

shall so find and exclude all land which is not benefited from the proposed district and shall redefine the proposed district's boundaries accordingly.

- (d) If the commission finds that the petition does not conform to the requirements of Section 54.015 of this code or that the project is not feasible, practicable, necessary, or a benefit to the land in the district, the commission shall so find by its order and deny the petition.
- (e) A copy of the order of the commission granting or denying a petition shall be mailed to each city having extraterritorial jurisdiction in the county or counties in which the district is located who requested a hearing under Section 49.011.¹

As set forth above, in determining if a project is feasible, practicable, and necessary and would be a benefit to the land to be included in the district, the TCEQ need only *consider* whether the MUD's construction cost are reasonable. Here, the construction costs were considered and found to be reasonable. Applicant and the ED have pointed to sufficient evidence in their Exceptions to the PFD to resolve concerns regarding construction costs and urges that the Commission approve the MUD despite the PFD's recommendation to the contrary.

II. APPLICANT'S REPLY TO ELLIS COUNTY'S EXCEPTIONS TO THE PFD

On September 26, 2024, Ellis County filed its Exceptions to the PFD.² The County argues that "authorizing a MUD based on premature information puts the future development at risk, which could have a significant detrimental impact on future residents." This is untrue.

The standard of review applicable to this matter, relates to the fundamental purpose of MUDs. MUD creation's primary purpose is to provide future homeowners with more affordable housing by allowing developer reimbursement of infrastructure construction costs through tax-exempt bond issuance. By allowing reimbursement of infrastructure costs and avoiding inclusion of costs in home and lot prices, a subdivision developer provides homes to prospective homebuyers at a materially lower market price. As a result, landowners have created thousands of MUDs across

¹ TWC § 54.021 (emphasis added).

² See generally Protestants' Exceptions to Proposal for Decision (September 26, 2024).

Texas over the past several decades that provide reimbursement of tens-of-billions of dollars in water, sewer, drainage facilities, and roads.³ This process is no different than the docket at issue.

There is no risk to the development or future homeowner throughout this process. If a proposed development within a MUD succeeds to the point where the Board of Directors of the MUD requests TCEQ approval for the issuance of bonds, TCEQ Staff will have performed a detailed and thorough review of the MUD, its development, and the infrastructure that the developer has then actually constructed on behalf of the MUD. At this further point, such reviews include, but are not be limited to whether the bonds proposed to be issued can be paid with an affordable tax rate being levied by the MUD on its existing/completed lots.⁴

Here, the core question before the TCEQ remains whether a MUD is feasible, practicable, necessary, and a benefit to the land to be included in the MUD.⁵ In considering this question, the TCEQ shall consider whether the proposed development is construction costs are reasonable. However, this is not an independent element that must be satisfied. Rather, it is a factor that the Commission shall *consider* in determining whether a proposed MUD is feasible, practicable, necessary, and a benefit to the land to be included in the MUD. The applicable MUD creation statutes and rules do not require that the TCEQ “*find*,” “*determine*,” or “*conclude*” as a standalone matter that construction costs are reasonable. Instead, the applicable law requires merely that the TCEQ *consider* whether construction costs are reasonable. In this case, the evidentiary record is replete with facts establishing that the proposed costs of development are reasonable, and that the project is feasible, practicable, and necessary and would be a benefit to the land to be included in the district.

³ See, e.g., *List of Texas Water Districts*, Texas Commission on Environmental Quality (“TCEQ”), at <https://www14.tceq.texas.gov/iwud/dist/index.cfm?fuseaction=ListDistricts&Command=list>.

⁴ 30 TEX. ADMIN. CODE §§ 293.41–293.61.

⁵ TEX. WATER CODE § 54.021; 30 TEX. ADMIN. CODE § 293.11(c)(5)(J) (emphasis added).

With regard to a groundwater source, at a recent TCEQ agenda meeting the TCEQ Commissioners amended a proposal for decision in a separate MUD creation matter for the express purpose of clarifying that the Commission *does not* consider proposed groundwater sources (or groundwater availability) of a MUD when approving or denying its creation.⁶ Rather, if a proposed development will result in an amount of impervious cover that is typical for a mostly single-family residential development, that this is sufficient for the groundwater issue.⁷ Here, Applicant provided testimony that the proposed development will not have an unreasonable impact on groundwater even if used as a feasible source.⁸ Applicant’s witness Yash Farah testified that the proposed MUDs park space and drainage areas can absorb water and that the proposed pervious cover has “more green space than what is typical in a residential development.”⁹ ED witness James Walker testified that regarding groundwater use, Protestants failed to rebut Applicant’s demonstration of the reasonableness of the MUDs anticipated impact.¹⁰

Regarding water quality, while the Commission must consider whether a proposed MUD will have an unreasonable impact on water quality, an in-depth analysis of water quality is not a part of the MUD review process because water quality considerations for any future development will be subject to other regulatory controls, including applications for a Texas Pollution Discharge

⁶ See ED Ex. JW-5 (Highland Lakes Final Order); see also ED Ex. JW-6 (Highland Lakes Proposal for Decision); see also TCEQ’s August 16, 2023 Agenda Meeting Broadcast at 1:31:00, available at <https://www.youtube.com/watch?v=kchPf38H17w> (providing footage of a public TCEQ Agenda meeting discussion relating to a joint petition to create three MUDs wherein Chairman Niermann emphasizes that the Commissioners are amending a Proposal for Decision “**to clarify that the Commission does not consider the proposed District’s water supply source to be a consideration for the groundwater issue**” under TWC § 54.021) (August 16th, 2023); see also *Petitions for Creation of Lakeview Municipal Utility District Nos. , 1, and 3*, TCEQ Docket Nos. 2021-0571-DIS, 2021-0572-DIS, and 2021-0573-DIS, SOAH Docket Nos. 582-22-0259, 582-22-0260, and 582-22-0261, Final Order at pg. 4, Finding of Fact No. 32, (providing the above referenced revision to a proposed order so as to clarify that “the proposed developments’ **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”) (emphasis added) (August 24, 2023).

⁷ *Id.*

⁸ App. Ex. 12 at 15:20–16:13 (Farah Direct).

⁹ Tr. at 107:5–11 (Farah Redirect) (May 15, 2024).

¹⁰ ED Ex. JW-1 at 15:14–18:20 (Walker Direct).

Elimination System (“TPDES”) permit application for a proposed development.¹¹ Again, Applicant provided testimony that the proposed MUD will not have an unreasonable impact on water quality.¹² Protestants failed to rebut Applicant’s demonstration of the reasonableness of the MUD’s anticipated impact on water quality.¹³

III. APPLICANT’S REPLY TO CAECM’S EXCEPTIONS TO THE PFD

On September 26, 2024, CAECM also filed its Exceptions to the PFD.¹⁴ Specifically, CAECM maintains that Applicant’s construction costs are unreasonable. In its argument, CAECM points to the Petition for Creation of Lakeview MUDS Nos. 2, 1, and 3 as controlling precedent. However, there is more recent precedent. Specifically, the ED cites to the guidance provided in Chairman Niermann’s Change Document from the Commission’s discussion of the Ellis Ranch MUD No. 1 PFD at the June 26, 2024 agenda meeting.¹⁵ The 5th bullet on page one of the document states, in full, “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 costs by the Applicant and the Protestants does not render the Applicant’s construction costs unreasonable.”¹⁶ Additionally, Texas Water Code section 54.021(b)(2) requires the commission to consider, “the reasonableness of *projected* construction costs, tax rates, and water and sewer rates.”¹⁷ Furthermore, 30 Texas Administrative Code section 293.11(d)(5) requires an applicant to submit a preliminary

¹¹ *Id.*; ED Ex. JW-1 at 13:8–14:27 (Walker Direct); Tr. at 162:10–164:3 (Walker Cross) (May 15, 2024).

¹² *Id.*; App. Ex. 12 at 13:22–15:2 (Farah Direct).

¹³ ED Ex. JW-1 at 15:14–18:20 (Walker Direct).

¹⁴ *See generally* CAECM’s Exceptions to Proposal for Decision;

¹⁵ TCEQ, Chairman’s Change Document, Commissioners’ Agenda, Jun. 26, 2024, Item No. 2, Petition by BRBK Edgewood, LLC for the Creation of Ellis Ranch Municipal Utility District No. 2 of Ellis County, TCEQ Docket No. 2022-1157-DIS, SOAH Docket No. 582-23-11658. Available at:

<https://www.tceq.texas.gov/downloads/agency/decisions/agendas/backup/2022/2022-1157-dis-change-document.pdf>

¹⁶ *Id.*

¹⁷ Texas Water Code § 54.021(b)(2) (emphasis added)

engineering report, which is signed and sealed by the Applicant's engineer, containing a statement of the estimated project cost.¹⁸ There is nothing in the TCEQ rules or the Texas Water Code which calls for finalized (or close to finalized) costs at this stage of the district creation process as the ALJs appear to be requiring. The projected construction costs will undoubtedly change over time, as they inevitably have in virtually every district creation application that has been submitted to the TCEQ.

Further, regarding costs, Applicant's witness and financial expert Ryan Nesmith confirmed that the tax rate for MUDs in Ellis County meets the \$1.00 per \$100.00 of valuation limitation provided by Commission rules—and that the proposed tax rate of \$0.70 per \$100.00 of valuation with \$0.30 for operation and maintenance will be more than sufficient to cover the operating costs of the District at full build out.¹⁹ Moreover, even with creation of the MUD, the prospective developer will continue to carry all financial risks until such time as the Commission approves any future reimbursement to the developer for funding of the MUD's infrastructure.²⁰

CAECM also argues that Ellis County's expert was more reliable.²¹ However, Mr. Hendricks is admittedly a municipal engineer, rather than a development engineer, which bases construction costs estimates on an entirely different set of factors than those of a MUD.²² Mr. Hendricks' testimony, therefore, does not deserve greater weight.

¹⁸ 30 TAC 293.11(d)(5).

¹⁹ App. Ex. 16 at 3:20–7:6 (Nesmith Direct); Tr. at 116:24–118:18 (Nesmith Cross) (May 15, 2024).

²⁰ See 30 TEX. ADMIN. CODE §§ 293.41–293.61; *see also* ED Ex. JW-1 at 10:28–11:6 (Walker Direct); *see also* Tr. at 119:13–121:20 (Nesmith Redirect) (May 15, 2024).

²¹ See CAECM's Exceptions to Proposal for Decision.

²² See Hendricks Cross at p. 147, ll. 14-21.

IV. APPLICANT'S RESPONSE TO THE ED'S EXCEPTIONS TO THE PFD

On September 26, 2024, the ED of the TCEQ filed its Exceptions to the PFD.²³ In its exceptions, the ED recommends that the Commission approve the Applicant's petition to create Shankle Road Municipal Utility of Ellis County despite the PFD's recommendation to the contrary. The Applicant agrees with the ED's Exceptions in their entirety.

The Applicant remains concerned that following the PFD's recommendation would result in the Commission acting outside the scope of what the MUD creation statutes and rules require and would place an unnecessary regulatory burden on Staff—and future MUD creation Applicants. For these reasons, Applicant respectfully urges that the Commission approve the creation of Shankle Road MUD of Ellis County.

V. CONCLUSION AND PRAYER

WHEREFORE, the Applicant respectfully requests that the Commission overrule Protestants' Exceptions to the PFD, and that the application to create Shankle Road MUD of Ellis County be approved as requested by the Applicant and the ED.

Applicant has met his burden through the evidence in showing that the MUD is feasible, practicable necessary and would benefit the land in the MUD.²⁴ Ellis County and CAECM, have protested solely to prevent a new development without basis. This land use dispute is simply a protest over the creation of a governmental entity that will have only positive impacts on

²³ See generally Executive Director's Exceptions to the Proposal for Decision, Executive Director of the Texas Commission on Environmental Quality (September 26, 2024)

²⁴ See generally TEX. WATER CODE CH. 54; see also ED Ex. JW-1 at 6:24–11:18 (Walker Direct); see also, ED-JW-3 at 23–31 (Technical Memorandum for Shankle Road Municipal Utility District of Ellis County); see also, App. Ex. 10 at 6:5–9 (Selinger Direct); see also App. Ex. 12 at 4:1–18:20 (Farah Direct); see also App. Ex. 14 at 4:4–9:14 (Gibson Direct); see also App. Ex. 16 at 3:20–7:6 (Nesmith Direct).

Applicant's property. Protestants have failed to rebut Applicant's showing that the MUD meets all applicable regulations and Commission rules and it should be approved.²⁵

Respectfully submitted,

COATS | ROSE

By:



Natalie B. Scott
State Bar No. 24027970
Tel: (512) 684-3846
nscott@coatsrose.com

Terrace 2
2700 Via Fortuna, Suite 350
Austin, Texas 78746
Tel.: (512) 469-7987
Fax: (512) 469-9408

Tim Green
State Bar No. 08370500
tgreen@coatsrose.com
Mindy Koehne
State Bar No. 24055789
mkoehne@coatsrose.com
16000 North Dallas Parkway, Suite 350
Dallas, Texas 75248
Tel.: (972) 982-8461
Fax: (713) 890-3979

ATTORNEYS FOR APPLICANT

²⁵ See ED Ex. JW-1 at 15:14–18:20 (Walker Direct).

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CERTIFICATE OF SERVICE

I hereby certify that on October 4th 2024, a copy of the foregoing Applicant's Reply to Exceptions to the Proposal for Decision was served on all person listed either via hand delivery, facsimile transmission, electronic mail, and/or by deposit in the U.S. Mail.

Public Interest Counsel:

Jennifer Jamison, Public Interest Counsel
TCEQ, Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Email: Jennifer.Jamison@tceq.texas.gov

Counsel for CAECM:

Eric Allmon and Lauren Ice
PERALES, ALLMON & ICE, P.C.
1206 San Antonio St.
Austin, Texas 78701
Email: eallmon@txenvirolaw.com
Email: lauren@txenvirolaw.com

Counsel for Ellis County:

Emily W. Rogers, Joshua D. Katz
Stefanie P. Albright
Bickerstaff Heath Delgado Acosta LLP
3711 South MoPac Expressway,
Building One, Suite 300
Austin, Texas 78746
Email: erogers@bickerstaff.com
Email: jkatz@bickerstaff.com
Email: salbright@bickerstaff.com

For the Executive Director:

Kayla Murray, Staff Attorney
Fernando Martinez, Staff Attorney
TCEQ Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Email: Kayla.Murray@tceq.texas.gov
Email: Fernando.martinez@tceq.texas.gov

James Walker, Technical Staff
TCEQ Water Supply Division, MC-152
P.O. Box 13087
Austin, Texas 78711-3087
Email: James.Walker@tceq.texas.gov

Ryan Vise, Deputy Director
TCEQ External Relations Division, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Email: pep@tceq.texas.gov



Natalie B. Scott