

TCEQ INTERNAL CONTROL NO. D-06242022-058

**PETITION BY DENTON 1000 LAND,
LP FOR CREATION OF DENTON
COUNTY MUNICIPAL UTILITY
DISTRICT NO. 12**

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**BEFORE THE
TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY**

**DENTON 1000 LAND, LP'S RESPONSE TO
REQUEST FOR CONTESTED CASE HEARING**

I. Introduction

Denton 1000 Land, LP (the "Petitioner") files this Response to the Request for Contested Case Hearing filed by the City of Sanger ("Sanger").

II. Background

Petitioner filed a petition with the Texas Commission on Environmental Quality (the "TCEQ" or "Commission") for consent for the creation of Denton County Municipal Utility District No. 12 (the "Denton County MUD No. 12"), in lieu of the City of Denton consent, pursuant to Texas Local Government Code ("LGC"), Section 42.042(f). Petitioner is a landowner of approximately 1,018.429 acres in Denton County, Texas. The Petitioner's land is located wholly within the City of Denton's extraterritorial jurisdiction ("ETJ"). Petitioner submitted its petition to the City of Denton for consent to creation of a political subdivision on June 18, 2021. The City of Denton refused to provide its consent to the creation of a political subdivision.

On January 4, 2022, Petitioner filed its petition for water and sanitary sewer services with the City of Denton. The City of Denton did not offer to provide water or sanitary sewer services or attempt to discuss such services in any way with Petitioner, and did not execute a contract providing for water and sanitary sewer service to the proposed development. Pursuant to Section 42.042(c), after 120 days from the filing of such petition for water and sanitary sewer services,

consent was deemed given by the City of Denton and Petitioner filed the petition for creation of Denton County MUD No. 12 with the TCEQ on June 24, 2022.

The Petitioner filed an Affidavit of Publication of the Notice of District Creation indicating that notice was published on October 30, 2022 and November 6, 2022, and a Certificate of Posting Notice from Michele Boutuell that Notice was posted on the bulletin board used for posting legal notices at the Denton County Clerk's Office on October 20, 2022. On December 6, 2022, Sanger filed its request for a contested case hearing.

III. Applicable Law

In the event that a municipality fails or refuses to give its consent to the creation of a political subdivision or fails or refuses to execute a contract providing for the water or sanitary sewer services requested within the time limits prescribed in LGC Sections 42.042(b) and (c), LGC Section 42.042(f) authorizes an applicant to petition the Commission to allow creation of the political subdivision. The Commission shall allow creation of the proposed political subdivision on the finding that the municipality either does not have reasonable ability to serve or has failed to make a legally binding commitment with sufficient funds available to provide water and wastewater service adequate to service the proposed development at a reasonable cost to landowner.¹ The commitment must provide that construction of the facilities necessary to serve the land will begin within two years and will be substantially completed within 4-1/2 years after the date the petition is filed with the municipality.

If the city fails or refuses to give its consent to the creation of a political subdivision within 90 days after the city receives a written request for consent, a majority of the qualified voters of the area of the proposed political subdivision and the owner of at least 50 percent of the land in

¹ LGC Section 42.042(f)

the proposed political subdivision may petition the city to make available to the area the water, sanitary sewer services, or both that would be provided by the proposed political subdivision.²

If the city fails to make a contract with a majority of the qualified voters and the owner of at least 50 percent of the land to be included in the proposed political subdivision within 120 days after the date the city receives the petition, the failure constitutes the city's consent for the owner of the land to petition the Commission for the creation of the political subdivision.³

IV. Analysis of the Petition

In order for Petitioner to meet the applicable prerequisite items for submittal of a petition to the Commission, the city must have failed or refused to give its consent to the creation of the political subdivision.⁴ Petitioner filed its petition for water and sanitary sewer services (Exhibit F of Petition) more than 90 days after the Petitioner's request for city consent (Exhibit C of Petition), as required by LGC Section 42.042(b).

The city failed to make a contract with Petitioner within 120 days of receipt of Petitioner's petition for services, and that failure constituted the city's consent for owner to submit a petition to the Commission for the creation of the political subdivision. The city does not have the ability to serve or the funds available to provide water and wastewater service adequate to service the proposed development at a reasonable cost to the landowner.⁵ The tract of land for Denton County MUD No. 12 is located in the City of Denton's ETJ. Therefore, the LGC requires the Petitioner to file the petition for consent to the creation and the petition for water and sanitary sewer service with the City of Denton. Sanger is not a proper party for the Petitioner to file a request for consent

² LGC Section 42.042(b)

³ LGC Section 42.042(c)

⁴ LGC Section 42.042(f)

⁵ LGC Section 42.042(f)

to the creation or a request for water and sanitary sewer service under the statutes that govern the creation of a municipal utility district.

V. Hearing Request Requirements

In order for the Commission to grant a request for a contested case hearing, the Commission must determine that the issue: (1) involves a disputed question of fact or a mixed question of law and fact; (2) was raised during the public comment period by an affected person; and (3) is relevant and material to the decision on the application.⁶ None of the elements for a hearing request have been met by Sanger.

Sanger has failed to demonstrate how it has statutory authority over issues relevant to the application or an interest that rises to the level of an affected person. An affected person is one who has a personal justiciable interest related to a legal right, duty privilege, power, or economic interest affected by the application. An interest common to the general public does not qualify as personal justiciable interest.⁷ In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) whether the requestor timely submitted comments on the application which were not withdrawn; and

⁶ 30 TAC § 50.115(c)

⁷ 30 TAC § 55.203

(7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.⁸

Sanger's arguments for a contested case hearing are based on (i) the feasibility, practicability and necessity of the district, and (ii) the argument that CCN rights are exclusive. However, upon review of the application, the Commission should determine that the claims for denial of the application and a contested case hearing presented by Sanger are without merit.

VII. Feasible and Practicable Requirements for Consideration

The Commission must grant or deny a MUD creation application in accordance with Section 54.021 of the Texas Water Code ("TWC"). In order to grant an application, the Commission must find that organization of the district as requested is feasible and practicable and is necessary and would be a benefit to the land to be included in the district. TWC § 54.021(d); 30 Texas Administrative Code ("TAC") § 293.13(a).

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:

- (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.

TWC § 54.021(b).

⁸ *Id.*

As noted by Sanger in the hearing request filed on December 6, 2022, Sanger holds the certificate of convenience and necessity (“CCN”) for the sewer service for the proposed district, which is located approximately (7.4) miles south of the Sanger city limits. In order to receive sewer service from Sanger, Denton County MUD No. 12 will have to build an onsite treatment plant. Denton County MUD No. 12 is necessary to finance the sewer infrastructure due to Sanger not having any facilities or funds dedicated to construct facilities to serve the area. Sanger has failed to provide any information regarding the sewer facilities that Sanger has available in the area to provide sewer service to Denton County MUD No. 12. The hearing request did not cite any specific items in which applicant declared to Sanger that it would not seek retail sewer service from the City of Sanger.

By way of background, the engineer report submitted to TCEQ with the creation application for Denton County MUD No. 12 explains that the proposed district is located within the City of Sanger sewer CCN and the Bolivar Water Supply Corporation (“BWSC”) water CCN. The engineer creation report states that the district will receive retail water service from BWSC and that Sanger will provide the retail sewer service pursuant to the fact that proposed district is within those CCNs. The TCEQ transferred responsibility for CCN items to the Public Utility Commission in 2014. The proper agency to review a CCN item would be the Public Utility Commission.

The Petitioner is currently in discussions with BWSC regarding an agreement for water service and Petitioner has discussed retail sewer service with Sanger. If the parties are unable to reach a beneficial agreement for sewer service, the Petitioner will consider filing an application with the Public Utility Commission to seek decertification from the Sanger sewer CCN. The Petitioner’s initial meetings with Sanger to discuss retail sewer service were in August of 2021.

The Petitioner has had numerous meetings and conference calls with Sanger representatives to discuss sewer service for the tract.

On November 3, 2022, the Petitioner submitted a draft wastewater service agreement to John Noblitt, the City Manager for the City of Sanger. Mr. Noblitt responded to Petitioner on November 3rd and confirmed that legal counsel for Sanger was reviewing the draft wastewater service agreement. The November 3rd email from Mr. Noblitt to the Petitioner stated that Sanger would provide comments the week of November 15th. However, no comments were provided by Sanger to the Petitioner. On November 29, 2022, the Petitioner followed-up with Sanger regarding comments to the draft wastewater service agreement. On December 1, 2022, Mr. Noblitt responded to the Petitioner that legal counsel for Sanger was still reviewing the draft wastewater agreement. On December 6th Sanger filed the hearing request and apparently denies all wastewater conversations that took place between the Petitioner and Sanger.

The Petitioner has provided TCEQ the required documentation for the feasibility and practicability in the engineer report that was filed with the Commission. The District is wholly located within the City of Denton's extraterritorial jurisdiction and west of the City of Krum. Sanger does not have any wastewater facilities currently in place for sewer service to the area and there are no other comparable services in the area. Due to the fact that there are no comparable providers within the vicinity of the property, the district is necessary to finance the facilities that will be required to provide water and sewer service to the area.

The second argument that Sanger asserts against the feasibility and practicability of the proposed district is based on a conservation easement that runs through a portion of the property to be included in the district. The conservation easement that traverses the tract largely mirrors the 100-year flood plain on the property. Therefore, a large portion of the conservation easement

doesn't impact the developable area of the property. The Petitioner currently plans to use the flood plain area for trails, landscaping and utility connections to other parts of the property. Sanger did not address how it has statutory authority for any items related to the Denton-Wise Soil and Water Conservation District (the "Conservation District"). The Conservation District is a separate entity apart from Sanger and the Conservation District would be the proper party that has standing to bring a claim or request a hearing on behalf of the Conservation District.

An easement held by the Conservation District that traverses through a portion of the 1018 acres is not a reason to deny the creation of Denton County MUD No. 12. Specifically, the statutory requirements provide that the Commission must exclude areas that it finds would not be benefited by the creation of the district and must redefine the boundaries of the proposed district according to its findings. 30 TAC § 293.13(b)(2); TAC § 54.021(c).

VIII. Exclusive Rights of CCN

Sanger alleges that the sewer CCN over the area means that Sanger has the *exclusive right* to provide retail sewer service to the service area designated in such certificate. Sanger relies on the authority of TWC § 13.002(20) for its exclusivity argument, but applicant believes that Sanger's reliance on TWC § 13.002(20) is unfounded. TWC § 13.002(20) states that:

...retail water or utility service means potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for compensation.

Sanger's claim of an *exclusive right* to provide retail sewer service conflicts with 16 Texas Administrative Code ("TAC") § 24.251. In accordance with 16 TAC § 24.251, "any certificate granted under this subchapter **shall not be construed to vest exclusive service or property rights** in and to the area certificated."⁹

⁹ 16 TAC § 24.251

VI. Conclusion and Prayer

Petitioner respectfully requests the Commission find that there are no disputed questions of fact or a mixed question of law and fact regarding the petition. Petitioner further requests that the Commission find that the City of Sanger does not meet the requirements of an affected person that has a personable justiciable interest in the petition and deny the Contested Case Hearing Request.

Respectfully submitted,

WINSTEAD PC

By: /s/ Ross S. Martin

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CERTIFICATE OF SERVICE

I certify that on December 28, 2022, the original and seven true and correct copies of the Denton 1000 Land, LP's Response to Hearing Request were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, electronic delivery, inter-agency mail, or by deposit in the U.S. Mail.

/s/ Ross S. Martin

Ross S. Martin

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