SOAH DOCKET NO. 582-22-07138
TCEQ DOCKET 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	**§ § § § §**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROTESTANTS' EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the City of Waxahachie (Waxahachie), City of Midlothian (Midlothian, collectively Cities), and Ellis County (County, and collectively Protestants) and files these Exceptions to the Proposal for Decision (PFD) and, in support thereof, would show the following:

I. INTRODUCTION

Protestants agree with the Administrative Law Judge's (ALJ) proposed recommendation that the proposed application (Application) for creation of the Highland Lakes Municipal Utility District No. 1 (District) should be denied. The ALJ properly recommends that the permit should be denied because Highland Lakes Midlothian I, LLC (Applicant), did not meet its burden of proving that the District creation meets all applicable requirements, namely that the Applicant failed to properly prove that the creation will not have an unreasonable effect on water quality and groundwater levels in the region. However, Protestants except to certain Findings of Fact and proposed Conclusions of Law in the PFD, as detailed below. Specifically, in addition to its failure to properly assess effects on water quality and groundwater levels, the Applicant failed to make a proper request for service, failed to demonstrate the that District is feasible, practicable, necessary,

and would be a benefit to the land, failed to prove that the petitions were signed by a majority in value of landowners, and did not properly request road powers pursuant to applicable Texas law.

II. EXCEPTIONS AND CORRECTIONS

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

The ALJ correctly states that the Applicant submitted the applicable petitions to the Cities requesting service and requesting consent to the District creations, respectively. (PFD pgs. 13-14). Further, the PFD correctly reflects that those petitions did not contain information about the proposed development that would allow the Cities to assess whether the provision of service was feasible. However, the ALJ reached the incorrect conclusion – although she states that it is "understandable and reasonable that the cities would need additional information to assess feasibility," her analysis then shifts the burden to the cities to engage in negotiations and request information from an applicant. (PFD pg. 15). Texas Local Government Code § 42.0425(c) states that an "owner of land in the area proposed to be added to the political subdivision *may not unreasonably refuse* to enter into a contract for water or sanitary sewer services with the municipality under [Texas Local Government Code] Section 42.042(c)." Tex. Local Gov't Code § 42.0425(c) (emphasis added). It is unreasonable to submit petitions for service which on their face provide no meaningful information that would allow a city to make a determination as to whether it could serve the proposed development and to make no attempts to negotiate with that city. The burden is on the Applicant, not the Cities, to meet the requirements of Texas statutes in to create a district, and as a matter of public policy, the Applicant seeking the privilege of creating a municipal utility district should have a higher duty than simply to pay lip service to the requirement that it seek service from a city.

Therefore, the Protestants except to and recommend the amendment of Finding of Facts No. 14, 15, and 16, as follows:

> "14. Applicant did not comply~~ied~~ with the requirements to submit a request for service where a proposed municipal utility district would be located within the ETJ of a city because ~~.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~~ The Applicant did not provide more information during the 120-day period allowed by statute for the parties to come to terms on a mutually agreeable contract."

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

> "5. Applicant satisfied the requirements related to requests for service when a MUD is proposed to be located within the extraterritorial jurisdiction of a city. Tex. Water Code § 54.016(a)-(d); Tex. Gov't Code § 42.042(a)-(f)."

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

1. Availability of comparable wastewater service

Protestants except to the ALJ's conclusion that the Applicant met its burden on the issue of whether comparable wastewater service is available for the District. The ALJ correctly notes that Waxahachie has comparable wastewater services available and has adequate capacity, with some upgrades, to serve the developments. (PFD pg. 19). Similarly, the ALJ states that Mountain Peak Special Utility District (SUD) (or Buena Vista-Bethel SUD) can provide water service to the development, upon construction of the water system infrastructure pursuant to a contract. (PFD pgs. 17, 20). However, the ALJ concludes that – although the water service issue is apparently satisfied despite the fact that infrastructure construction and updates are needed – there is no wastewater service available from the Cities, or comparable service, "in existence presently." (PFD

pg. 20). Practically, the development in question currently consists of uninhabited land, and any infrastructure capable of serving the future development will need to be constructed. It is unreasonable to hold the Cities to the standard that it must have "currently existing infrastructure to serve the District." (PFD pg. 21). While Waxahachie does not have currently existing infrastructure to serve the development, such infrastructure could be constructed. The City has available capacity to serve the District, and the Applicant failed to engage in meaningful negotiations to explore the availability of comparable systems, stating that it "wasn't worth the time" to explore. (PFD pg. 18). Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 23 which states that:

> "23. The City of Waxahachie does have nearby facilities and existing capacity."

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

> "6. Applicant satisfied the requirements related to availability of comparable service from other systems. Tex. Water Code § 54.021(b)(1) and 30 Tex. Admin. Code § 293.11(d)(5)(G)."

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

Protestants except to the ALJ's conclusion that the Applicant met its burden on the issue of reasonableness of projected construction costs, tax rates, and water and sewer rates. The ALJ acknowledges that there is evidence on record that Applicant's construction cost estimates for the water treatment plant and related necessary infrastructure are significantly understated. (PFD pgs. 25, 26). Because the costs and tax rates needed to generate the funds to build this infrastructure are interrelated, it follows that the proposed tax rates and water and sewer rates are also understated, and therefore unreasonable. Despite acknowledging these shortfalls in the

Application, the ALJ assumes in error that the developer will be able to pay any amount not covered by the statutorily allowed $1.00 tax rate, despite a lack of evidence in the record to show as much. (PFD pg. 28). By this logic, any applicant could simply state that they will charge the maximum statutorily allowed tax rate – regardless of whether such a rate is sufficient for the development, and regardless of their actual infrastructure expenses.

Based on the evidence in the record, the ALJ should have concluded that the Applicant did not meet its burden of showing that this project is economically feasible by providing accurate construction and rate estimates in its Preliminary Engineering Report, and therefore, construction costs, tax rate, and water and sewer rates as proposed are unreasonable. The Protestants except to and recommend the amendment of Findings of Fact Nos. 28 through 30, as follows:

> "28. The Applicant has not met its burden to determine that ~~T~~the proposed tax rate is reasonable compared to other taxing authorities in the area.
>
> 29. The Applicant has not met its burden to determine that ~~The~~ proposed construction costs are reasonable.
>
> 30. The Applicant has not met its burden to determine that ~~T~~the proposed water and sewer rates are reasonable."

The Protestants also except to and recommend rejection of Conclusion of Law No. 9, which states that:

> "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 district. Tex. Water Code § 54.021(b)(3)."

3. Effect on Groundwater Levels and Recharge within the Region

The Protestants agree with the ALJ's conclusion that there is insufficient evidence to show that the proposed District and the subsequent development will not have an unreasonable effect on groundwater levels in the region.

The Protestants except to the conclusion that the proposed development will not have an unreasonable effect on groundwater recharge in the region because, like the groundwater level issue, the Applicant did not provide sufficient information to reach that conclusion. There is no evidence in the record from any expert that would allow the fact finder to find that the percentage of pervious cover at full buildout in an over 2,000 acres will not unreasonably affect recharge. Notably, the Applicant failed to provide pertinent information to adequately assess impacts on recharge, such as the hydrological characteristics of the portions of the aquifer to be impacted by the proposed District. Like the section in the Preliminary Engineering Report on groundwater, the information on recharge is cursory and inadequate. The Applicant did not meet its burden of proof regarding groundwater levels and recharge capability. Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 35 as follows and the rejection of Finding of Fact No. 37, which state that:

> "35. Insufficient evidence was presented to establish that the proposed development will not have an unreasonable effect on the recharge capability of groundwater in the area and the groundwater level in the region.
>
> ~~37. The District, its systems, and subsequent development will not have an unreasonable effect on the recharge capability of a groundwater source~~."

The Protestants also except to and recommend rejection of Conclusion of Law No. 9, which states that:

> "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 district. Tex. Water Code § 54.021(b)(3)."

4. Effect on Natural Run-off Rates and Drainage

The Protestants except to the ALJ's conclusion that the District, its systems, and the subsequent development will not have an unreasonable effect on natural run-off rates and

drainage. The ALJ again acknowledges that the Applicant provides only "scant" information about the District's proposed drainage facilities, run-off rates before and after development, and information about whether stormwater will be redirected from its basin of origin. (PFD pg. 36). Despite this, the ALJ accepts the Texas Commission on Environmental Quality's (TCEQ or Commission) assertion that it can defer to local authorities and accepts a cursory statement that the Applicant will comply with local regulation. (PFD pg. 36-37).

On the contrary, simply stating that the Applicant must comply with local authorities' applicable design criteria for storm drainage improvements is not sufficient to meet Applicant's burden under the Texas Water Code. The TCEQ – not a local authority – is tasked with considering whether the proposed district and subsequent development will have an unreasonable effect on natural run-off rates and drainage. The Executive Director and the TCEQ should not abdicate their responsibility to local authorities. Nevertheless, the Applicant has failed to provide enough detailed information for any authority, state or local, to assess the impacts. Thus, the Applicant have failed to meet its burden of proof to show that the proposed District and subsequent development will not have an unreasonable effect on the natural run-off rates and drainage. Therefore, the Protestants except to and recommend rejection of Finding of Fact No. 42, which states that:

> "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."

The Protestants also except to and recommend rejection of Conclusion of Law No. 9, which states that:

> "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 district. Tex. Water Code § 54.021(b)(3)."

5. Effect on Water Quality

The Protestants agrees with the ALJ's finding that the Applicant did not meet its burden to show that the proposed District and subsequent development will not have an unreasonable effect on water quality.

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

The Protestants except to the ALJ's conclusion that the proposed District and the subsequent development will not have an unreasonable effect on total tax assessments on all land located within the District. The ALJ acknowledges that there is evidence that the proposed system costs have been undervalued. The Protestants assert that the costs, rates, and tax assessments are interrelated. The vast underestimation of construction costs – and the lack of many necessary substantive details about the development – affects the entire financial model for this proposed development. The Protestants except to and recommend rejection of Conclusion of Law No. 9, which states that:

> "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 district. Tex. Water Code § 54.021(b)(3)."

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

The Protestants agree with the ALJ's conclusion that the Applicant did not meet its burden to show that the project is feasible and practicable, and therefore justified, based on insufficient evidence that the District will not have an unreasonable effect on water quality or groundwater levels within the region. (PFD pg. 46). The Protestants except to that conclusion solely to expand the scope – for all of the reasons detailed above, the Applicant failed to meet its burden to show

that the proposed District is feasible, practicable, necessary or a benefit to the land. Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 51 as follows, which states that:

> "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."

The Protestants also except to and recommend rejection of Conclusion of Law No. 9, which states that:

> "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 district. Tex. Water Code § 54.021(b)(3)."

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

The Protestants except to the ALJ's conclusion that the Applicant met its burden with respect to this issue. Section 293.11(d)(1) of the TCEQ's rules specifically requires that a petition for the creation of a MUD be "signed by persons holding title to land representing a total value of more than 50% of the value of all land in the proposed district *as indicated on tax rolls of the central appraisal district*." 30 Tex. Admin. Code § 293.11(d)(1) (emphasis added). The certification regarding the ownership from the Chief Appraiser is no longer accurate, and without a new certification from the Chief Appraiser, there is no evidence that Highland Lakes Midlothian I, LLC owns at least 50 percent of the value of all land in the proposed district. (PFD pg. 47). Contrary to the ALJ's conclusion, pursuant to the statute, there is no evidence in the record for Applicant to meet its burden on this issue without the certification from the appraisal district.

Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 53 as follows, which states that:

> "53. There is insufficient evidence in the record to establish that the Applicant is the holder of title to majority in value of land to be included within the proposed District."

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

The Protestants except to the ALJ's conclusion that the Applicant met its burden with respect to this issue. It is unreasonable to accept the Applicant's preliminary report for the proposed developments because it clearly contains errors and/or omissions; for instance, it is unreasonable to assume that a development of this size will contain only major thoroughfares and not internal road facilities. The layout therefore does not show *all* road facilities to be constructed. 30 Tex. Admin. Code § 293.202(a)(7). As a matter of law, the Applicant did not carry its burden with respect to the road power issue. Therefore, the Protestants except to and recommend rejection of Finding of Fact No. 56, which states that:

> "56. Applicant established that the funding of the road improvements is financially and economically feasible.

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

> "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)."

E. Exceptions to the recommended actions.

The Protestants agree with the PFD's recommendation to deny the Application based on insufficient evidence that the District will not have an unreasonable effect on water quality or groundwater levels within the region. However, the Protestants disagree with the above listed

Findings of Fact and Conclusions of Law because the Applicant has not met its burden of proof in this case on these statutory requirements as well, in that the Applicant failed to make a proper request for service, failed to demonstrate the that District are feasible, practicable, necessary, and would be a benefit to the land, failed to prove that the petitions were signed by a majority in value of landowners, and did not properly request road powers pursuant to applicable Texas law. Based on the reasons cited above, the Protestants assert that the Application to create the proposed district should not be granted.

III. CONCLUSION AND PRAYER

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2023, a true and correct copy of the above and foregoing document was served on all parties on the mailing list via electronic or regular mail.

Emily W. Rogers
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