

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

December 4, 2023

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**Natalie Scott, Kevin Bartz, and Randall Wilburn, for Applicant
Emily Rogers and Kimberly Kelley, for Protestants
Harrison Malley, for the ED
Jessica Anderson and Josiah Mercer, for OPIC**

**RE: Docket Number 582-23-11662.TCEQ; Texas Commission on
Environmental Quality No. 2022-0534-DIS; *Application of
Highland Lakes Midlothian I, LLC for the Creation of FM 875
Municipal Utility District 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 OF HIGHLAND LAKES MIDLOTHIAN I, LLC FOR THE
CREATION OF FM 875 MUNICIPAL UTILITY DISTRICT OF ELLIS
COUNTY**

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**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**APPLICATION OF HIGHLAND LAKES MIDLOTHIAN I, LLC FOR THE
CREATION OF FM 875 MUNICIPAL UTILITY DISTRICT 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 FM 875 Municipal Utility District of Ellis County (District).¹

¹ Applicant Exs. 5 and 8.

The proposed District is approximately 283.231 acres (the Property) located wholly within the extra-territorial jurisdiction (ETJ) of the City of Midlothian (Midlothian) in Ellis County, Texas (located on the south side of and adjacent to FM 875, approximately 4,200 feet west of McAlpin Road, and approximately 8,400 feet east of FM 663).²

The proposed District is contiguous to Applicant's simultaneously-filed petition for Highland Lakes Municipal Utility District No. 1 of Ellis County (HLMUD 1), which was recently granted by the Commission.³ Because the Petition in this matter was factually related to the petition for HLMUD 1, the parties in this matter participated in the hearings for both and argued similar positions in each: TCEQ's Executive Director (ED) recommends that the Petition be granted; the Office of Public Interest Counsel (OPIC) does not object to the Petition; and Midlothian and Ellis County (collectively, "Protestants") recommend denial of the Petition.

Based on the evidence presented and the applicable law, the Administrative Law Judge (ALJ) concludes Applicant met its burden of proving the District's creation meets all applicable requirements and should be granted.

² Applicant Exs. 5, 8, and 11.

³ Tex. Comm'n on Env'tl. Quality, *Application by Highland Lakes Midlothian I, LLC for the Creation of Highland Lakes Municipal Utility District No. 1 of Ellis County*, SOAH Docket No. 582-22-07138; TCEQ Docket No. 2022-0532-DIS (Final Order Granting Petition) (Nov. 6, 2023).

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.

On September 28, 2022, the Commission determined that the Protestants were affected persons and referred this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.⁴ On March 30, 2023, the ALJ held a preliminary hearing in this matter, at which time Applicant offered the Administrative Record, Tabs A-C, which was admitted as Applicant Exhibits A-C, and the Applicant, ED, OPIC, and Protestants were named as parties.⁵

The hearing on the merits was held August 17, 2023,⁶ before ALJ Ross Henderson at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Applicant was represented by attorneys Natalie Scott, Kevin Bartz, and Randall Wilburn. The Protestants were represented by attorneys Emily Rogers and Kimberly Kelley. The ED was represented by attorney Harrison Malley. OPIC was represented by attorneys Jessica Anderson and Josiah Mercer. The record closed after submission of written closing arguments on October 6, 2023. However, on November 6, 2023, a post-hearing conference was convened, and thereafter the ALJ reopened the record to take official notice of:

⁴ Applicant Ex. A (Interim Order).

⁵ SOAH Order Memorializing Preliminary Hearing And Establishing Prehearing Requirements (March 31, 2023).

⁶ The hearing was scheduled to convene August 16-17, 2023, but was continued to begin August 17 at the request of the parties.

(1) the Commission’s November 6, 2023, final order on the petition of HLMUD 1; (2) the Commission’s October 25, 2023, discussion on consideration of the petition of HLMUD 1; and (3) the June 29, 2023, Proposal for Decision in that matter.⁷

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.⁸ 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.⁹

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

⁷ See FN 3; *see also* SOAH Order Scheduling Post-Hearing Conference (this docket) (Nov. 9, 2023).

⁸ Tex. Water Code § 54.012.

⁹ Tex. Water Code §§ 54.014, .021; 30 Tex. Admin. Code § 293.11(a), (d).

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 with jurisdiction fails to provide its consent within 90 days after receipt of the written request, a majority of the electors in the area proposed to be included in the district or the owner or owners of 50 percent or more of the land to be included may request the city to make available to the land the water or sanitary sewer service contemplated to be provided by the district. If the city and the requestors fail to execute a mutually agreeable contract providing for the water or sanitary sewer service requested within 120 days after receipt of the petition, the requestors may petition the Commission for creation of the district.¹⁰

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.¹¹ 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

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

¹¹ Tex. Water Code § 54.014.

“ _____ County Municipal Utility District No. _____.”
(Insert the name of the county and proper consecutive number.) The proposed district shall not have the same name as any other district in the same county.¹²

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.¹³

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.¹⁴ The Commission shall deny the petition if it does not conform to the requirements of Texas Water Code section 54.015, or if the project is not feasible, practicable, necessary, or a benefit to the land in the district.¹⁵ 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.¹⁶

¹² Tex. Water Code § 54.015.

¹³ 30 Tex. Admin. Code § 293.11(d).

¹⁴ Tex. Water Code § 54.021(a).

¹⁵ Tex. Water Code § 54.021(d).

¹⁶ 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.¹⁷

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.¹⁸ If the petition includes a request for road powers, it must include:

¹⁷ Tex. Water Code § 54.021(b).

¹⁸ Tex. Water Code § 54.234(a).

- 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 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.¹⁹

Applicant carries the burden of proof by a preponderance of the evidence.²⁰

IV. DISCUSSION

Applicant offered 26 exhibits,²¹ which were 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; and Ryan Nesmith, a municipal advisor for MUDs. The Protestants had 17 exhibits

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

²⁰ 30 Tex. Admin. Code § 80.17(a).

²¹ Applicant Exs. 1-26; *see* Tr. at iii-v.

admitted²² and presented the testimony of Chris Dick, Midlothian City Manager; Gary Hendricks, Professional Engineer (P.E.) and Registered Public Land Surveyor (R.P.L.S.), who provided municipal engineering and surveying services to District; and Tim Osting, P.E., Water Resources Engineer. The ED had four exhibits admitted²³ and presented the testimony of Justin Taack, Manager of the Districts Team for the Commission.

A. WHETHER APPLICANT COMPLIED WITH TEXAS LOCAL GOVERNMENT CODE SECTIONS 42.042 AND 42.0425, TEXAS WATER CODE SECTION 54.016, AND 30 TEXAS ADMINISTRATIVE CODE SECTION 293.11(a) AND (d) (REGARDING REQUIRED SUBMITTALS OF REQUESTS FOR CONSENT AND FOR SERVICE).

By virtue of the proposed District's location within Midlothian's ETJ, certain precursor requirements arose before Applicant could submit its Petition for district creation to the Commission. Namely, Applicant was first required to submit a request to Midlothian requesting consent to the creation of the District (signed by landowners within the proposed District representing a total value of more than 50% of the tax rolls in the District).²⁴ If Midlothian withheld its consent for 90 days, Applicant was next required to submit a request for water or sewer service to Midlothian.²⁵ Then, only if Midlothian and the Applicant failed to execute a

²² Protestants Exs. 1-17; *see* Tr. at vii-viii.

²³ ED Exs. JT-1 to JT-4; *see* Tr. at vi.

²⁴ Tex. Water Code § 54.016(a); 30 Tex. Admin. Code § 293.11(a)(2).

²⁵ Tex. Water Code § 54.016(b)-(c).

mutually agreeable contract providing for the water or sewer service within 120 days, could Applicant petition TCEQ for creation of the District.²⁶

1. Evidence and Arguments

It was un rebutted that, on September 9, 2020, the Property was majority-owned by Kimberly Dawn Gravens, Wayne Hill, and Elaine Hill, who collectively sent a petition (dated August 20, 2020) for consent to the creation of the proposed District to Midlothian.²⁷ Midlothian did not respond to the petition, so 90 days later, on December 8, 2020, the landowners requested Midlothian provide water and sewer services.²⁸ Midlothian never responded to the requests for services in writing; but, in conversations, Midlothian's representatives stated it wanted the proposed District annexed into Midlothian's corporate limits and developed with larger lots and less density and that Midlothian had no interest or ability in providing wastewater service to the Property.²⁹ It was un rebutted that Midlothian and the landowners did not enter into contracts for water and sewer services within 120 days. On April 29, 2021, Applicant acquired title to the Property in the proposed District, and thereafter, Applicant filed the Petition with the Commission. Applicant, the ED, and OPIC agree that this evidence shows Applicant met its burden with respect to submittal of a petitions for consent for creation of the District and its required requests for service.

²⁶ Tex. Water Code § 54.016(c)-(d); Tex. Loc. Gov't Code § 42.042(f); 30 Tex. Admin. Code § 293.11(d).

²⁷ Applicant Ex. 1.

²⁸ Applicant Ex. 3.

²⁹ Applicant Ex. 13 (Livingston Dir.) at 3.

Protestants acknowledge that Midlothian never responded to the petition for district creation and never entered into contracts for water or wastewater service with the landowners or Applicant.³⁰ Regarding water service, Midlothian states it could not provide water service to Applicant because the Property is located within Mountain Peak Special Utility District’s (Mountain Peak SUD) water Certificate of Convenience and Necessity (CCN).³¹ However, Protestants contend that Applicant has failed to meet its burden regarding wastewater service because the request for wastewater service contained insufficient information from which Midlothian could evaluate it and because Applicant did not negotiate in good faith for the provision of service. Protestants assert that these purported failures by Applicant violated Texas Local Government Code section 42.0425, which prohibits the District from “unreasonably refus[ing] to enter into a contract for water or sanitary sewer services.”

2. ALJ’s Analysis

The ALJ concludes that Applicant has met its burden with respect to these requirements. The undisputed evidence demonstrates that the majority holders of land within the District submitted the required petitions for the creation of the District and the requests for water and sewer service to Midlothian. Midlothian admitted receiving both and responding to neither. If Midlothian needed additional information to assess feasibility for wastewater service, it failed to request it during the 120-day period. Applicant did not unreasonably refuse to enter into a contract

³⁰ Protestants’ Reply Brief at 2.

³¹ Protestants Ex. 1 (Dick Dir.) at 5.

with Midlothian, because a contract was never offered or discussed. Further, if Midlothian's representatives' statement that Midlothian wanted the proposed District annexed into Midlothian's corporate limits and developed with larger lots and less density was a condition of service, this would violate Texas Local Government Code section 42.0425(a), which prohibits a municipality from conditioning its consent on such demands. 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 section 54.016, Texas Local Government Code section 42.042, 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 SECTION 54.021(b))

1. Availability of comparable service from other systems (Texas Water Code section 54.021(b)(1), 30 Texas Administrative Code section 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.³² A creation application shall contain an investigation and evaluation of the availability of comparable service from

³² Tex. Water Code § 54.021(b)(1).

other systems, including, but not limited to, water districts, municipalities, and regional authorities.³³

a) Evidence and Arguments

According to the District’s preliminary engineering report, the District’s land is within Mountain Peak SUD’s water CCN.³⁴ The District intends to receive water from Mountain Peak SUD.³⁵ The District is not located within the wastewater CCN of any entity.³⁶ As previously discussed, although the Property is within Midlothian’s ETJ, Midlothian did not respond to a request for water or wastewater service. The District plans to construct the water distribution system and dedicate it to the CCN holder, and will construct, own, operate, and maintain the wastewater collection and treatment systems (to be shared with recently created HLMUD 1),³⁷ the local storm drainage system, and local roads to serve the District.³⁸ The ED reviewed the preliminary engineering report and determined, “there are no other sources which have the facilities or capacity to serve the proposed District.”³⁹

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

³⁴ Applicant Ex. 11 at 8-9.

³⁵ Applicant Ex. 11 at 8-9.

³⁶ Applicant Ex. 11 at 8-9.

³⁷ Tr. at 23 (Livingston Cross).

³⁸ Applicant Ex. 11 at 8-9.

³⁹ ED Exs. JT-1 at 6, JT-3 at 20.

Protestants admit that it is not feasible or practicable for Midlothian to provide comparable wastewater services to the District.⁴⁰ However, Protestants contend that the City of Waxahachie (Waxahachie) has comparable wastewater service available and allege that Applicant failed to investigate it as an alternative option to constructing a new wastewater plant. Although the District is not within the ETJ of Waxahachie, recently created HLMUD 1 is partially within it, and District intends to share wastewater service with HLMUD 1.⁴¹ Mr. Hendricks said 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, and the service would be more cost effective.⁴²

Mr. McCracken, the engineer hired by Applicant to create the preliminary engineering report, testified that considering the distance to Waxahachie's system, they did not think it was a viable option.⁴³

OPIC addressed only Midlothian's capabilities and concludes that there is presently no comparable service available to the District.

b) ALJ's Analysis

The ALJ concludes that Applicant has met its burden on this issue. Applicant intends to obtain water service from the CCN holder, Mountain Peak SUD.

⁴⁰ Protestants Ex. 2 (Hendricks Dir.) at 11-12.

⁴¹ TCEQ Docket No. 2022-0532-DIS, Proposal for Decision, p. 10.

⁴² Protestants Ex. 2 (Hendricks Dir.) at 13-14.

⁴³ Tr. at 51.

Regarding wastewater service, the preponderance of the evidence established that there is no comparable service available. Waxahachie does not possess the current infrastructure to provide service without upgrades, and its facilities are a significant distance from the Property. Although Applicant was not required to petition Waxahachie for wastewater service in this matter (because the Property is not within Waxahachie's ETJ), Applicant made such a petition to Waxahachie in the simultaneously-filed, and recently approved, petition for creation of HLMUD 1—and Waxahachie did not respond to HLMUD 1's request.⁴⁴ Further, there is no evidence that Waxahachie could legally provide service to the Property (in Midlothian's ETJ) and Protestants provided no basis in law or precedent to require Applicant to investigate service from an entity with no jurisdiction or authority to provide service. In other words, because of the obvious technical and legal obstacles noted, and Waxahachie's non-response to HLMUD 1's request, it was reasonable for Applicant to assume service from Waxahachie to the District was unavailable.

2. Reasonableness of projected construction costs, tax rates, and water and sewer rates (Texas Water Code section 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.⁴⁵

⁴⁴ TCEQ Docket No. 2022-0532-DIS, Final Order Granting Petition, FOFs 10, 13.

⁴⁵ Tex. Water Code § 54.021(b)(2).

a) Evidence and Arguments

Applicant asserts that the projected construction costs are reasonable; that the proposed water and sewer rates are reasonable and competitive with the rates charged by the cities; and that the contemplated District tax rate of \$0.75 per \$100 valuation falls within the reasonableness standards set by the TCEQ under its economic feasibility rules.⁴⁶

(i) Construction Costs

Applicant contracted with an outside engineering company to conduct a Preliminary Engineering Report (Report), which included estimated construction costs, and Applicant submitted the Report with its Petition.⁴⁷ The estimated costs are allocated between the District, HLMUD 1, and Midlothian (for certain portions of HLMUD 1 which are within the city limits of Midlothian).

Protestants contend that Applicant has not provided reasonable projected costs and a detailed rate analysis based on the actual plans for the proposed development, but rather has provided a rough estimate of what is needed to operate and maintain a MUD in general. Protestants argue that the projected water and wastewater construction costs are significantly undervalued and unreasonable for the projected capacity needs of the proposed District. Mr. Hendricks, on behalf of Protestants, testified that Applicant underestimates the costs by at least 50 percent for: the major water supply and distribution systems; the wastewater treatment

⁴⁶ See 30 Tex. Admin. Code § 293.59(k)(3).

⁴⁷ Applicant Ex. 11, Tables 2-7.

plant; and the cost of wastewater collection lines.⁴⁸ Protestants also say Applicant's estimate fails to include necessary appurtenances such as valves, fittings, and installation by boring and does not include any costs for the offsite water lines required to connect to Mountain Peak SUD's facilities, nor have costs been included for water distribution elements such as elevated storage tanks, ground storage tanks, and pump stations.⁴⁹ Therefore, Protestants assert the actual cost of the infrastructure is greater than that estimated by Applicant in its calculations.

Applicant responds these costs were reasonable at the time they were made in July 2021, however, rapid inflation of construction costs and offsetting rising home values have occurred since.⁵⁰ Mr. McCracken stated that water infrastructure will be phased-in through a \$6,000 per connection capital recovery fee and the Report does not include any of the costs for off-site facilities for water because, at the time of the Report, Mountain Peak SUD agreed to provide those improvements in exchange for 20 acres of land.⁵¹ Regarding the construction costs, Applicant notes that the District may seek up to an additional \$0.25 per \$100 valuation in taxes (up to the maximum allowable in 30 Texas Administrative Code section 293.59(k)) as a buffer to offset any additional costs that might accrue, and stated that the rapidly rising home values in the area will also offset any additional costs.⁵²

⁴⁸ Protestants Ex. 2 (Hendricks Dir.) at 15-24.

⁴⁹ Protestants Ex. 2 (Hendricks Dir.) at 17.

⁵⁰ Applicant Ex. 15 (McCracken Dir.) at 10.

⁵¹ Tr. at 56.

⁵² Tr. at 87

The ED's Staff reviewed the estimated costs and also found them to be reasonable.⁵³ OPIC concludes that the costs appear to be in line with other district creations in the area and that Applicant must pay all construction costs up front and may not seek reimbursements which exceed the statutory cap of \$1.00 per \$100 in valuation.

(ii) Tax Rates

On behalf of Applicant, Mr. Nesmith testified that the proposed project meets the requirements of Texas Water Code section 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 \$0.75 per \$100 valuation, which falls below the maximum \$1.00 per \$100 valuation allowable under 30 Texas Administrative Code section 293.59(k).⁵⁴ Mr. Nesmith testified that the District is economically feasible based on these tax rates.⁵⁵ Applicant submitted a market study (Study) that estimated the total assessed value of the District at build-out. The ED reviewed the Study in conjunction with the Report's cost estimates and concluded the rates were sufficient:

assuming a 98% collection rate and an ultimate AV of \$369,310,000, a projected ultimate tax rate of approximately \$0.70 (\$0.46 for utilities and \$0.24 for roads) per \$100 AV was indicated to be necessary to meet the annual debt service requirements for the proposed District. An additional \$0.05 per \$100 AV is projected to be levied for maintenance

⁵³ ED Exs. JT-1 to JT-4 (specifically, JT-1 at 6-7).

⁵⁴ Applicant Ex. 19 (Nesmith Dir.) at 4-5.

⁵⁵ Applicant Ex. 19 (Nesmith Dir.) at 6.

and operating expenses, for a combined proposed District tax rate of \$0.75.⁵⁶

(iii) Water and Sewer Rates

Regarding sewer rates, the Report details the sewer rates charged by nearby Midlothian and Waxahachie.⁵⁷ Mr. McCracken testified the rates will be set to be competitive with Midlothian and Waxahachie's rates and that the rates should be sufficient to fund the cost of operating the wastewater plant.⁵⁸ The water rates will be set by Mountain Peak SUD, and its rates were also included in the Report.⁵⁹ Applicant contends that the rates should be competitive with surrounding developments.⁶⁰

Protestants contend that the water rates proposed by Applicant are not reasonable because, as discussed above, they do not account for all of the infrastructure costs in the District's estimates.

b) ALJ's analysis

The ALJ finds Applicant met its burden to prove the reasonableness of projected construction costs, tax rates, and water and sewer rates.⁶¹ The ALJ notes

⁵⁶ ED Ex. JT-3 at 24.

⁵⁷ Applicant Ex. 11 at 13.

⁵⁸ Applicant Ex. 16 (McCracken Dir.) at 13.

⁵⁹ Applicant Ex. 11 at 13.

⁶⁰ Applicant Ex. 16 (McCracken Dir.) at 13.

⁶¹ Tex. Water Code § 54.021(b)(2).

that most of the costs at issue were adjudicated and approved in the recently decided petition for HLMUD 1.⁶² Nevertheless, the ALJ re-confirms that the Report, Applicant's expert testimony, and the ED's review all establish that the cost estimates were reasonable when submitted. The Commission has held that the reasonableness of costs should be adjudged at the time the costs were submitted.⁶³ Applicant provided un rebutted evidence that there has been significant cost inflation since the Petition was submitted; and the ALJ finds that this inflation, to some extent, accounts for the gap between Protestants' and Applicant's cost estimates. Applicant's estimates are more reliable for purposes of determining reasonableness of costs when submitted, because they were made closer in time to the submission of the Petition. Further, Applicant adequately addressed Protestant's arguments relating to the costs required for Mountain Peak SUD to provide water service, explaining that Mountain Peak SUD has agreed to cover the upfront costs of facilities and Applicant will phase in those costs by paying a \$6,000 capital recovery fee for each connection. Finally, Applicant also demonstrated there is a significant buffer created by rising home valuations and another \$.025 per \$100 valuation that Applicant has at its disposal to cover any costs.

The ALJ finds that the projected tax rates are reasonable and sufficient to fund those projected costs. The District's market valuations were not disputed. The projected tax rate is \$0.75 per \$100 valuation, which falls below the maximum \$1.00 per \$100 valuation allowable under 30 Texas Administrative Code section 293.59(k).

⁶² TCEQ Docket No. 2022-0532-DIS, Final Order Granting Petition, FOF 29.

⁶³ SOAH Docket No. 582-22-07138; TCEQ Docket No. 2022-0532-DIS (Commission discussion at open meeting) (Oct. 25, 2023).

The District is economically feasible, because the ED’s review confirmed that the tax rates are sufficient to cover the estimated costs.

The preponderance of evidence also establishes that the proposed water and sewer rates are reasonable. Mr. McCracken testified that the District’s wastewater rates will be set to be competitive with neighboring Waxahachie and Midlothian. He also testified that the water rates will be set by Mountain Peak SUD and therefore should be competitive with the surrounding developments. The ALJ is not persuaded by Protestants’ arguments that the projected water rates are not reasonable because they do not include certain infrastructure costs. As discussed above, Applicant explained that those water infrastructure costs will be recovered in a means other than in the water rates.

3. Whether or not the proposed district and the systems and subsequent development within the proposed district will have an unreasonable effect on land elevation or subsidence (Texas Water Code section 54.021(b)(3)(A), (B))

a) Evidence and arguments

Applicant’s Report addressed the issues of land elevations and subsidence. Regarding land elevations, the Report states the “fill and/or excavation associated with the development of the District’s systems will not cause any changes in land elevation other than that normally associated with the construction of the underground utility systems, drainage facilities, and paving.”⁶⁴ Regarding

⁶⁴ Applicant’s Ex. 11 at 14.

subsidence, the Report states “no facilities are proposed that will cause or contribute to subsidence.”⁶⁵ Mr. McCracken elaborated that subsidence is common in the Houston area, but is not a concern for aquifers in the Dallas/Fort Worth area.⁶⁶ The ED reviewed and agreed with the Report’s conclusions on these issues.⁶⁷ No other party submitted evidence or briefed these issues.

b) ALJs Analysis

The ALJ concludes that Applicant has met its burden on these issues.

4. 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 section 54.021(b)(3)(C), (D))

a) Evidence and Arguments

Applicant asserts that it has met its burden by proving, 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. Regarding recharge, Mr. McCracken testified that no facilities are proposed that will adversely impact the recharge capability of a groundwater source in any unusual way. He said that open space, natural drainage corridors, and the predominantly single-family

⁶⁵ Applicant’s Ex. 11 at 14.

⁶⁶ Applicant Ex. 16 (McCracken Dir.) at 15.

⁶⁷ ED Ex. JT-1 at 6.

residential land use that are part of the MUD development plan leave significant pervious surfaces for groundwater to recharge. This testimony echoes the Report's conclusion that there are no proposed facilities that will contribute to adverse impacts on the recharge capability of any groundwater sources or to groundwater levels.⁶⁸ The ED reviewed and agreed with the Report's conclusions on these issues.

Protestants argue that Applicant failed to meet its burden on these issues. Specifically, they contend that Applicant's Report was insufficient because it was conclusory and failed to consider the actual impact Mountain Peak SUD's use of groundwater will have on groundwater levels in the region and Applicant provided no studies about how the proposed development will impact groundwater recharge. Applicant dismisses the ED's conclusion on these issues because they rely upon Applicant's alleged insufficient Report.

OPIC argues that Mountain Peak SUD will select its water source for serving customers in the region irrespective of the District's creation. OPIC agrees with Applicant and the ED, 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.

⁶⁸ Applicant Ex. 11 at 14.

b) ALJ's Analysis

Concerning impact on groundwater level, the Commission recently affirmed that it will not consider the impacts of a district's potential use of groundwater as a source of water supply for this inquiry.⁶⁹

Applicant provided evidence on the percentage of open space and pervious cover at full buildout, which was not refuted. Applicant also offered uncontroverted evidence that there was nothing unusual about the development which would cause impacts to groundwater levels or recharge capability greater than any other such typical development. Further, the Commission confirmed in a recent related decision on creation of HLMUD 1 that, there is no written requirement or policy, as Protestants urge, for Applicant to conduct a study of groundwater recharge.⁷⁰

Therefore, the ALJ finds that Applicant met its 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.

⁶⁹ SOAH Docket No. 582-22-07138; TCEQ Docket No. 2022-0532-DIS (Commission discussion at open meeting) (Oct. 25, 2023).

⁷⁰ *Id.*

5. 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 section 54.021(b)(3)(E))

a) Evidence and Arguments

The Report states:

The storm water runoff within the District will be collected within the curb and gutters of the streets, an underground drainage system, and in natural tributaries. Storm water from the District generally flows to the east in an unnamed tributary of South Prong Creek. South Prong Creek flows through the Highland Lakes property, immediately east of the District's eastern boundary, eventually discharging to Lake Waxahachie, approximately 6 miles to the southeast of Highland Lakes . . . Storm Water Collection - The storm water collection system for the District will consist of a combination of street curb and gutters with inlets, and reinforced concrete pipes ranging from 18-inch diameter to 60-inch diameter, as well as single concrete box culverts for larger flows . . . Design Criteria - All storm drainage improvements will be designed in accordance with the applicable design criteria established by the City of Midlothian, generally utilizing the Rational Method and a 100-year storm event.⁷¹

Mr. McCracken testified that the District's "detention facilities conforming to generally accepted design practices will maintain post-development flows at or below pre-development conditions, and maintain velocities at or below non-erosive levels . . . [and] will not have any unusual effect on natural run-off rates and drainage."⁷²

⁷¹ Applicant Ex. 11 at 10-11.

⁷² Applicant Ex. 15 (McCracken Dir.) at 16.

For the ED, Mr. Taack explained that because “storm drainage is usually under the jurisdiction of local authorities, such as cities, counties or flood control districts, [the ED] . . . does not require review of the design plans or specifications for storm drainage systems.⁷³ He elaborated, the ED “considers a reference to review and approval by local jurisdictions as an indication that the storm drainage will comply with any applicable requirements regarding storm runoff.”⁷⁴ Finally, he stated that the ED reviewed the Report and found that the representations therein were sufficient to support that the District will not have an unreasonable effect on drainage or runoff.⁷⁵

OPIC concluded that Applicant’s representation that its system will conform to Midlothian’s applicable design criteria provides sufficient assurance that the system will perform in a comparable fashion to other systems under the Midlothian’s 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 runoff rates and drainage.⁷⁶ They allege that the preliminary engineering report contains little substantive information—only conclusory statements that there will be adequate storm

⁷³ ED Ex. JT-1 at 11.

⁷⁴ ED Ex. JT-1 at 11.

⁷⁵ ED Ex. JT-1 at 11.

⁷⁶ See Protestants Ex. 2 (Hendricks Dir.) at 32-36.

drainage. They contend that the Report does not provide any information about the natural run-off rates before development to compare with the post-development rates; does not provide an evaluation of what the local regulations related to drainage will require; and does not contain any information about whether offsite drainage facilities are required or what the associated costs may be. 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.

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. 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.

b) ALJ's Analysis

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. The Report provides 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 pre-development conditions.⁷⁷ The Report states the proposed District's drainage system will include a curb and gutter system, underground drainage system, the natural tributaries, and if required, detention facilities.⁷⁸ It further states the stormwater drainage system will be designed in accordance with applicable design criteria established by Midlothian.⁷⁹ On this issue, the Commission defers to the local authorities' governance over stormwater drainage and has stated that an Applicant's representation that it will comply with local requirements is sufficient.⁸⁰

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

a) Evidence and Arguments

For this issue, the parties addressed wastewater and storm water separately.

(i) Wastewater Discharges

Applicant states that the District will not have unreasonable water quality impacts because it intends to construct, own, and operate a wastewater treatment facility permitted by the Commission.⁸¹ The ED agrees, stating an in-depth analysis

⁷⁷ Applicant Ex. 11 at 10-11.

⁷⁸ Applicant Ex. 11 at 10-11.

⁷⁹ Applicant Ex. 11 at 10-11.

⁸⁰ ED Ex. JT-1 at 9.

⁸¹ Applicant Ex. 11 at 14.

of water quality is not required in this proceeding because the Commission relies on the Texas Pollutant Discharge Elimination System Permit (TPDES) permit application to address water quality.⁸² OPIC also agrees, arguing that the District, as a permit holder, will be subject to the Commission's rules and regulations, as any other plant owner would.

Protestants argue that the Report should include detailed information about the treatment level that will be required because the receiving bodies barely meet state water quality standards.⁸³

(ii) Stormwater Quality

Regarding stormwater, Mr. McCracken stated the District's collection, conveyance, and detention facilities for storm water will be designed, constructed, operated and maintained in compliance with all federal, state and local requirements, including the requirements of Midlothian and Ellis County.⁸⁴ As discussed previously, the District plans to construct a storm water collection system to maintain natural runoff rates. Mr. McCracken explained that he does not anticipate impacts to water quality different from or beyond that of any similar project.⁸⁵

⁸² ED Ex. JT-1 at 9.

⁸³ Protestants Ex. 10 (Osting Dir.) at 18-19.

⁸⁴ Applicant Ex. 15 (McCracken Dir.) at 13.

⁸⁵ Applicant Ex. 15 (McCracken Dir.) at 16.

The ED's Technical Memorandum references the Report's proposed stormwater drainage collection system and adds that all "proposed improvements will be designed and constructed in accordance with Ellis County design criteria."⁸⁶ Mr. Taack testified that an evaluation of non-point source pollutants, such as nutrients, is not a required part of the review of a District petition.⁸⁷

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.

Protestants assert that no stormwater quality controls are proposed or were evaluated for the District.⁸⁸ Mr. Osting testified that without stormwater 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.⁸⁹ Higher concentrations of nutrients 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.⁹⁰ Thus, it is likely there will be increases in algae and vegetation growth, and lower dissolved

⁸⁶ ED Ex. JT-1 at 9.

⁸⁷ ED Ex. JT-1 at 9.

⁸⁸ Protestants Ex. 10 (Osting Dir.) at 9.

⁸⁹ Protestants Ex. 10 (Osting Dir.) at 11.

⁹⁰ Protestants Ex. 10 (Osting Dir.) at 13.

oxygen, which can negatively impact aquatic life in SCS 17 Reservoir, South Prong Creek, and Waxahachie Lake.⁹¹ 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 at present.⁹² Additionally, because one of the receiving water bodies, SCS 17 Reservoir, is small, the additional nutrients will not be quickly assimilated.⁹³ Protestants allege that Midlothian's stormwater controls do not apply in its ETJ, and if stormwater is not addressed here, these issues will not be addressed.

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.⁹⁴ TCEQ rules require the MUD application to include a preliminary engineering report containing an evaluation of the effect of the district and its systems and subsequent development within the district on water quality.⁹⁵ In the Commission's recent decision regarding the petition for the creation of HLMUD 1, identical issues were raised by Protestants and the Commission found that the applicant met its burden on this issue by showing

⁹¹ Protestants Ex. 10 (Osting Dir.) at 18-19.

⁹² Protestants Ex. 10 (Osting Dir.) at 17.

⁹³ Protestants Ex. 10 (Osting Dir.) at 18.

⁹⁴ Tex. Water Code § 54.021(b)(3)(F).

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

that it would meet state and local water quality standards. Regarding the point source, the ALJ agrees with Applicant, the ED, and OPIC, that the Applicant’s plan to discharge waste pursuant to a Commission-issued TPDES permit is sufficient to meet its burden. On the issue of stormwater runoff, the Commission elaborated that an Applicant meets its burden “where the record shows that Applicant intends to limit post-development flows at or below pre-development conditions and comply with all federal, state, and local requirements for its stormwater collection.”⁹⁶ The ALJ finds that the Petition has complied with these requirements. Therefore, the ALJ finds that Applicant demonstrated the District will not have an unreasonable effect on water quality.

7. 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 section 54.021(b)(3)(G))

a) Evidence and Arguments

Applicant notes that the Petition contemplates a District tax rate of \$0.75 per \$100 valuation, which falls within the limits of \$1.00 per \$100 valuation set by the TCEQ under its economic feasibility rules. Mr. Nesmith testified that, at that rate, the total overlapping tax rate on land within the District will be approximately \$2.58 per \$100 valuation, which is consistent with, and well below the top threshold for, comparable tax rates in the Dallas Metropolitan area.⁹⁷ Therefore, Applicant argues

⁹⁶ TCEQ Docket No. 2022-0532-DIS, Final Order Granting Petition, III. Explanation of Changes, 2; *see also* Commission discussion at open meeting, same docket (Oct. 25, 2023).

⁹⁷ Applicant Ex. 19 (Nesmith Dir.) at 15; 30 Tex. Admin. Code § 293.59(k)(3).

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.

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 Applicant underestimated the costs of the proposed facilities. They argue the additional unaccounted 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 (\$1.10 per \$100 valuation).⁹⁸

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.⁹⁹

OPIC takes the position that because the District's tax rate is constrained by TCEQ's \$1.00 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, OPIC finds that Applicant has met its burden with

⁹⁸ Protestants Ex. 2 (Hendricks Dir.) at 27-28.

⁹⁹ ED Ex. JT-1 at 6-7.

respect to whether total tax assessments will have an unreasonable effect on all land located within the District.

b) ALJ's Analysis

The issue of costs and tax rates were addressed above. Regarding whether total tax assessments will have an unreasonable effect on all land located within the District, Applicant's un rebutted evidence showed that at \$0.75 per \$100 valuation, the aggregate tax rate is similar to that of other communities in the area.¹⁰⁰ Even if Applicant sought the maximum allowable rate of \$1.00 per \$100 valuation, the aggregate tax rate would still be within the range of nearby communities. Therefore, Applicant has met its burden on this issue.

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 (TEXAS WATER CODE SECTION 54.021; 30 TEXAS ADMINISTRATIVE CODE SECTION 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.¹⁰¹ Applicant further maintains that creation of the District will allow Applicant to utilize the

¹⁰⁰ Applicant Ex. 12 at 42.

¹⁰¹ Applicant Ex. 15 (McCracken Dir.) at 13-14.

lowest cost financing tool to deliver lots and homes at the lowest possible price to homeowners.¹⁰² 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.¹⁰³

Protestants reiterate previously addressed arguments relating to costs, arguing again that the project is not feasible.

The ED asserts that there is a market need for the District as demonstrated by market studies and the Report submitted by Applicant with the Petition.¹⁰⁴ Mr. Taack stated that the District will provide a means for needed facilities for development to meet the market need at a tax rate within the Commission's feasibility tax rate limits.¹⁰⁵

OPIC takes no position on this issue.

2. ALJ's Analysis

The ALJ concludes that Applicant's Petition included sufficient information to meet its burden to show a justification of need for the District and that the creation of the District provides the necessary means to provide the required facilities for development to meet the market need. Therefore, Applicant has met its burden to

¹⁰² Applicant Ex. 13 (Livingston Dir.) at 10.

¹⁰³ Applicant Ex. 13 (Livingston Dir.) at 10.

¹⁰⁴ ED Ex. JT-1 at 5-6.

¹⁰⁵ ED Ex. JT-1 at 5-6.

prove that the District is feasible, practicable, necessary, and will benefit the land to be included in the District, and will further the public welfare.

D. WHETHER OR NOT THE DISTRICT CREATION PETITION WAS 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 SECTION 54.014)

1. Evidence and Argument

Applicant asserts it has met its burden on this issue. Mr. Livingston testified that he is the Vice President of Highland Lakes Midlothian I, LLC.¹⁰⁶ The Applicant states the Petition, Special Warranty Deeds, and affidavits from the Ellis County Central Appraisal District's Chief Appraiser all further show that the Applicant held title to the Property when the Petition was submitted.¹⁰⁷ The ED states that the Ellis County Appraisal District has certified that the appraisal rolls indicate that the Applicant is the owner of the majority in value of the land in the proposed District.¹⁰⁸

Neither Protestants nor OPIC took a 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

¹⁰⁶ Applicant Ex. 13 (Livingston Dir.) at 2-3.

¹⁰⁷ Applicant Ex. 13 (Livingston Dir.) at 2.

¹⁰⁸ ED Ex. JT-3 at bates 0019.

of the holders of title of the land within the proposed district, as indicated by the tax rolls of the central appraisal district. The preponderance of the unrebutted evidence demonstrates that Applicant is the holder of title to a majority in value of the land to be included within the proposed District.¹⁰⁹

E. WHETHER THE APPLICANT’S REQUEST FOR ROAD POWERS MEETS THE APPLICABLE REQUIREMENTS OF TEXAS WATER CODE SECTION 54.234, AND 30 TEXAS ADMINISTRATIVE CODE SECTIONS 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 54.234.¹¹⁰ 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;
- (7) a preliminary layout showing the proposed location for all road facilities to be constructed, acquired, or improved by the district;

¹⁰⁹ No party disputed the qualifications of Gary Eckeberger, Michael Gleason, Jay Sterling Gravens, Robert Glenn Holland, and James B. Sammons, III, who requested to be temporary directors and (1) are each at least 18 years old; (2) are each a resident of the State of Texas; and (3) each either owns land subject to taxation within the proposed District or is a qualified voter within the proposed District. Additionally, the majority are residents of the county in which the proposed District is located, a county adjacent to the county in which the proposed District is located, or if the proposed District is located in a county that is in a metropolitan statistical area designated by the United States Office of Management and Budget or its successor agency, a county in the same metropolitan statistical area as the county in which the proposed District is located. *See* Tex. Water Code § 54.022.

¹¹⁰ Applicant Ex. 8.

- (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

Applicant asserts that the Report meets the requirements of the statute and rules, and states that they have provided a preliminary layout of the major thoroughfares.¹¹¹ 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.¹¹² Those costs include a preliminary estimate for both local and major roadways.¹¹³ Mr. McCracken testified that the layout of the District shows only the major roads, not the local roads; but, he said that, based on the density of the development, the cost of the local roads can be estimated without identifying where they are early in the process.¹¹⁴

Protestants argue that Applicant failed to comply with the requirements to establish road powers for the proposed District because Applicant did not provide a

¹¹¹ Applicant's Closing Brief at 25.

¹¹² Applicant Ex. 15 (McCracken Dir.) at 10.

¹¹³ Applicant Ex. 11, Table 2, at bates 0018.

¹¹⁴ Tr. at 90.

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 Report does not show the location of all the roadways to be constructed within the District—only the major collectors.¹¹⁵ 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. Midlothian has not consented to the creation of the District with road powers.¹¹⁶

After reviewing the preliminary layout of the roads, the ED determined that they appear to benefit the District and financing appears feasible.¹¹⁷ The ED concludes that the applicable requirements have been satisfied for granting road powers with the District creation.

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 either the cities consent to District's road powers or the provisions of Texas Water Code section 54.016 have been followed.¹¹⁸ As discussed above, the ALJ concludes that Applicant's Petition complies with Texas Water Code section 54.016; therefore,

¹¹⁵ Tr. at 67-68; Applicant Ex. 11.

¹¹⁶ Protestants' Closing Argument at 24.

¹¹⁷ ED Ex. JW-3 at 0025.

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

the Applicant also meets the requirement of 30 Texas Administrative Code section 293.202(a)(4).

The evidence is undisputed that Applicant provided a preliminary layout 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 request 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.¹¹⁹

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

Additionally, the Commission will not assess reporting or transcription costs against the ED or OPIC because they are statutory parties who are precluded by law from appealing the Commission's decision.¹²⁰

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. The 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 in the business of subdividing, selling, and developing land for profit. All parties fully participated in the hearing and benefitted from the transcript. Based on these factors, the ALJ recommends that the Commission assess the transcription costs as follows: 50 percent to Applicant and 50 percent to Protestants.

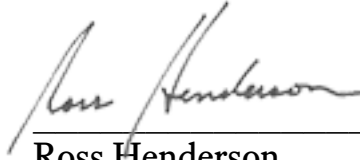
V. CONCLUSION

The ALJ concludes that Applicant met its burden of proving the Petition meets all applicable requirements. Therefore, the ALJ recommends that the

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

Commission approve Applicant's Petition for creation of FM 875 Municipal Utility District of Ellis County.

Signed December 4, 2023

A handwritten signature in cursive script that reads "Ross Henderson". The signature is written in black ink and is positioned above a horizontal line.

Ross Henderson
Presiding Administrative Law Judge

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER GRANTING PETITION FOR CREATION OF FM 875 MUNICIPAL UTILITY DISTRICT OF ELLIS COUNTY; TCEQ DOCKET NO. 2022-0534-DIS; SOAH DOCKET NO. 582-23-11662

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the petition for creation of FM 875 Municipal Utility District of Ellis County (District). A Proposal for Decision (PFD) was issued by Ross Henderson, 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 with the Commission, and on November 19, 2021, Applicant filed an amended petition (Petition), with the Commission, for the creation of FM 875 Municipal Utility District of Ellis County.
2. Applicant simultaneously filed a petition with TCEQ for Highland Lakes Municipal Utility District No. 1 of Ellis County (HLMUD 1), which was granted by the Commission on November 6, 2023.
3. The Petition was declared administratively complete on December 2, 2021.

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. On March 8, 2022, notice of the Petition was posted in the Ellis County Courthouse, the place where legal notices in Ellis County are posted.
6. TCEQ received timely hearing requests filed by the City of Midlothian (Midlothian) and Ellis County (collectively, “Protestants”). The Commissioners determined that the Protestants were affected persons and referred this matter to the SOAH for a contested case hearing.
7. On March 30, 2023, the SOAH ALJ held a preliminary hearing in this matter, at which time Applicant offered the jurisdictional exhibits and the Applicant, ED, OPIC, and Protestants were named as parties.
8. The hearing on the merits was held August 17, 2023, before ALJ Ross Henderson at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Applicant was represented by attorneys Natalie Scott, Kevin Bartz, and Randall Wilburn. The Protestants were represented by attorneys Emily Rogers and Kimberly Kelley. The ED was represented by attorney Harrison Malley. OPIC was represented by attorneys Jessica Anderson and Josiah Mercer. The record closed after submission of written closing arguments on October 6, 2023. However, on November 6, 2023, a post hearing conference was convened, and thereafter the ALJ reopened the record to take official notice of: (1) the Commission’s November 6, 2023, final order on the petition of HLMUD 1; (2) the Commission’s October 25, 2023, discussion on consideration of the Petition; and (3) the June 29, 2023, Proposal for Decision in that matter.

Request for Service

9. The proposed District is approximately 283.231 acres (the Property) located wholly within the extra-territorial jurisdiction (ETJ) of Midlothian in Ellis County, Texas (located on the south side of and adjacent to FM 875, approximately 4,200 feet west of McAlpin Road, and approximately 8,400 feet east of FM 663).

10. On September 9, 2020, the Property was owned by Kimberly Dawn Gravens, Wayne Hill, and Elaine Hill, who sent a petition (dated August 20, 2020) for consent to the creation of the proposed District to Midlothian. The landowners did not receive a written response from Midlothian.
11. Ninety days later, on December 8, 2020, the landowners petitioned Midlothian to provide water and sewer services and did not receive a written response within 120 days.
12. In conversations, Midlothian's representatives stated it wanted the proposed District annexed into Midlothian's corporate limits and developed with larger lots and less density, and that Midlothian had no interest or ability in providing wastewater service to the Property.
13. Applicant's request complied with the requirement to submit a request for service where a proposed municipal utility district would be located within the ETJ of a city.
14. The 120-day period for reaching mutually agreeable contracts for service expired without agreements or contracts.
15. On April 29, 2021, Applicant acquired title to the Property in the proposed District.
16. Thereafter, Applicant filed the Petition with the Commission.

Availability of Comparable Service from Other Systems

17. The Property is located within Mountain Peak Special Utility District's (Mountain Peak SUD) water Certificate of Convenience and Necessity (CCN).
18. Applicant will obtain its water supply from Mountain Peak SUD.
19. The Property is not located within the wastewater CCN of any entity.
20. Midlothian does not have existing infrastructure to provide the District wastewater services, and no other wastewater system is available.

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

21. The projected tax rate is \$0.75 per \$100 valuation.
22. 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.
23. The proposed tax rate is reasonable compared to other taxing authorities in the area.
24. The proposed construction costs are reasonable.
25. The proposed water and sewer rates are reasonable.

Effect on Land Elevations and Subsidence Within the Region

26. The District, its systems, and subsequent development will not have an unreasonable effect on land elevations or subsidence within the region.

Effect on Groundwater Levels and Recharge Within the Region

27. The proposed development's resulting impervious cover from mostly single-family residential lots will not have any greater effect on groundwater levels or recharge capacity of groundwater in the region than any other typical single-family development.
28. The District, its systems, and its subsequent development will not have an unreasonable effect on groundwater levels within the region nor the recharge capability of any groundwater source.

Effect on Natural Run-off Rates and Drainage

29. The storm water runoff within the District will be collected with the curb and gutters of the streets, with an underground drainage system, and in the natural tributaries.

30. The District is located on a moderately sloping site. The majority of existing drainage is through overland flow to existing tributaries that drain to South Prong Creek and eventually outfall to Lake Waxahachie.
31. All storm drainage improvements will be designed in accordance with the applicable design criteria established by Midlothian, generally utilizing the Rational Method and a 100-year storm event.
32. If detention facilities are required by applicable design criteria, detention facilities will be implemented to maintain post-development flows at pre-development conditions.
33. The District, and the systems and subsequent development within the District, will not have an unreasonable effect on natural run-off rates and drainage.

Effect on Water Quality

34. The District will own and operate a wastewater treatment plant pursuant to a permit issued by TCEQ, which entails its own permitting process.
35. The District's stormwater collection, conveyance, and detention facilities will be designed, constructed, operated, and maintained in compliance with all federal, state, and local requirements.
36. Sufficient evidence was presented to establish that the District, its systems, and its subsequent development will not have an unreasonable effect on water quality.

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

37. The petition for creation of the District contemplates a District tax rate of \$0.75 per \$100 valuation, which falls within the limits set by the TCEQ under its economic feasibility rules.
38. The District, its systems, and subsequent development within the proposed District will not have an unreasonable effect on total tax assessments on all land located within the District.

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

39. The Applicant established that 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

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

Request for Road Powers

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

Allocation of Transcript Costs

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

Appointment of Temporary Directors

48. Applicant established that Gary Eckeberger, Michael Gleason, Jay Sterling Gravens, Robert Glenn Holland, and James B. Sammons, III requested to be temporary directors and (1) are each at least 18 years old; (2) are each a resident of the State of Texas; and (3) each either owns land

subject to taxation within the proposed District or is a qualified voter within the proposed District. Additionally, the majority are residents of the county in which the proposed District is located, a county adjacent to the county in which the proposed District is located, or if the proposed District is located in a county that is in a metropolitan statistical area designated by the United States Office of Management and Budget or its successor agency, a county in the same metropolitan statistical area as the county in which the proposed District is located.

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 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 municipal utility district 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. The District and the systems and subsequent development will not have an unreasonable effect on: land elevation; subsidence; groundwater level within the region; recharge within the region; natural run-off rates and drainage; water quality; or total tax assessments on all land located within the districts. Tex. Water Code § 54.021(b)(3).

8. Applicant's request for road powers meets all applicable requirements. Tex. Water Code § 54.234; 30 Tex. Admin. Code §§ 293.11(d)(11), .202(a), (b).
9. If the Commission finds that the petition conforms to the requirements of Texas Water Code section 54.015 and that the project is feasible and practicable and is necessary and would be a benefit to the land to be included in the district, the Commission shall find so by its order and grant the petition. Tex. Water Code § 54.021(a).
10. 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).
11. Sufficient 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.
12. Gary Eckeberger, Michael Gleason, Jay Sterling Gravens, Robert Glenn Holland, and James B. Sammons, III qualify to be temporary directors under Texas Water Code section 54.022.
13. 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).
14. 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).

15. Considering the factors in 30 Texas Administrative Code section 80.23(d)(1), an appropriate allocation of transcript costs is: 50 percent to Applicant and 50 percent to Protestants.
16. Applicant's Petition should be granted.

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 FM 875 Municipal Utility District of Ellis County and the request to acquire road powers is granted, and the District is created under the terms and conditions of Article XVI, Section 59 of the Texas Constitution and Texas Water Code Chapters 49 and 54.
2. The District shall be composed of approximately 283.231 acres of land located in Ellis County, Texas and located entirely within the extraterritorial jurisdiction of Midlothian, contained in the metes and bounds description in Applicant's Exhibit 1, 5, and 8, and attached as Exhibit A.
3. The District shall have, and shall be subject to, all of the rights, duties, powers, privileges, authority, and functions conferred and imposed by the TCEQ and the general laws of the State of Texas relating to municipal utility districts, including road powers under Texas Water Code section 54.234, subject to the requirements of the TCEQ and the general laws of the State of Texas relating to the exercise of such powers.
4. Gary Eckeberger, Michael Gleason, Jay Sterling Gravens, Robert Glenn Holland, and James B. Sammons, III are named and appointed as temporary directors and shall, as soon as practicable after the date of entry of this Order, execute their official bonds and take their official oaths of office. All such bonds shall be approved by the Board of Directors of the District, and each bond and oath shall be filed with the District and retained in its records.
5. The transcript costs are allocated 50 percent to the Applicant and 50 percent to Protestants.

6. 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.
7. The effective date of this Order is the date the Order is final as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.
8. The Commission's Chief Clerk shall forward a copy of this Order to all parties and all affected persons.
9. 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.
10. This Order shall in no event be construed as an approval of any proposed agreements or of any particular items in any documents provided in support of the petition for creation, nor as a commitment or requirement of the TCEQ in the future to approve or disapprove any particular items or agreements in future applications submitted by the District for TCEQ consideration.

ISSUED:

**TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY**

Jon Niermann, Chairman for the Commission