SOAH DOCKET NO. 582-23-11662
TCEQ DOCKET NO. 2022-0534-DIS

APPLICATION OF HIGHLAND LAKES MIDLOTHIAN I, LLC FOR THE CREATION OF FM 875 MUNICIPAL UTILITY 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 Midlothian (City) 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 disagree with the Administrative Law Judge's (ALJ) proposed recommendation that the proposed application (Application) for creation of the FM 875 Municipal Utility District No. 1 (District) should be approved for creation. The ALJ improperly recommends that the petition should be approved because Highland Lakes Midlothian I, LLC (Applicant) met its burden of proving that the District creation meets all applicable requirements. Protestants except to the proposed Findings of Fact and Conclusions of Law in the PFD, as detailed below. Specifically, the Applicant failed to make a proper request for service and failed to demonstrate that the District is feasible, practicable, necessary, and would be a benefit to the land.

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 City requesting service and requesting consent to the District creation. (PFD pg. 10). Further, the PFD

correctly reflects that the petition did not contain information about the proposed development that would allow the City to assess whether the provision of service was feasible. (PFD pg. 11). However, the ALJ reached the incorrect conclusion by improperly shifting the burden to a city to engage in negotiations and request information from an applicant: "If *Midlothian* needed additional information to assess feasibility for wastewater service, *it* failed to request it . . .". (PFD pg. 11, emphasis added). 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 a petition for service which on its face provides 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 City, 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.

Further, the ALJ includes an irrelevant finding of fact regarding the Applicant's discussions with the City of Midlothian regarding the entire proposed development, which is in three parts, and includes an in-city portion. (Applicant's Exhibit No. 11 – Page 6 (FM8750006)). Whether or not the Applicant asserts that Midlothian wanted this proposed District to be annexed into Midlothian's corporate limits and developed with larger lots and less density is unrelated to relevant question at hand of whether or not to create the FM 875 MUD.

Therefore, the Protestants except to and recommend the rejection and the amendment of Finding of Facts No. 12 and 13, respectively, as follows:

> ~~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 failed to comply ~~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. Midlothian needed more information thanwhat was included in the petition to determine its willingness to provide sewer services to the proposed District.

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. 14). Similarly, the ALJ states that Mountain Peak Special Utility District (SUD) can provide water service to the development. (PFD pg. 13). However, the ALJ concludes that – although the water service issue is apparently satisfied despite the fact that the District has to construct the water system and upgrades are undoubtedly needed – there is no wastewater service available from Waxahachie because it does not have current

infrastructure and would require upgrades. (PFD pg. 15). 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 treat the water service differently from the wastewater service. While Waxahachie does not have currently existing infrastructure to serve the development, such infrastructure could be constructed, and Waxahachie has available capacity to serve the District. Further, it is improper for the ALJ to rely on "Waxahachie's non-response to HLMUD 1's request" for service as a factor, because the Applicant failed to engage in meaningful negotiations to explore the availability of comparable systems both for the Highland Lakes MUD No. 1 and the FM 875 MUD. Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 20 which states that:

> "20. Midlothian does not have existing infrastructure to provide the District wastewater services~~, and no other wastewater system is available~~. 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. 16-17). Despite acknowledging these shortfalls in the Application, the ALJ assumes in error that

inflation explains the gap between the Applicant's and Protestant's cost estimates, and that the Applicant's estimates are more reliable because they were closer in time to the Petition submission date. (PFD at page 20). However, no evidence was provided by the Applicant to support this supposition. Further, this explanation ignores the fact that the Applicant's estimate wholly fails to include all of the elements needed for a wastewater system. (See, e.g., Protestant's Exhibit 2, 17:8-10 (Hendricks)). Inflation and varying costs of certain components cannot explain the Applicant's failure to reasonably provide an estimate for a complete system.

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. Furthermore, the ALJ's reliance on the $6,000 capital recovery fee for each connection to offset the necessary costs to provide water services is unsupported in the record. (PFD pg. 20). The Applicant's engineer stated that the Preliminary Engineering Report does not contain any costs associated with offsite facilities. (Tr. 56:16 – 23 (McCracken)). The Applicant did not provide enough information to determine whether the $6,000 capital recovery fee will offset the necessary costs, because the Applicant did not provide a complete estimation of those costs.

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. 23 through 25, as follows:

> "23. <u>The Applicant has not met its burden to determine that ~~T~~the</u> proposed tax rate is reasonable compared to other taxing authorities in the area.

> 24. The Applicant has not met its burden to determine that ~~The~~ proposed construction costs are reasonable.
>
> 25. 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. 7, which states that:

> "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)."

3. Effect on Groundwater Levels and Recharge within the Region

The Protestants except to the conclusion that the proposed development will not have an unreasonable effect on groundwater levels and recharge in the region because the Applicant did not provide sufficient information to reach that conclusion. While, as the ALJ states, there might be no written requirement or policy for the Applicant to conduct a study of groundwater, the Texas Water Code specifically charges the TCEQ with assessing whether or not the proposed district and subsequent development will have an unreasonable impact on groundwater levels. Tex. Water Code §54.021. It is the Applicant's burden to prove as much, and because the TCEQ did not conduct an independent analysis beyond the Applicant's report in order to meaningfully assess this factor, the Applicant needed to provide more information than it provided in this Application. Specifically, 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, other than the percentage of pervious cover and the opinion that the District will not be "unusual," which has no basis in law as a standard. The information provided on groundwater is cursory, conclusory, 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. 27 as follows and the rejection of Finding of Fact No. 28, which state that:

> "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.~~ Insufficient evidence was presented to establish that the proposed development will not have an unreasonable effect on the groundwater level in the region and the recharge capability of groundwater in the area.
>
> ~~28. 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. 7, which states that:

> "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)."

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 accepts the Texas Commission on Environmental Quality's assertion that it can defer to local authorities and accepts a cursory statement that the Applicant will comply with local regulation. (PFD pg. 28). 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. Tex. Water Code § 54.021.

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 has 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. 33, which states that:

> "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."

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

> "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)."

5. Effect on Water Quality

The Protestants except to the ALJ's conclusion that the proposed District, its systems, and the subsequent development will not have an unreasonable effect on water quality. Regarding stormwater quality, the ALJ notes that the Commission recently stated 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." (PFD Page 32). The ALJ found that the Applicant complied with both requirements. This is problematic for two reasons. First, the Applicant's engineer admitted that he failed to do an analysis of the relevant pre-development conditions, like run-off rates. (Tr. 64:11-25 (McCracken)). The Preliminary Engineering Report likewise does not provide any information about the natural run-off rates before development in order to compare with the post development

rates. (Tr. 64:11-14 (McCracken); Protestants Ex. 2 – 34:18-23 (Hendricks) (Bates 000044)). Therefore, there is not adequate evidence in the record to show that the Applicant can limit post-development flows at or below pre-development conditions.

Second, there are no stormwater quality controls in this area. The County does not have stormwater quality regulations; similarly, the City of Midlothian cannot and does not regulate stormwater quality for the proposed development because it is outside of the City limits. The Applicant's statement that it will comply with stormwater quality regulations is therefore meaningless, and reliance on that statement by the TCEQ cannot operate to show that "the district and its system and subsequent development within the district will have an unreasonable effect on" water quality. Tex. Water Code § 54.021(b)(3)(F). Moreover, except for conclusory statements in the Applicant's testimony that the development is similar to other developments and not "unusual," there is no evidence showing that this development is no different than other developments in the area and that the impacts to water quality will be the same as other developments. Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 36, which states that:

> "36. ~~S~~Insufficient evidence was presented to establish that the District, its systems, and its subsequent development will not have an unreasonable effect on water quality.

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

> "7. The 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)."

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. (PFD pg. 33). The Protestants assert that the costs, rates, and tax assessments are interrelated. The underestimation of construction costs – and the lack of many necessary substantive details about the development – affects the entire financial model for this proposed development. Therefore, the Protestants except to and recommend the amendment of Finding of Fact No. 38 as follows, which states that:

> "38. Insufficient evidence was presented to establish that t~~T~~he 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."

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

> "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)."

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 disagree with the ALJ's conclusion that the Applicant met its burden to show that the project is feasible and practicable, and is therefore justified. (PFD pg. 35-36). 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. 39 as follows, which states that:

> "39. The Applicant presented insufficient evidence to ~~established~~ that 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. 7, which states that:

> "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)."

C. Exceptions to the recommended actions.

The Protestants disagree with the PFD's recommendation to grant the Application because the Applicant presented insufficient evidence that the project is feasible and practicable, that other systems cannot serve the development, that the construction costs, tax rates, and water and sewer rates are reasonable, and that the District will not have an unreasonable effect on the listed factors in Texas Water Code section 54.021(b)(3). Therefore, 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 the applicable statutory requirements. 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 December 22, 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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