

**SOAH DOCKET NO. 582-23-11658
TCEQ DOCKET NO. 2022-1157-DIS**

APPLICATION BY GRBK EDGEWOOD, LLC FOR THE CREATION OF ELLIS RANCH MUNICIPAL UTILITY DISTRICT NO. 1	§ § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**ELLIS COUNTY’S REPLIES TO APPLICANT’S AND THE EXECUTIVE
DIRECTOR’S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, Ellis County (County or Protestant) and files this, its Replies to the GRBK Edgewood, LLC’s (Applicant) and Texas Commission on Environmental Quality (TCEQ) Executive Director’s (ED) Exceptions to the Proposal for Decision (PFD) regarding the proposed application (Application) for creation of the Ellis Ranch Municipal Utility District No. 1 (District) and, in support thereof, would show the following:

I. Response to the Applicant’s Exceptions to the PFD

The ALJs properly found that the projected construction costs for the proposed District are unreasonable, and therefore the overall tax rate is unreasonable and the proposed District is not economically feasible based on those underestimated costs. The Applicant’s exceptions are an attempt to muddy the waters, and are fraught with misrepresentations regarding the proposed construction costs and the evidence in the record. The Applicant appears to attempt to argue that its projected construction costs, as shown by the evidence in the record are not material for any number of reasons, including due to: the development company’s net worth; an increase in home prices¹; the apparent contention that the Protestants and ALJs (and arguably Applicant’s own

¹ Both the Applicant and ED emphasize that the construction costs at hand should be assessed as presented in 2022, without taking into account any changes in costs from 2022 – 2024. However, both parties also mention as justification for the underestimated construction costs that “the ALJs are not accounting for any change in the total assessed valuation or the interest rates” (ED Exceptions at 4), and similarly, “given GRBK’s financial position and the increase in home values in the region, the economic feasibility of the District should not be an issue in this case” (Applicant’s

experts²) analyzed the Preliminary Engineering Report incorrectly throughout the hearing process; and an attempt to rehash arguments regarding the sufficiency of the County's evidence that the ALJs did not find persuasive³. Each of these arguments are misleading, post hoc justifications for an unreasonable Preliminary Engineering Report and Application. The ALJs correctly found that the Applicant did not meet its burden on each required element to justify the creation of the proposed District.

A. The Applicant's contingency estimation is inaccurate.

The Applicant misrepresents the appropriate contingency fee for the project in its exceptions. First, the Applicant represents that because there are three MUDs, and each is apparently allocated a pro rata share of certain costs with a 5% contingency fee, therefore the total contingency fee is 15% across the three MUDs. Applicant's Exceptions, Page 10. This is mathematically incorrect. That logic would hold true for simple addition, but not the calculation of a percentage. Five percent of District 1's share of costs, plus a respective 5% of District 2 and 3's share of costs, still adds up to 5% of the total projected costs across all three Districts. A contingency of 15% does not magically appear because the three MUDs' pro rata share estimations

Exceptions, Page 17). The Applicant and ED cannot have it both ways – either the Commission should be assessing the Application as written at the time of submission, or account for intervening factors after the Application was submitted. The County understands the Water Code looks to the former and prepared its evidence as such.

² During the hearing, Applicant's engineer explained the pertinent charts in the Preliminary Engineering Report in a way that contradicts the Applicant's explanation in its exceptions. (Tr. 29:18-23 (Heroy)).

³ The Applicant previously filed two motions to strike the experts' testimony, which were denied. Applicant continues to argue, without supporting evidence, that water and wastewater engineering and infrastructure costs in the Central Texas area versus the Ellis County area are significantly different. Again, Applicant's own engineer Mr. Heroy is also an engineer based in the Central Texas area, and like Mr. Lozano, was found by the ALJs to be qualified to testify as to water infrastructure costs in the State of Texas. (Applicant Ex. 3 (Heroy Resume)).

may be combined; rather, the contingency would still be 5% of the larger total estimation of costs for all three districts.

Second, the pro rata “shared costs” estimation is for two components of the proposed project, and two components only – the wastewater treatment plant and offsite water costs. According to the Applicant’s Preliminary Engineering Report, this estimation does not include the onsite water system costs, certain wastewater system costs, storm drain system costs, roadway and paving costs, or earthwork and erosion and sedimentation costs. Applicant’s Exhibit 4 – Table 3 and Opinion of Probable Cost. Each of these costs were assigned an independent estimation to be borne solely by the District in question and an overall contingency of 5% each. The ALJs were presented with this evidence, and acting as fact finders, found that a 5% contingency fee for a project at this stage was an unreasonable estimation.

Lastly, in contradiction to the Applicant’s statement otherwise, the County’s expert, Mr. Dennis Lozano, P.E., did present evidence through his expert opinion that a contingency estimate at this stage of the project should reasonably and customarily be 15-20%. Tr. 91:24 – 92:5 (Lozano). While Applicant is correct that no statute details that exact percentage required for a construction contingency– which makes sense, because it would be project stage specific – the statute *does* require a reasonable estimation of proposed construction costs for the proposed project. Tex. Water Code § 54.021(b)(2). The County’s evidence shows that a project at this tentative, conceptual stage should have a higher contingency percentage based on normal engineering practices. Tr. 91:24 – 92:5 (Lozano). The ALJs as fact finders found this evidence persuasive. The Applicant argues on one hand that the projected District costs need only be “tentative itemized cost estimates” (Applicant’s Exceptions, Page 4 (emphasis added by Applicant)) but on the other hand, it does not have to account for contingent events because its

engineer “may have some specific knowledge to arrive at that contingency number” that is indicative of a high level of specific knowledge of the process. Applicant’s Exceptions, Page 11. The Applicant wants it both ways, depending on which of Applicant’s many arguments that it supports.

B. The cost contributions of MUDs 2 and 3 were properly analyzed by the ALJs.

The Applicant presents the cost contributions of MUDs 2 and 3 as though the ALJs overlooked the evidence in the record. On the contrary, the ALJs properly analyzed the evidence at hand. Whether shared by the other MUDs or standalone costs, the Applicant simply presented unreasonable cost estimates for this District in its Preliminary Engineering Report.

The Preliminary Engineering Report does represent some costs that the three MUDs will presumably share. In its exceptions, the Applicant explains that Table 3.B of the Report contains numbers only calculated for District 1, not 2 and 3; Table 3.B is the pro rata District 1 share of the overall estimations for offsite water and the wastewater plant.⁴ For the first time in this hearing process, the Applicant presents actual percentages of each District’s share of the costs of certain items, and represents that going forward, District 1 would only be responsible for ¼ of the costs of any increased construction. Applicant’s Exceptions, Page 13. This is problematic and unpersuasive for several reasons. First, this representation in post-hearing briefing are not in evidence. Nowhere has the Applicant or its experts testified as to the breakdown of costs between the districts, or provided evidence that the purported District shares would be the same in the

⁴ The Applicant’s own engineer did not seem to understand the Applicant’s representations in this Report at the time of the hearing: “If you look at table three under item A, developer contribution items, those are the costs for the facilities just within MUD number one. Under B district items, those items would be shared by Ellis Ranch MUDs numbers one, two and three.” (Tr. 29:18-23 (Heroy)).

future. Second, this clarification does not change Mr. Lozano's analysis or the ALJs' analysis. As explained below, this is not new information – Mr. Lozano *did* look at the total cost of the treatment plants proposed to serve all three districts. Lastly, the shared costs presented only account for two components of construction costs – offsite water and wastewater – and the other construction costs are to be borne entirely by the District in question.

Mr. Lozano did analyze the total cost of the wastewater treatment plant proposed to serve all three MUDs, and he found that it was underestimated in its totality. Hearing Tr. 82:8 – 83:14 (Lozano Cross). The parties and fact finders did not ignore or misunderstand the evidence in the record, or fail to consider a fractional percentage borne by this District when the totality should have been considered. Mr. Lozano looked at the entirety of the figures presented, which again, consist of both shared costs for all three MUD districts and individual costs for just this proposed District. *Id.* After analyzing this evidence, Mr. Lozano opined that the individual elements borne by the District were underestimated by 40% to 60%. Protestant Exhibit 1 – Lozano Prefiled Testimony, page 7:1-8 (Lozano). He looked at the whole wastewater treatment plant proposed to serve all three districts, and after opining that the treatment capacity unit cost of \$12 per gallon per day was significantly understated, found that the proposed costs were understated by at least 50%. *Id.* at page 7:12-20. The alleged contributions from the other MUDs aside, the costs as presented for the District are unreasonable under Texas Water Code section 54.021.

In sum, the ALJs are correct that based on the evidence presented, the Applicant has not carried its burden to show that the District, its system, and the subsequent development are feasible, practicable, necessary, and will benefit the land due to the Applicant's underestimated costs and contingencies.

C. The Applicant failed to carry its burden to show that its request for road powers meets the applicable requirements of Tex. Water Code § 54.234, and 30 TAC §§ 293.11(d)(11) and 293.202(b).

The Applicant argues that evidence was not introduced to refute the Applicant's self-serving statements about its proposed roadway facilities. The Applicant carries the significant burden to present enough evidence to show it complied with the requirements of Texas Water Code § 54.234, and 30 TAC §§ 293.11(d)(11) and 30 TAC § 293.202(b) to establish road powers for the proposed District. In part, the Applicant must provide "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 . . ." 30 Tex. Admin. Code 293.202(b). Applicant carries the burden of proof by a preponderance of the evidence, and it failed to meet that burden. 30 Tex. Admin. Code § 80.17(a).

Contrary to what the Applicant states in its exceptions, Mr. Lozano provided testimony that can be summarized as follows: "Based on the high-level evaluation of unit costs described above for the water, wastewater, drainage, and roads costs, the estimated total cost for these improvements is understated by at least 50%." Protestant Exhibit No. 1 – Prefiled Testimony of Dennis Lozano, 7:17-20 (emphasis added). The Applicant lays out its projected costs and states in its Preliminary Engineering Report that the contingency for its road construction cost estimate is only 5%. Applicant's Exhibit 4 – Table No. 4 (GRBK000559). Mr. Lozano examined those figures and found them inadequate. No protesting party had the burden to produce competing roadway construction costs because it was the *Applicant's* burden to present reasonable costs. After assessing all the evidence, the ALJs as fact finders determined that the Applicant did not carry its burden of proof to show that the roadway costs and the contingency presented were reasonable.

Therefore, the Applicant's request for road powers should be denied pursuant to the applicable statutes.

II. Response to the ED's Exceptions to the PFD

The ED's exceptions frame the ALJs' PFD as creating and requiring new factors and standards that do not currently exist in the law. This is simply not true – each of the factors assessed by the ALJs clearly exist in the relevant statutes, namely Texas Water Code section 54.021. The issue is that the ED has not meaningfully assessed these statutory factors in its review of MUD applications, instead relying completely on the representations made by the Applicant and its engineers, however conclusory, and doing no independent analysis of whether the Applicant met the requirements of the Water Code. The ED's overall argument in these exceptions can be summed up in its following sentence: "The ED relied on the Applicant's engineer to determine the appropriate contingency percentage, and there was nothing in the application materials that indicated to the ED that this contingency percentage was inappropriate." ED's Exceptions, Page 3. Barring an applicant's paid engineer sabotaging their own project by including contradictory information, this explanation is circular and would simply never result in meaningful review of an application. The standard of review implemented by the ED– and reiterated in these exceptions – is no standard at all and does not comply with the Legislature's directive to this Commission in Chapter 54 of the Texas Water Code.

A. Construction Costs and Economic Feasibility

In response to the ALJs' finding that the proposed construction costs are unreasonably low, the ED states that the Applicant's engineer "testified that the projected construction costs appear reasonable compared to other taxing authorities in the area" as the main basis that the ALJs' finding is incorrect. ED's Exceptions, Page 2. The ED then states that "[t]his is the appropriate test to use

to determine if the applicant's projected costs are reasonable, not an unsupported estimate developed by the Protestant's witness." *Id.* at 3. While there is evidence in the record about other authorities' tax rates, there is no evidence in the record about other taxing authorities' construction costs. Therefore, that simply cannot be the "appropriate test." The ED's witnesses are not engineers and thus do not have the requisite expertise to make this assessment – either the ED is taking the word of the Applicant's engineer on its face, or it is considering the evidence presented by the County's engineers, but the ED itself has not conducted an independent review of this Application to evaluate the reasonableness of the construction costs.

In essence, the ED argues that the cost estimates presented can be so preliminary at this point in the process – the only time in which a protestant may contest them and the Commission may review them – that it renders this MUD creation process pointless. While the County agrees that the costs can be preliminary, and in fact argues that a higher contingency is necessary precisely *because* the costs can be so preliminary, the statute must require something more than a blind guess. The ED's argument suggests that any estimate at all put forth by an engineer – even an unreasonable one – should be approved because it could all change in the intervening months. As a policy matter, the ED's suggestion that the ALJs and Commission accept applications while ignoring whether the actual plans presented are reasonably estimated provides no standard at all by which the Commission creates districts pursuant to Chapter 54 of the Texas Water Code.

The ALJs are the fact finders in this proceeding and are charged with determining how much weight to assign the evidence presented in the case. Here, the ALJs considered all the evidence presented and found the County's engineer's assessment more persuasive regarding the projected costs of construction and overall economic feasibility.

B. Groundwater Levels and Recharge of a Groundwater Source

Similarly, the ED did not meaningfully review this proposed District's effect on groundwater levels or recharge of groundwater source. The ED states that there is no evidence in the record that the proposed District will have an unreasonable effect on these factors, but that is just the point – the Applicant did not present enough evidence regarding the amount of impervious cover, and its effect on recharge, in comparison to other developments. Because the ED did not independently examine the factors either, the ED's approval effectively ignores the requirement to consider these factors in the statute. Again, the ALJs are not placing new burdens on applicants, as the ED characterizes it. Rather the ALJs are requiring there to be enough nonconclusory evidence in the record so that the Commission can determine whether there are unreasonable effects as mandated by Section 54.021.

CONCLUSION AND PRAYER

The Protestant respectfully requests that the TCEQ deny the Applicant's and the ED's exceptions, and grant and recommend the PFD with the County's exceptions as laid out in its March 18, 2024 Exceptions to the PFD. The Protestant respectfully requests any other relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on March 28, 2024, a true and correct copy of the above and foregoing document was served on all parties via electronic filing service provider.


Emily W. Rogers