater levels” and the “[p]rimary water source is provided via surface water sources” is incorrect.⁹³ Based on the TCEQ's Water District Database (WDD), Mountain Peak SUD currently serves a population of 16,008 with 5,336 connections,

⁹⁰ App. Ex. 20 at 009.

⁹¹ Tr. Vol 1 at 60-61, 90.

⁹² App. Ex. 18 at 16.

⁹³ See App. Ex. 20 at 0014.

and Buena Vista SUD serves a population of 5,193 with 2,074 connections. Further the WDD indicates that combined, the maximum day production capability of both SUDs combined is approximately 6.2 MGD.⁹⁴ Both SUDs are primarily reliant on thirteen reported active groundwater wells for water supply.⁹⁵ Protestants point out that the Applicant did not conduct an analysis to determine what impact the District and development would have on groundwater levels, given the fact that both SUDs rely on groundwater as a source for their water supply.⁹⁶

The ED notes that since the District represented it will obtain its water supply from surface water sources, groundwater use is not expected. Therefore, the ED states there is no evidence that groundwater levels, groundwater recharge capacity, or land subsidence will be impacted by development of the proposed District.⁹⁷

OPIC states that the creation of the District neither induces nor formulates the SUD business models, and the utilities' sale of water would continue irrespective of District creation. Therefore, OPIC is of the opinion 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.

⁹⁴ Prot. Ex. 10 at 14.

⁹⁵ Prot. Ex. 10 at 13-15.

⁹⁶ Tr. Vol. 1 at 60-61.

⁹⁷ ED Closing Argument at 4; ED Ex. JW-3.

b) ALJ's Analysis

Applicant has the burden to demonstrate that the proposed development will not have an unreasonable effect on the groundwater level in the region or the recharge capability of a groundwater source. Concerning recharge capability, Applicant provided evidence on the percentage of pervious cover at full buildout which was not refuted.

Concerning impact on groundwater levels, the preliminary engineering report provides no evaluation beyond a statement that “[n]o facilities are proposed that will contribute to adverse impacts of groundwater levels. Primary water source is provided via surface water.”⁹⁸ Applicant will obtain its water supply from the CCN holder(s)—Mountain Peak SUD, and potentially Buena Vista SUD. Mountain Peak SUD will supply surface water as well as groundwater to the District. Mountain Peak SUD has expressed a goal to seek out new sources of surface water and to predominately supply surface water; however, they have also expressed a desire to Applicant to drill up to three wells on the Property. Notably, the evidence shows that the production capacity of both SUDs is primarily reliant on groundwater.⁹⁹ Applicant was clear in testimony that it did not evaluate the impacts of the proposed development on groundwater levels, nor did it include any such evaluation in the preliminary engineering report.¹⁰⁰

⁹⁸ App. Ex. 20 at 0014.

⁹⁹ Prot. Ex. 10 at 14.

¹⁰⁰ Tr. Vol. 1 at 60-61.

Therefore, the ALJ finds that Applicant met its burden to show that the proposed development will not have an unreasonable effect on the recharge capability of groundwater in the area but that insufficient evidence was presented to establish that the proposed development will not have an unreasonable effect on the groundwater level in the region.

4. Whether the proposed district and the systems and subsequent development within the proposed district will have an unreasonable effect on natural run-off rates and drainage (Texas Water Code §§ 54.021(b)(3)(E))

a) Evidence and Arguments

Applicant argues that the District will not have any unusual effect on natural run-off rates and drainage. The land in the District is intended to be developed as a typical single family residential development.¹⁰¹ The storm water runoff within the District will be collected with the curb and gutters of the streets, an underground drainage system, and in the natural tributaries.¹⁰² The District is located on a moderately sloping site. The majority of existing drainage is through overland flow to existing tributaries which drain to South Prong Creek and eventually outfall to Lake Waxahachie. If required, detention facilities will maintain post-development flows at or below pre-development conditions.¹⁰³ The preliminary engineering report states that all storm drainage improvements will be designed in accordance with the

¹⁰¹ App. Ex. 18 at 14-15.

¹⁰² App. Ex. 20 at 0011.

¹⁰³ App. Exs. 18 at 16; 20 at 0014.

applicable design criteria established by Midlothian and Waxahachie, generally utilizing the Rational Method and a 100-year storm event.¹⁰⁴

The ED states that if required, detention facilities will maintain post-development flows at or below pre-development conditions to have minimal effects on run-off rates and drainage.¹⁰⁵ Mr. Walker explained that storm water quality is not specifically addressed in MUD creation applications—instead the TCEQ defers to the design criteria established by the city and/or county.¹⁰⁶

OPIC determined that although the preliminary engineering report does not contain design plans or other detailed information with respect to its stormwater drainage system, Applicant has represented that its system will conform to Midlothian’s and Waxahachie’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 cities’ jurisdiction and will not have an unreasonable effect on runoff rates and drainage.

Protestants contend Applicant did not meet its burden of proof to demonstrate that the proposed district and the systems and subsequent development within the district will not have an unreasonable effect on natural run-off rates and drainage. They note that the preliminary engineering report contains little substantive information—only conclusory statements that there will be adequate storm

¹⁰⁴ App. Ex. 20 at 0011.

¹⁰⁵ ED Ex. JW-3 at 0023.

¹⁰⁶ ED Ex. JW-1 at 10.

drainage.¹⁰⁷ They contend that the preliminary engineering report does not provide any information about the natural run-off rates before development in order to compare with the post development rates;¹⁰⁸ does not provide an evaluation of what the local regulations related to drainage will require;¹⁰⁹ and does not contain any information about whether offsite drainage facilities are required and what the associated costs may be.¹¹⁰ Protestants also argue that the ED's analysis is conclusory by stating that the system will be constructed in accordance with the applicable city's design criteria, without reviewing whether the proposed drainage facilities, capacities, and proposed costs were sufficient or correct to meet those design standards.¹¹¹

Protestants 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.¹¹² They argue that simply stating that Applicant must comply with the cities' applicable design criteria for storm drainage improvements is not sufficient to meet Applicant's burden under the Texas Water Code.

¹⁰⁷ App. Ex. 20 at 0011.

¹⁰⁸ Prot. Ex. 10 at 15-16; Tr. Vol. 1 at 70-71.

¹⁰⁹ Tr. Vol. 1 at 67.

¹¹⁰ Tr. Vol. 1 at 66; App. Ex. 20.

¹¹¹ Tr. Vol. 1 at 149.

¹¹² Prot. Ex. 10 at 16-17.

b) ALJ's Analysis

In determining whether a project is feasible, practicable, necessary, and would be a benefit to the land included in the district, the Texas Water Code requires the Commission to consider whether the proposed district will have an unreasonable effect on natural run-off rates and drainage.¹¹³ Commission rules require a preliminary engineering report to include “an evaluation” of the effect the proposed district will have on natural run-off rates and drainage.¹¹⁴

In this case, the preliminary engineering report indicates the proposed District's drainage system will include a curb and gutter system, underground drainage system, the natural tributaries, and if required, detention facilities. It further states the stormwater drainage system will be designed in accordance with applicable design criteria established by Waxahachie and Midlothian.¹¹⁵ 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.

In this case, although scant, the information provided in the preliminary engineering report does provide a description of the natural drainage on the Property and states that if detention facilities are required by applicable design criteria, detention facilities will be implemented to maintain post-development flows at

¹¹³ Tex. Water Code § 54.021(b)(3)(E).

¹¹⁴ 30 Tex. Admin. Code § 293.11(d)(5)(H)(v).

¹¹⁵ App. Ex. 20 at 0011.

pre-development conditions.¹¹⁶ Therefore, the ALJ finds that the proposed District, and the systems and subsequent development within the proposed District, will not have an unreasonable effect on natural run-off rates and drainage.

5. Whether or not the district, the systems, and subsequent development within the district will have an unreasonable effect on water quality (Texas Water Code § 54.021(b)(3)(F))

a) Evidence and Arguments

Applicant expects no adverse effect on water quality because its wastewater treatment plant will treat wastewater generated by the development and the District will comply with all applicable state and local stormwater requirements.¹¹⁷ Mr. McCracken explained that he does not anticipate any different impacts to water quality than what any other similar project would have.¹¹⁸ He agreed that similar developments have resulted in increased concentrations of nutrients in the water, but does not believe that it would be unreasonable. He did not conduct any water quality modeling in developing his opinion concerning water quality.¹¹⁹

The ED notes that the treatment and disposal of wastewater will be via the District's proposed wastewater treatment facility by means of a sanitary sewer collection, transport, and treatment system, all of which will be designed and

¹¹⁶ App. Ex. 20 at 0014.

¹¹⁷ App. Exs. 18 at 14; 20 at 0015.

¹¹⁸ App. Ex. 18 at 14.

¹¹⁹ App. Ex. 18 at 14; Tr. Vol. 1 at 73-75.

operated in accordance with the rules and regulations of the TCEQ.¹²⁰ Mr. Walker explained that water quality analysis is not part of the review process for creation of a MUD. The ED relies on an associated Texas Pollutant Discharge Elimination System Permit (TPDES) permit application to address water quality.¹²¹ Because the MUD will need a TPDES permit to discharge treated wastewater, Mr. Walker testified that the granting of this MUD application will not have an adverse impact on water quality.

Protestants take the position that Applicant has not met its burden to demonstrate that the proposed District and its systems and subsequent development within the District will not have an unreasonable effect on water quality. Specifically, Protestants note that there are two sources of pollution that could impact the water quality: (1) stormwater runoff from the development; and (2) point source discharge from the proposed wastewater treatment plant for the development.

Protestants assert that no stormwater quality controls are proposed or were evaluated for the District.¹²² Mr. Osting testified that there are no local rules or ordinances for the proposed District area that would require analysis, design, or implementation of permanent post-construction control of non-point source nutrient pollutants from stormwater runoff.¹²³ Likewise, stormwater quality is not addressed in the preliminary engineering report, nor by the ED in as part of the MUD

¹²⁰ ED Ex. JW-3 at 0023.

¹²¹ ED Ex. JW-1 at 10.

¹²² Prot. Ex. 4 at 9.

¹²³ Prot. Ex. 4 at 9; Tr. Vol. 1 at 144.

application review process—therefore, there is no review of whether the stormwater runoff from the proposed District will have an unreasonable effect on water quality.¹²⁴

Mr. Osting testified that without storm water quality controls, there will be an increase in concentrations of nitrate, phosphorus, sediment, and other constituents, as studies have shown that residential storm water runoff has elevated concentrations of these constituents, when compared to open space conditions.¹²⁵ Higher nutrient concentration, such as nitrogen and phosphorus, in storm water runoff will also promote the growth of nuisance vegetation and a reduction in dissolved oxygen in the receiving waters.¹²⁶ Thus, it is likely there will be increases in algae and vegetation growth, and lower dissolved oxygen, which can negatively impact aquatic life in SCS 17 Reservoir, South Prong Creek, and Waxahachie Lake.¹²⁷ Mr. Osting explained that this is particularly problematic because the receiving water bodies, including SCS 17 Reservoir, South Prong Creek, Waxahachie Lake, Waxahachie Creek, and Bardwell Lake, are barely meeting state water quality standards.¹²⁸

With regard to the point source discharge from the proposed wastewater treatment plant, Mr. Osting noted that the same water bodies are the proposed

¹²⁴ ED Ex. JW-1 at 10; Prot. Ex. 4 at 10.

¹²⁵ Prot. Ex. 4 at 10-11.

¹²⁶ Prot. Ex. 4 at 12.

¹²⁷ Prot. Ex. 4 at 18.

¹²⁸ Prot. Ex. 4 at 15-16.

receiving water bodies for both the storm water runoff and the proposed water treatment plant discharge. He testified that the draft permit for the TPDES permit for Applicant provides lower permit limits for total suspended solids, ammonia, and phosphorus than what Applicant initially requested because TCEQ determined that the requested discharge concentrations would cause an unreasonable effect on water quality.¹²⁹ Additionally, because the receiving water body SCS 17 Reservoir is small, the additional nutrients will not be quickly assimilated.¹³⁰

In sum, Protestants opine that because the proposed District has no stormwater quality treatment measures, and because the proposed development will increase nutrients delivered into the water bodies, it is likely one or more of the receiving water bodies will violate the water quality standards.

OPIC 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. Regarding the surface water run-off, OPIC finds that Applicant's representation that it will construct the development's drainage system to meet state water quality standards provides sufficient assurance that surface water run-off will not have an unreasonable effect on water quality.

¹²⁹ Prot. Ex. 4 at 15-16.

¹³⁰ Prot. Ex. 4 at 17-18.

b) ALJ's Analysis

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.¹³¹ TCEQ rules require the MUD application to include a preliminary engineering report containing an evaluation of the effect the district and its systems and subsequent development within the district on water quality.¹³²

With regard to point source discharge, in this case, the District proposes to own and operate a wastewater treatment plant pursuant to a permit issued by TCEQ. The ED's position is to defer the required evaluation to the TPDES permitting process. Therefore, concerns regarding the level of treatment required to protect a potentially impaired water body will be addressed by TCEQ while processing the wastewater permit application, and as noted by Mr. Walker, the District will not be able to discharge without a TPDES permit.

With regard to stormwater runoff, the ED does not review non-point source pollutants, instead relying on local authorities.¹³³ However, the evidence in this case demonstrates that neither the County, nor Waxahachie, nor Midlothian have

¹³¹ Tex. Water Code § 54.021(b)(3)(F).

¹³² 30 Tex. Admin. Code § 293.11(d)(5)(H)(vi).

¹³³ ED Ex. JW-1 at 10.

non-point source pollution requirements.¹³⁴ Applicant has not performed any analysis regarding stormwater quality.¹³⁵ Additionally, the preponderance of the evidence in this case established that without stormwater quality controls, there will be an increase in concentrations of nitrate, phosphorus, sediment, and other constituents promote the growth of nuisance vegetation and a reduction in dissolved oxygen in the receiving waters.¹³⁶ Therefore, based on the failure to evaluate the effect of stormwater runoff from the proposed development on water quality, the ALJ finds that insufficient evidence was presented to establish that the District will not have an unreasonable effect on water quality.

6. Whether or not the proposed district, its system, and subsequent development within the proposed district will have an unreasonable effect on total tax assessments on all land located within the proposed districts (Texas Water Code § 54.021(b)(3)(G))

a) Evidence and Arguments

Applicant argues that the petition for creation of the District contemplates a District tax rate of \$1 per \$100 valuation, which falls within the limits set by the TCEQ under its economic feasibility rules, and therefore the financing of the District's facilities and operations will not have an unreasonable effect on the total tax assessments on all land in its boundaries.¹³⁷

¹³⁴ Prot. Ex. 4 at 9; Tr. Vol. 1 at 144.

¹³⁵ Tr. Vol. 1 at 71-72.

¹³⁶ Prot. Ex. 4 at 10-12; Tr. Vol. 1 at 73-74, 76-77.

¹³⁷ App. Ex. 20 at 0013; 30 Tex. Admin. Code § 293.59(k)(3).

Protestants argue Applicant has not met its burden to establish that the proposed District will not have an unreasonable effect on the total tax assessments on land within the proposed district because it has not provided adequate information to make such a determination. Specifically, as discussed in section IV.B.2. of this Proposal for Decision (PFD), they contend that Applicant provided cost estimates that are significantly less than reasonable and customary projections of costs of the proposed facilities. By undervaluing the major sanitary sewer collection and treatment systems construction costs by \$37,000,000 to \$43,000,000, they argue those costs will have a significant impact on the financial modeling and result in an effective tax rate substantially higher than the tax rate proposed by the Applicant.

The ED reviewed the application and found that the estimated costs of improvements in the District appear sufficient to support a reasonable tax rate for debt service payments for the proposed bond indebtedness. Tax rates for each particular bond issue will be reviewed and justified on their own economic feasibility merits before the District issues any bonds.¹³⁸

OPIC notes that Mr. McCracken testified that the total overlapping tax rates in the District are projected to range between \$2.60 and \$2.82 per \$100 valuation, which is reasonable and comparable to other districts in the area.¹³⁹ Despite the

¹³⁸ ED Ex. JW-1 at 6-8.

¹³⁹ See App. Ex. 18 at 17.

Protestants' concerns that the construction costs have increased and would not be supported by the debt service tax rate as presented, OPIC takes the position that because the District's tax rate is constrained by TCEQ's \$1 tax rate cap, inaccuracies regarding Applicant's total costs of utilities, such as construction costs, do not render the overlapping tax rates calculated by Applicant inaccurate. Therefore, upon evaluation of the evidence, OPIC finds that Applicant has met its burden with respect to whether total tax assessments will have an unreasonable effect on all land located within the District.¹⁴⁰

b) ALJ's Analysis

The ALJ concludes 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 District. The petition for creation of the District contemplates a District tax rate of \$1 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. In addition, 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.

¹⁴⁰ OPIC Closing Argument at 17.

C. WHETHER THE APPLICANT HAS PROVIDED A JUSTIFICATION FOR CREATION OF THE DISTRICT SUPPORTED BY EVIDENCE THAT THE PROJECT IS FEASIBLE, PRACTICABLE, NECESSARY, AND WILL BENEFIT THE LAND TO BE INCLUDED IN THE DISTRICT (30 TEXAS ADMINISTRATIVE CODE § 293.11(c)(5)(J))

1. Evidence and Arguments

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 District is the typical infrastructure needed to serve a single-family development. Applicant further maintains that creation of the District will allow Applicant to utilize the lowest cost financing tool to deliver lots and homes at the lowest possible price to homeowners. Mr. Livingston testified that the District is necessary for it to be feasible and practicable to develop the Property with the facilities and services proposed because it will allow for long term, low interest rate, tax exempt bonds.¹⁴¹ Mr. Nesmith testified that the District is feasible based on the development's assessed valuation, the proposed facilities, and the projected tax rate.¹⁴²

Protestants assert that the Project is likely not feasible because, as discussed in section IV.B.2., Applicant's analysis regarding costs underestimates the projected costs and subsequently the projected tax rate. Protestants stress that if the additional costs of the facilities are more than the developer can afford, then this Project is not feasible, and thus, it is not sufficient just to conclude those additional costs will be borne by the developer. Further, Protestants state Applicant has not demonstrated

¹⁴¹ App. Ex. 16 at 9-11.

¹⁴² App. Ex. 24 at 5.

that the Project, as proposed, is necessary. As previously discussed in section IV.B.1., the Project will receive water service from Mountain Peak SUD and/or Buena Vista SUD and could obtain wastewater service from the City of Waxahachie.

The ED asserts that “complete justification” is satisfied by the findings in the preliminary engineering report and application materials.¹⁴³ The technical memorandum notes that if not for the District, the improvements required to provide water service, a wastewater system, local storm drainage system, local roadways, and the collector and arterial roadways to serve the land would not be feasible to construct.¹⁴⁴

OPIC takes no position on this issue.

2. ALJ’s Analysis

The ALJ concludes that the preliminary engineering report does not include complete justification for creation of the District because insufficient evidence was presented to establish that the District will not have an unreasonable effect on water quality or groundwater levels in the region. As discussed in sections IV.B.3 and 5 of this PFD, Applicant failed to evaluate the effect of stormwater runoff from the proposed development on water quality, and failed to establish that the proposed development will not have an unreasonable effect on the groundwater level in the region.

¹⁴³ ED Closing Argument at 5.

¹⁴⁴ ED Exs. JW-3 at 0020; JW-4 at 0044.

D. WHETHER OR NOT THE DISTRICT CREATION PETITIONS ARE 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 (TEXAS WATER CODE § 54.014)

1. Evidence and Argument

Protestants argue Applicant has failed to demonstrate that the petition for the creation of the proposed district is signed by a majority in value of the holders of title of the land in the proposed district as indicated by the county tax rolls. The petitions for the creation of the proposed district submitted to Waxahachie and Midlothian were signed by Thomas E. Kelly on behalf of Bay Harbor, an entity that currently holds no title to the Property.¹⁴⁵ Both the petition and the amended petition to the TCEQ were signed by Shannon Livingston on behalf of Applicant.¹⁴⁶

The affidavit of the Chief Appraiser for the Ellis County Appraisal District certified that on November 19, 2021, Applicant owned 100 percent of the appraised value of the land within the MUD.¹⁴⁷ However, Protestants point to the testimony of Mr. Livingston, stating that the proposed directors now hold title to five acres to be included in the District.¹⁴⁸ Thus, they argue, the certifications regarding the ownership from the Chief Appraiser are no longer accurate and that without a new

¹⁴⁵ App. Exs. 6, 7.

¹⁴⁶ App. Exs. 8, 10.

¹⁴⁷ App. Ex. 25.

¹⁴⁸ Tr. Vol. 1 at 18; App. Ex. 27.

certification from the Chief Appraiser, there is no evidence that Applicant owns at least 50 percent of the value of all land in the proposed district.

The ED states that Applicant represented to the ED that this requirement has been satisfied, and the ED had not seen any evidence that refutes that representation.¹⁴⁹ Additionally, the tax rolls of the central appraisal district, which were part of the applications, reflected the holders of title of the land at the time of the Petition. ED's witness Mr. Walker testified that at the time of receipt of the petition, the Applicant owned over 50 percent of the land to be included in the proposed district.¹⁵⁰

Applicant provides no argument on this issue, other than to state that is has met this requirement by citing to the petitions for creation, Mr. Livingston's prefiled testimony, and the deed conveying the Property from Bay Harbor to Applicant on April 30, 2021.¹⁵¹

OPIC takes no position on this issue.

2. ALJ's Analysis

Texas Water Code section 54.014 requires that the petition requesting creation of a MUD that is filed with the Commission be signed by a majority in value

¹⁴⁹ ED Closing Argument at 5.

¹⁵⁰ Tr. Vol. 1 at 153-54; App. Ex. 25.

¹⁵¹ Applicant's Closing Argument at 16.

of the holders of title of the land within the proposed district, as indicated by the tax rolls of the central appraisal district. In this case, both the petition and amended petition for creation were filed by Applicant, not Bay Harbor.¹⁵²

Concerning the five acres in the proposed District now owned by the temporary directors, the ALJ does not agree that this calls into question the majority ownership held by Applicant as represented by the chief appraiser at the time the petition was filed with the Commission. The preponderance of the evidence demonstrates that Applicant is the holder of title to majority in value of land to be included within the proposed District.

E. WHETHER THE APPLICANT’S REQUEST FOR ROAD POWERS MEETS THE APPLICABLE REQUIREMENTS OF TEXAS WATER CODE § 54.234, AND 30 TEXAS ADMINISTRATIVE CODE §§ 293.11(d)(11) AND 293.202

The Petition requests the TCEQ grant the District the authority to provide roads, as allowed by Texas Water Code section 54.234.¹⁵³ A district’s application for road powers must provide the following information described by 30 Texas Administrative Code section 293.202(a)(4), (7), (8), and (9):

- (4) 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;

¹⁵² App. Exs. 8, 10.

¹⁵³ App. Ex. 10.

- (7) a preliminary layout showing the proposed location for all road facilities to be constructed, acquired, or improved by the district;
- (8) 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;
- (9) 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.

1. Evidence and Argument

Protestants argue that Applicant failed to comply with the requirements to establish road powers for the proposed District because Applicant did not provide a layout of the proposed location for all road facilities within the proposed District, as required by 30 Texas Administrative Code section 293.202(a)(7). Specifically, the preliminary engineering report does not show the location of all the roadways to be constructed within the District—only the major collectors.¹⁵⁴ Because Applicant did not have information on all of the road facilities within the proposed District, Applicant could not provide a detailed cost analysis of road construction costs and analyze the impact of road costs on the proposed district. Neither Midlothian nor Waxahachie have consented to the creation of the District with road powers.¹⁵⁵

¹⁵⁴ Tr. Vol. 1 at 75-76; App. Ex. 20.

¹⁵⁵ Tr. Vol. 1 at 75.

Applicant asserts that the preliminary engineering report meets the requirements of the statute and rules, and states that they have provided a preliminary layout of the major thoroughfares.¹⁵⁶ Mr. McCracken testified that the preliminary engineering report his firm prepared only shows the “major collectors,” not all of the roadways to be constructed in the District.¹⁵⁷ He also stated that the report does not contain a narrative statement analyzing the effect of the proposed road facilities on the District’s financial condition.¹⁵⁸ However, in discussing the cost estimates to be financed by the District, Mr. McCracken testified that as of July 2021, when the preliminary engineering report was prepared, the costs were reasonable estimates.¹⁵⁹ Those costs include a preliminary estimate for both local and major roadways.¹⁶⁰ He further opined that based on the assessed valuation shown in the Market Study, the Preliminary Engineering Report, the facilities proposed to be financed by the District, and the projected tax rate, the District is economically feasible.¹⁶¹

After reviewing the preliminary layouts of the roads, the ED determined that they appear to benefit the District and financing appears feasible.¹⁶² The ED

¹⁵⁶ Applicant’s Closing argument at 16.

¹⁵⁷ Tr. Vol. 1 at 75-76.

¹⁵⁸ Tr. Vol. 1 at 76.

¹⁵⁹ App. Ex. 18 at 10.

¹⁶⁰ App. Ex. 20 at 19.

¹⁶¹ App. Ex. 18 at 13.

¹⁶² ED Ex. JW-3 at 0028.

concludes that the applicable requirements have been satisfied for granting road powers with the District creation.¹⁶³

OPIC did not take a position with respect to road powers.

2. ALJ's Analysis

Applicant's petition with a request for road powers must include evidence that the cities either consent to District's road powers or that the provisions of Texas Water Code § 54.016 have been followed.¹⁶⁴ As discussed in section IV.A. of this PFD, the ALJ concludes that Applicant's Petition complies with Texas Water Code section 54.016; therefore the Applicant also meets the requirement of 30 Texas Administrative Code § 293.202(a)(4).

The Commission's rules also require an 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;
- a cost analysis and detailed estimate of the proposed road facilities and statement of the amount of bonds estimated to be necessary to finance the roads; and
- a narrative analysis of the proposed facilities upon the district's financial condition and demonstration that they are financial and economically feasible for the district.¹⁶⁵

¹⁶³ ED Closing Argument at 5.

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

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

The evidence is undisputed that Applicant only provided the layout of major thoroughfares rather than providing the layout of all road facilities to be constructed in the District. While the ALJ does not believe the rule goes so far as to require the depiction of every road in the proposed District—as it is only requesting a *preliminary* layout, the layout does need to provide enough information for a cost analysis to estimate the amount of bonds needed along with an analysis of the impact they will have on the financial and economic feasibility of the district.

Applicant provided preliminary layouts of the major roads, detailed cost estimates, including an estimate for local roadways, and the projected road bond requirements, which established that the funding of the road improvements are financially and economically feasible.

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

F. 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.¹⁶⁶

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.¹⁶⁷

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 if the District is created. 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 ALJ finds that no party requested the transcript, because it was required by SOAH. The Protestants are local governmental entities. Applicant is a company owning 2,148.6 acres in the proposed District, and is in the business of subdividing, selling, and developing land for profit. All parties fully participated in the hearing and benefitted from the transcript. By participating in the hearing, Protestants pointed out deficiencies in Applicant's Petition. Based on these factors, the ALJ recommends that the Commission assess the transcription costs as follows: 70 percent to Applicant and 30 percent to Protestants.

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

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

V. CONCLUSION

The ALJ concludes that Applicant did not meet its burden of proving the Petition meets all applicable requirements. Therefore, the ALJ recommends that the Commission deny Applicant's petition for creation of Highland Lakes Municipal Utility District No. 1 of Ellis County. In the alternative, the ALJ recommends that Applicant be required to evaluate the effect of stormwater runoff from the proposed development on water quality and provide evidence of evaluation of the impact the proposed development will have on the groundwater level in the region.

Signed June 29, 2023



Meitra Farhadi
Presiding Administrative Law Judge

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER DENYING PETITION FOR CREATION OF HIGHLAND LAKES MUNICIPAL UTILITY DISTRICT NO. 1 OF ELLIS COUNTY; TCEQ DOCKET NO. 2022-0532-DIS; SOAH DOCKET NO. 582-22-07138

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the petitions for creation of Highland Lakes Municipal Utility District No. 1 of Ellis County. A Proposal for Decision (PFD) was issued by Meitra Farhadi, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), 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 July 23, 2021, Highland Lakes Midlothian I, LLC (Applicant) filed a petition, and on November 19, 2021, Applicant filed an amended petition (Petition), with the Commission for the creation of Highland Lakes Municipal Utility District No. 1 of Ellis County (District).
2. On March 13 and March 20, 2022, notice of the Petition was published in the *Waxahachie Daily Light*, a newspaper regularly published or circulated in Ellis County, the county in which the district is proposed to be located.
3. On January 28, 2022, notice of the Petition was posted in the Ellis County Courthouse, the place where legal notices in Ellis County are posted.

4. TCEQ received timely hearing requests filed by the City of Waxahachie (Waxahachie), the City of Midlothian (Midlothian), and Ellis County (County) (collectively, “Protestants”). The Commissioners determined that the Protestants were affected persons and referred this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.
5. On September 21, 2022, SOAH ALJ Meitra Farhadi held a preliminary hearing in this matter, at which time Staff for the Executive Director (ED) of TCEQ offered the jurisdictional exhibits and Applicant, ED, the Office of Public Interest Counsel (OPIC), and Protestants were named as parties.
6. The hearing on the merits was held March 23-24, 2023, before SOAH ALJ Meitra Farhadi at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Applicant was represented by attorney Natalie Scott. The Protestants were represented by attorney Emily Rogers. The ED was represented by attorney Bobby Salehi. OPIC was represented by attorney Eli Martinez. The record closed after submission of written closing arguments on May 5, 2023.

Request for Service

7. The proposed District is approximately 2,153.6 acres located in Ellis County, Texas (Property). Approximately 1,270 acres are located in the extraterritorial jurisdiction (ETJ) of Waxahachie, and approximately 883 acres are in the ETJ of Midlothian.
8. The proposed District is bounded by FM 875 to the north and east, Baucum Road to the west, and approximately 4,500 feet north of Cox Road on the south.
9. On August 7, 2020, the Property was owned by Bay Harbor Investment, LLC (Bay Harbor), who sent a petition for consent to the creation of the proposed District to both Waxahachie and Midlothian. Bay Harbor did not receive a written response from either city.
10. On December 1, 2020, Bay Harbor petitioned both Waxahachie and Midlothian for water and sewer services and did not receive a written response from either city.

11. On April 29, 2021, Applicant acquired title to 2,148.6 acres located in the proposed District.
12. Neither Waxahachie nor Midlothian consented to, nor refused, the petition for consent to the creation of the proposed District.
13. Neither Waxahachie nor Midlothian consented to nor refused the petition for water and sewer services by Bay Harbor.
14. Applicant complied with the requirements to submit a request for service where a proposed municipal utility district would be located within the ETJ of a city.
15. Waxahachie and Midlothian both needed more information than what was included in the petition to determine their willingness to provide sewer services to the proposed District.
16. Neither city requested more information during the 120-day period allowed by statute for the parties to come to terms on a mutually agreeable contract.
17. On July 23, 2021, Applicant filed a petition, and on November 19, 2021, Applicant filed an amended petition for creation of the District with the TCEQ.

Availability of Comparable Service from Other Systems

18. The Property is partially within Mountain Peak Special Utility District's (Mountain Peak SUD) water Certificate of Convenience and Necessity (CCN) and partially within Buena Vista-Bethel Special Utility District's (Buena Vista SUD) water CCN.
19. The Property is not located within the wastewater CCN of any entity.
20. Waxahachie has a wastewater treatment plant approximately 10 miles from the Property, with the closest line approximately 15,000 feet from the Property.
21. With some upgrades, Waxahachie has adequate capacity in the combination of its existing and proposed wastewater collection and treatment systems to provide service to the proposed District.

22. Waxahachie's current Wastewater Master Plan envisions providing wastewater collection and treatment to all areas within the city's ETJ.
23. Neither city currently has existing infrastructure to serve the District.

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

24. Since preparation of the preliminary engineering report, construction costs have increased approximately 35 percent.
25. Since the preliminary engineering report was issued, the valuation of the lots has increased, which mitigates the cost increase of the facilities.
26. The projected tax rate is \$1 per \$100 valuation, comprised of \$0.95 for debt and \$0.05 for operation and maintenance.
27. The developer will pay all upfront costs of capital improvements and can only be reimbursed to the extent available under the \$1 per \$100 valuation maximum tax rate set by TCEQ rules.
28. The proposed tax rate is reasonable compared to other taxing authorities in the area.
29. The proposed construction costs are reasonable.
30. The proposed water and sewer rates are reasonable.

Effect on Groundwater Levels and Recharge Within the Region

31. Applicant will obtain its water supply from the CCN holder(s)—Mountain Peak SUD, and potentially Buena Vista SUD.
32. The production capacity of both SUDs is primarily reliant on groundwater.
33. Mountain Peak SUD has expressed a goal to seek out new sources of surface water and to predominately supply surface water; however, they have also expressed a desire to drill up to three wells on the Property.

34. Applicant did not evaluate the impacts of the proposed development on groundwater levels, nor did they include any such evaluation in the preliminary engineering report.
35. Insufficient evidence was presented to establish that the proposed development will not have an unreasonable effect on the groundwater level in the region.
36. The District will be comprised of approximately 70 percent pervious cover at full buildout.
37. The District, its systems, and subsequent development will not have an unreasonable effect on the recharge capability of a groundwater source.

Effect on Natural Run-off Rates and Drainage

38. The storm water runoff within the District will be collected with the curb and gutters of the streets, an underground drainage system, and in the natural tributaries.
39. The District is located on a moderately sloping site. The majority of existing drainage is through overland flow to existing tributaries which drain to South Prong Creek and eventually outfall to Lake Waxahachie.
40. All storm drainage improvements will be designed in accordance with the applicable design criteria established by Midlothian and Waxahachie, generally utilizing the Rational Method and a 100-year storm event.
41. If detention facilities are required by applicable design criteria, detention facilities will be implemented to maintain post development flows at predevelopment conditions.
42. The proposed District, and the systems and subsequent development within the proposed District, will not have an unreasonable effect on natural run-off rates and drainage.

Effect on Water Quality

43. The District will own and operate a wastewater treatment plant pursuant to a permit issued by TCEQ, which entails its own permitting process.

44. Neither the County, Waxahachie, nor Midlothian have non-point-source pollution requirements.
45. Applicant has not performed any analysis regarding stormwater quality or evaluated the effect of stormwater runoff from the proposed development on water quality.
46. Without stormwater quality controls, there will be an increase in concentrations of nitrate, phosphorus, sediment, and other constituents that promote the growth of nuisance vegetation and a reduction in dissolved oxygen in the receiving waters.
47. Insufficient evidence was presented to establish that the District will not have an unreasonable effect on water quality.

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

48. The petition for creation of the District contemplates a District tax rate of \$1 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.
49. Any bond that may be issued will undergo an economic feasibility process before issuance, which further assures that an unreasonable effect on the total tax assessments will be avoided.
50. The proposed District, its system, and subsequent development within the proposed District will have an unreasonable effect on total tax assessments on all land located within the proposed District.

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

51. Due to the failure to establish that the District will not have an unreasonable effect on water quality or groundwater levels in the region, insufficient evidence was presented to establish the District is feasible, practicable, necessary and will benefit all of the land included in the District.

Petition Signature of a Majority in Value of the Landowners

- 52. Both the petition and amended petition for creation of the District that were filed with the Commission were filed by Applicant.
- 53. Applicant is the holder of title to majority in value of land to be included within the proposed District.

Request for Road Powers

- 54. The Petition requests the TCEQ grant the District the authority to provide roads.
- 55. Applicant provided a preliminary layout as to the major thoroughfares and a cost estimate of the proposed road facilities.
- 56. Applicant established that the funding of the road improvements is financially and economically feasible.

Allocation of Transcript Costs

- 57. No party requested the transcript because SOAH required a transcript.
- 58. All parties fully participated in the hearing and benefitted from the transcript.
- 59. Applicant consists of a company that owns, maintains, subdivides, and develops land.
- 60. By participating in the hearing, Protestants pointed out deficiencies in Applicant's Petition.

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. Loc. 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. Insufficient evidence was presented to establish the District will not have an unreasonable effect on water quality. Tex. Water Code § 54.021(b)(3)(F) and 30 Tex. Admin. Code § 293.11(d)(5)(H)(vi).
8. Insufficient evidence was presented to establish that the proposed development will not have an unreasonable effect on the groundwater level in the region. Tex. Water Code § 54.021(b)(3)(C) and 30 Tex. Admin. Code § 293.11(d)(5)(H)(iii).
9. The District and the systems and subsequent development will not have an unreasonable effect on: recharge within the region, natural run-off rates and drainage; or total tax assessments on all land located within the districts. Tex. Water Code § 54.021(b)(3).
10. 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).
11. 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).

12. 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).
13. 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, groundwater 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).
14. Insufficient evidence was presented to establish the projects are feasible, practicable, and necessary and would be a benefit to the land included in the District. Tex. Water Code § 54.021; 30 Tex. Admin. Code § 293.11(d)(5)(J).
15. 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).
16. 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).
17. Considering the factors in 30 Texas Administrative Code section 80.23(d)(1), an appropriate allocation of transcript costs is: 70 percent to Applicant and 30 percent to Protestants.
18. Applicant's Petition 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 Petition for Creation of Highland Lakes Municipal Utility District No. 1 of Ellis County is denied.
2. The transcript costs are allocated 70 percent to the Applicant and 30 percent to 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