

**SOAH DOCKET NO. 582-23-16963
TCEQ DOCKET NO. 2022-1653-DIS**

APPLICATION FOR THE	§	BEFORE THE STATE OFFICE
CREATION OF LAMPASAS	§	
COUNTY MUNICIPAL UTILITY	§	OF
DISTRICT NO. 1	§	
	§	ADMINISTRATIVE HEARINGS

**THE ASSOCIATION OF CONCERNED LANDOWNERS OF
LAMPASAS COUNTY’S REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE CHAIRMAN NIERMANN AND COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Protestant Association of Concerned Landowners of Lampasas County files this Reply to the Exceptions to the Proposal for Decision filed by Petitioner Pitt Creek Ranch, LLC and the TCEQ Executive Director.

I. INTRODUCTION

Neither the Petitioner nor the ED raise any new or helpful arguments in their exceptions to the PFD that were not already raised either in their closing arguments or replies to closing arguments, or that explain how the outcome under these new arguments would be different. As such, the Petitioner and the ED have presented no good, justifiable, legal reason for having the ALJ reexamine the same arguments already considered and addressed in the PFD. Out of an abundance of caution, CLLC addresses each of these arguments again.

In its exceptions, Petitioner improperly attempts to shift the burden of proof to the Protestant to show that there is *not* sufficient demand for the proposed development. It is the applicant who bears the burden to show that the proposed project *is necessary*, including sufficient market demand. Protestant’s witness Richard Petree testified that there is insufficient market demand for the proposed development given its location and price point. The ALJ properly found

this testimony to be more reliable than Petitioner's market study, given Mr. Petree's extensive experience evaluating land evaluations in Lampasas County.

Furthermore, the Petitioner's and the ED's assertions that current construction costs should be ignored under the reasonableness analysis are based on an erroneous interpretation of the law and Commission precedent. The ALJ properly used the best evidence available to conclude that construction costs have risen significantly and therefore construction of the proposed MUD is not reasonable. Similarly, the Petitioner continues to argue that projected tax rates are reasonable despite undisputed evidence of increased construction costs and projected municipal bond interest rates.

For all these reasons, and those more specifically described below, the Petitioner's and the ED's exceptions to the PFD should be rejected.

II. REPLY TO THE EXCEPTIONS BY PETITIONER AND THE EXECUTIVE DIRECTOR

A. Necessity and Demand

Petitioner argues that the ALJ gives improper weight to the evidence of Protestant's witness Richard Petree, who testified that there is insufficient market demand for the proposed development. Petitioner incorrectly states that Mr. Petree only provided "anecdotal historical evidence." As explained in detail in both the PFD and Protestant's exceptions, Mr. Petree provided market data based on his extensive experience in land evaluations in Lampasas County. The ALJ's conclusion as to need was premised upon the ALJ's judgment as to the relative credibility of the witnesses, and the Commission should not disturb the ALJ's conclusion on this issue.

Petitioner points out that its market study is the only market study in the record. However, Petitioner's market study was submitted in an attempt to comply with TCEQ Rule 293.11(a)(6), and Petitioner has the burden of proof in this case. Protestant has no such burden to complete a

market study, and the credible testimony of Mr. Petree is sufficient to demonstrate that the Petitioner did not meet its burden of proof. While the Petitioner's market study may contain information consistent with TCEQ guidance, that information does not actually demonstrate that there is sufficient demand for the proposed development.

Petitioner also attempts to undermine Mr. Petree's testimony that the 2021 Lampasas County median household income was \$66,506 and the 2021 median property value in Lampasas County was \$174,300. Petitioner asserts that this data "does not provide any information on the financial capability of households having an income greater than \$66,506." However, it is the Petitioner's burden to demonstrate that Lampasas County residents with an income above \$66,506 will reasonably be able to afford the homes in the proposed MUD, which will cost \$850,000 on average.¹ It has failed to do so. Furthermore, the ALJ already considered this evidence and found that Mr. Petree's testimony and application of this data was more credible as a matter of fact. The ALJ spent several months contemplating this evidence, and his findings should receive deference.

Petitioner further assumes that the proposed development will be attractive to buyers from outside of Lampasas County but conveniently ignores that: (1) properties in the area generally sell as medium to large ranches used as second homes or retirement homes,² where the proposed development contains mostly contains lots that are 1.0-8.0 acres in size; and (2) other developments offered comparable properties closer to metropolitan areas, and potential buyers would not pay higher prices for property within the MUD that was a less convenient location than other available properties.³ Petitioner's analysis of historical sales in Lampasas County likewise ignores these variables.

¹ App. Ex. 4 at 11.

² Ex. CLLC 7 at 4:7-8.

³ Ex. CLLC 7 at 4-5.

Petitioner's attempt to distinguish this case from *Galilee Partners* also falls short. In *Galilee Partners*, Petitioner did not demonstrate sufficient demand for a dense residential development with several small lots per acre in a rural area. Although the proposed development in this case is not as dense, the Petitioner has still failed to show sufficient demand for lots of this size and price, especially given their rural location.

The increase in mortgage rates should be considered for the same reasons that current construction costs should be considered, and the ALJ weighed the best available evidence.

Finally, the ED argues in its exceptions that "the conclusion that the district is not necessary but would nonetheless be a benefit [to the land] creates an irreconcilable contradiction." Whether the MUD, including subsequent development, is necessary and whether the MUD would benefit the land are separate inquiries under the Water Code. It is plausible that the district itself could benefit the land, and yet the subsequent development is not *necessary* because there is not sufficient market demand.

B. Feasibility of the Project

The Petitioner and the ED's exceptions recycle the same arguments regarding projected construction costs that were urged in their closing arguments and responses to closing arguments. The ALJ has analyzed and addressed the arguments presented by the Petitioner and ED in the PFD. Therefore, Protestant urges the Commission to reject the Petitioner and the ED's arguments regarding this issue.

i. Projected Construction Costs

Petitioner erroneously asserts that adopting the PFD would require Petitioner to periodically update construction costs in the Application, which would constitute "improper *ad hoc* rulemaking without prior notice to Applicant in violation of Applicant's due process rights." This severely overcomplicates and misrepresents the PFD. The ALJ simply evaluated the *best*

information available at the time of the hearing to determine if the proposed MUD is reasonable by considering the most current data relating to anticipated construction costs. It is nonsensical to pretend that it is still 2022 when considering whether construction of the proposed MUD is reasonable. The ED asserts that the PFD creates an “unresolved question as to how the Commission could close the evidentiary record.” The answer is simple and does not change current precedent: the record closes at the later of: the end of the hearing; or the date the final brief is due, when closing arguments are made in writing. 1 Tex. Admin. Code § 155.425(e). Thus, in this case, the record closed on May 10, 2024 with the submission of the parties’ responses to closing arguments.

Under a plain language interpretation of Texas Water Code § 54.021, current economic conditions should be considered when evaluating an application for creation of a MUD. Texas Water Code § 54.021 requires consideration of “the reasonableness of projected construction costs, tax rates, and water and sewer rates.” The statute does not specify that such consideration should be backdated to the time the application was filed.

In support of its argument that only construction costs at the time of the application should be considered, Petitioner continues to rely on Texas Water Code § 54.015(2). This section of the Water Code requires that MUD petitions “state . . . the cost of the project as then estimated by those filing the petition.” The ALJ properly found that Water Code Section 54.015(2) “address[es] the content of the petition, not the probative value of that information.”

At no point has Petitioner or the ED demonstrated a valid statutory or TCEQ rule-based justification for ignoring current construction costs. In fact, ED witness James Walker conceded during the hearing on the merits that there is no statutory authority to support the ED’s standard practice of sole reliance on cost estimates provided at the time of the application, and conversely, there is no statutory prohibition on the ED’s ability to request updated costs to ensure

reasonableness (or on an applicant's ability to voluntarily provide such updates to ensure accuracy of the application).⁴

Furthermore, the Commission has previously considered the best available evidence, including current construction costs, when determining the reasonableness of a proposed MUD. In *Galilee Partners*, the Commission found that current economic conditions rendered the proposed MUD economically unfeasible.⁵ The applicant argued that a 2005 Water Control and Improvement District creation petition should be approved based on conditions in 2005, while ignoring the real estate circumstances of 2007. The protestants argued that conditions at the time of hearing were relevant. The ALJ in this matter found that the relevant conditions were the most recent conditions, and based upon that decision and the finding that the MUD was not economically feasible, recommended denial of the creation of the district. During an open meeting on April 22, 2009, the Commissioners adopted the ALJ's PFD and denied the application.

Similarly, the recent decision in *Highland Lakes* shows that the Commission considered post-application costs.⁶ Petitioner argues in its exceptions that *Highland Lakes* is not applicable precedent because construction costs were not "the primary basis for the decision." Whether construction costs were the *primary* basis for the Commission's decision in *Highland Lakes* is irrelevant because this issue was directly addressed in the Commission's Findings of Fact. Petitioner also argues that if *Highland Lakes* did set a standard to consider current construction costs, this standard was recently superseded by the Commission's decision in *Ellis Ranch*.⁷ However, the temporal standard for application cost estimates was simply not an issue in *Ellis*

⁴ HOM Tr. at 195-96.

⁵ *Application of Galilee Partners, L.P., for Creation of Maypearl Water Control and Improvement District No. 1 of Ellis County, Texas*, TCEQ Docket No. 2005-1686-DIS; SOAH Docket No. 582-07-2163.

⁶ *Petition for Creation of Highland Lakes Municipal Utility District No. 1 of Ellis County*, TCEQ Docket No. 2022-0532-DIS; SOAH Docket No. 582-22-07138.

⁷ *Petition for the Creation of Ellis Ranch Municipal Utility District No. 1*, TCEQ Docket No. 2022-1157-DIS; SOAH Docket No. 582-23-11658.

Ranch, where the petitioner and protestants disagreed on the projected construction costs *at the time of the application*. In the section of the Final Order cited by Petitioner in its exceptions, the Commission states, “Although the ALJs based their conclusion that the construction costs are unreasonable on there being a difference of opinion between the Applicant and the Protestant on construction costs, the discrepancy between the estimated cost by the Applicant and the Protestant does not render the Applicant’s construction costs unreasonable.”⁸

Therefore, the Commission should follow established precedent of considering current construction costs and adopt the ALJ’s determination based on the *best information available*.

ii. Projected Tax Rates

The Petitioner’s and the ED’s arguments regarding projected tax rates are identical to those already considered by the ALJ. These arguments are premised on: (1) ignoring the evidence establishing that municipal bond interest rates are higher than the 4% assumed in the Application; and (2) ignoring the undisputed evidence of increased construction costs. While both Protestant and the ALJ acknowledge that each municipal utility district bond issue must meet the TCEQ’s financial feasibility requirements before the TCEQ will approve that bond issuance, this does not impact the separate, required analysis that projected tax rates are *reasonable*.

Petitioner further argues that it can only be reimbursed costs based on the tax rate limit of \$1.00 per \$100 of assessed value in Lampasas County, and if the cost of the capital improvements increases beyond what is estimated in the Application, then the developer’s reimbursement will still be limited in amount or delayed until assessed value increases with time. A tax rate that does not cover all expenses is not reasonable. To the degree that the tax rates exceed the limit of \$1.00

⁸ *Ellis Ranch* Final Order at 9, Explanation of Changes, Sec. 1.

per \$100 of assessed value in Lampasas County, Petitioner still must justify that these rates are reasonable. It has failed to do so.

Therefore, the ALJ properly found that the Petitioner did not meet its burden of proof to show reasonable projected tax rates.

C. Transcript Costs

Petitioner excepts to the ALJ's recommended allocation of transcript costs, arguing that "Protestant has failed to provide evidence of any impact or adverse effect within the Commission's jurisdiction that its members will suffer as result of the project that is proposed to be undertaken by the District." The Commission already decided that CLLC has affected person status in granting the hearing requests of members of CLLC.

Petitioner also asserts that CLLC imposed "a costly discovery and hearing process" on the Petitioner. CLLC participated in the hearing to a reasonable degree to protect the due process rights of its members. Cross-examination by CLLC was limited to issues relevant to the Application at issue and not unduly cumulative.

The most members of CLLC stand to gain from the current proceedings is maintenance of the status quo. On the other hand, Petitioner stands to gain considerable economic benefit from the proceedings, and from the existence of the transcript. The transcript facilitates the creation of a record which Petitioner can use in its attempt to meet its burden of proof. For these reasons, no portion of the transcript costs should be allocated to CLLC and instead should be allocated entirely to the Petitioner.

III. REVISIONS TO THE PROPOSED ORDER

For all the reasons stated above, Protestant opposes all proposed findings, proposed conclusions, and other revisions to the proposed order offered by the Petitioner as either unnecessary or erroneous. The ED does not provide specific proposed revisions but instead

generally recommends that the Commission grant the Application, and Protestant responded to the ED's arguments in the above analysis.

IV. CONCLUSION

CLLC respectfully requests that the Commission deny the Petition for the creation of Lampasas County Municipal Utility District, because the Petitioner has not met its burden and has not demonstrated that its Petition meets the applicable statutory and regulatory requirements.

CLLC further requests such other and further relieve to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 8, 2024, a true and correct copy of the foregoing document was filed with SOAH and the Chief Clerk of the TCEQ, and a copy was served to all persons listed below.

/s/ Eric Allmon
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