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State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

October 16, 2024

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RE: Docket Number 582-23-26772; TCEQ No. 2023-0566-DIS;
Application for the Creation of Shankle Road MUD of Ellis County

Dear Parties:

On September 6, 2024, the Administrative Law Judges (ALJs) issued their Proposal for Decision (PFD). Timely exceptions were filed by Steve Selinger (Applicant),¹ Citizens Against Ellis County MUDS (CAECM), Ellis County, and the Executive Director (ED) of the Texas Commission on Environmental Quality (Commission). Applicant, CAECM, and Ellis County filed timely replies to

¹ Applicant also filed Corrections to Exceptions on October 4, 2024, after the deadline.

exceptions. The ED did not file a reply, and the Office of Public Interest Counsel did not file any exceptions or reply to other parties' exceptions.

Applicant's Exceptions

In the PFD, the ALJs recommended denying Applicant's petition (Petition) to create the Shankle Road Municipal Utility District (MUD) of Ellis County because Applicant had not shown his projected costs for the development are reasonable. Applicant excepts to this recommendation, arguing that the tentative estimates cited in the Petition are sufficient to meet his burden of proving they are reasonable.

At the outset, the ALJs note that Applicant's exceptions rely in part on an exhibit that **was not admitted** into evidence. Applicant's Exhibit 21, which he points to as evidence that he received "an actual bid for a sewer plant from an actual, bona [sic] fide contractor,"² was excluded from evidence, was not considered by the ALJs, and should not be considered by the Commission. There is no evidence in the record that Applicant or Mr. Farah ever obtained even a tentative construction bid for any part of this project.

Applicant's exceptions argue that "discrepancies" between parties' competing cost estimates do not render his cost estimates unreasonable. This sidesteps the fact that Applicant bears the burden of proof in this case, meaning he had to show by a preponderance of the evidence that his cost estimates—while only tentative at this stage—are reasonable. As discussed at length in the PFD, Applicant did not meet this burden because his expert, Mr. Farah, had little basis for arriving at the estimates included in the Application, let alone determining they were reasonable. The ALJs have already addressed why they found Mr. Farah's estimates unreliable and were unpersuaded by his assertions.³ This includes specifically Mr. Farah's claim to have evaluated costs in comparable districts, which Applicant relies heavily on in the exceptions. While Applicant would have weighed the evidence

² Applicant's Exceptions at 5.

³ PFD at 36-37, 43-47.

differently, his exceptions do not show any error in the facts or analysis the ALJs have set forth in the PFD.

Applicant also argues that even if his cost estimates are unsupported, that factor alone cannot justify denying the Petition. Instead, he suggests that as long as he has shown that the projected tax, water, and sewer rates (which the ALJs found were reasonable) will generate sufficient revenue to cover construction costs, the development overall is feasible.⁴ In response, CAECM points to the Commission's order in *Petitions for Creation of Lakeview Municipal Utility District Nos. 1, 2, and 3*, where the Commission denied the petitions at issue, finding the Applicant had not shown the projects were feasible, practicable, and necessary because "[i]nsufficient evidence was presented to establish the reasonableness of projected construction costs."⁵ The ALJs agree with CAECM that, contrary to Applicant's exceptions, *Lakeview* stands for the proposition that reasonableness of costs must be separately considered, and that the development cannot be considered feasible if that requirement is not met. The PFD already addresses why anticipated future bond revenues do not eliminate the statutory requirement to consider reasonableness of projected construction costs.⁶

ED's Exceptions

The ED joins Applicant in urging the Commission to grant the Petition, arguing that the ALJs should have accepted the opinion of the ED's witness, James Walker, that Applicant's projected costs were reasonable. At the hearing, Mr. Walker testified that he believed Applicant's cost estimates appeared reasonable, and the ED's exceptions take issue with the fact that the ALJs gave little weight to Mr. Walker's opinion on this issue.⁷

⁴ Applicant's Exceptions at 6.

⁵ Order Denying Petitions for Creation of Lakeview Municipal Utility District Nos. 1, 2, and 3, SOAH Docket Nos. 582-22-0259, -0260, and -0261, TCEQ Docket Nos. 2021-0571, -0573, and -0574, at 5 (Finding of Fact 12) and (Conclusion of Law 12).

⁶ PFD at 46-47; Tex. Water Code § 54.021(b)(2).

⁷ PFD at 45.

The exceptions focus on the ED's review process for applications like this one. They argue that while ED staff is tasked with reviewing the materials submitted with a petition to "determin[e] whether the required materials and data have been provided," the ED "is not tasked with independently verifying the veracity of these materials and data."⁸ Mr. Walker was not required to have any experience with real estate development costs nor was he required to probe the reliability of any of the materials provided by the Applicant with the Petition, the ED argues.⁹

The ALJs do not disagree, and they offer no opinions on the Commission's pre-referral processes for reviewing MUD applications. That is well outside of SOAH's jurisdiction. However, in a contested-case hearing, the ALJs have to decide how much evidentiary weight to give the opinions offered by each witness. Here, Mr. Walker's opinion was offered to bolster Applicant's assertion that his cost estimates were reasonable. The other parties appropriately cross-examined Mr. Walker to determine what his opinion was based on, and Mr. Walker clearly testified that he had determined that Applicant's costs "appeared reasonable" primarily, if not entirely, because Mr. Farah said they were.

As discussed in the PFD and referenced above, the ALJs found Mr. Farah had scant experience and little support for his cost estimates. Mr. Walker's unexamined acceptance of Mr. Farah's estimates shed no light on whether they were, in fact, reasonable. That is why Mr. Walker's opinion was given little weight, and why the ALJs concluded that the preponderance of the evidence did not show how the cost estimates submitted with the Petition could be reasonable, as Applicant was required to prove.

Ellis County's Exceptions

Ellis County agrees with the ALJs' recommendation to deny the Petition, but its exceptions argue that the ALJs should have found additional grounds for denial. They contend that the Application should also be denied because Applicant has not proposed a "legally feasible development"—that is, a development with sufficient

⁸ ED's Exceptions at 3-4.

⁹ ED's Exceptions at 7.

detail to allow for meaningful evaluation of the statutory factors—and therefore has not met his burden of showing that proposed water and wastewater rates are reasonable or that the development will not have an unreasonable effect on the factors listed in Texas Water Code § 54.021(b)(3). Ellis County suggests that the Commission “should require that projects be further along in the development planning process . . . in order to allow for evaluation of the *actual* project that is planned.”¹⁰

The arguments raised in Ellis County’s exceptions were extensively presented at the hearing and in written briefs. They were duly considered by the ALJs and addressed in the PFD. The ALJs recommend no substantive changes in response to these exceptions.


CAECM’s Exceptions

CAECM excepted only to the ALJs’ recommendation on transcription costs—namely, the recommendation that CAECM and Ellis County each bear 15% of the cost. CAECM’s exceptions reiterate the same arguments raised in their post-hearing brief,¹¹ and they have already been considered and addressed in the PFD.

Having considered the parties’ exceptions, the ALJs recommend no changes to the PFD. The PFD is ready for the Commission’s review.



Rebecca Smith
Presiding Administrative Law Judge



Sarah Starnes
Presiding Administrative Law Judge

CC: Service List

¹⁰ Ellis County Exceptions at 2 (emphasis in original).

¹¹ See CAECM’s Written Closing Arguments at 17-18.

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