SOAH DOCKET NO. 582-23-26772
TCEQ DOCKET NO. 2023-0566-DIS

APPLICATION FOR THE CREATION OF SHANKLE ROAD MUNICIPAL UTILITY DISTRICT OF ELLIS COUNTY	**§ § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

ELLIS COUNTY'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, Ellis County, Texas (County or Protestant) and files this, its Exceptions to the Proposal for Decision.

I. Introduction

Protestant agrees with the Administrative Law Judges' (ALJs) recommendation that the proposed petition (Petition) for the creation of the Shankle Road Municipal Utility District (District) should be denied. The ALJs properly recommend that the Petition should be denied because Stephen Selinger (Applicant) did not meet his burden of proving that the proposed District's creation meets all applicable state law requirements. Specifically, the Applicant failed to properly prove that the construction costs are reasonable, and that the project and the District are feasible, practicable, and necessary and would be a benefit to the land included in the District as required by Section 54.021 of the Texas Water Code. However, Protestant excepts to certain proposed Findings of Fact and Conclusions of Law in the Proposal for Decision (PFD), as detailed below. Specifically, in addition to the deficiencies in the Petition listed above, the Applicant did not meet its burden on the following statutory elements for a district's creation: (1) whether District's proposed water and wastewater rates are reasonable; (2) whether the proposed District and subsequent development will have an unreasonable effect on land elevation and subsidence in the region; (3) whether the proposed District and subsequent development will have an unreasonable effect on groundwater levels and groundwater recharge capability within the region;

(4) whether the creation of the District will have an unreasonable effect on natural runoff, drainage, and water quality in the region; (5) whether the proposed District and subsequent development will have an unreasonable effect on water quality within the region; and (6) whether the proposed District and subsequent development will have an unreasonable effect on total tax assessments on all land located within the proposed District.

Protestant generally excepts to the ALJs' conclusion that the Applicant has carried its burden on any of the factors in Texas Water Code § 54.021 because the Applicant has not proposed a legally feasible development to evaluate. It is suggested that because the District is in the early stages of the development process and plans for development can change in the future, the feasibility of the proposed project cannot be determined. If it is not possible to determine the feasibility of a proposed district at this stage, then TCEQ should require that projects be further along in the development planning process when applying for creation to create a municipal utility district (MUD) in order to allow for evaluation of the *actual* project that is planned. In this matter, the Applicant has submitted plans that amount to a caricature of a development plan that the Applicant cannot legally ever develop but that the parties to this proceeding must review and scrutinize regarding feasibility. Authorizing a MUD based on premature information puts the future development at risk, which could have a significant detrimental impact to future residents and the neighboring region. For example, allowing for the creation of a district with grossly underestimated costs and a development plan that does not support a water supply suggests that the property is not able to support a feasible development. Infrastructure and homes may be constructed with or without a valid source of water. Construction may begin without a reasonable plan for supporting the proposed development in its entirety. The Applicant or a future developer of the property subject to the MUD may take significant steps in the development process before

the reality of infeasibility is realized. The County understands that development plans may change, but what the Applicant must show is that *this* property can support a legally feasible development as described in *this* Application to justify creation of a MUD. The Applicant has not done this.

The negative impact to the state in allowing creation of MUDs on property that has not been sufficiently proven to support feasible developments is significant. How many MUDs has the TCEQ approved that have not yet started development? How many MUDs have started development only to fail because the actual costs cannot be supported by bonding and the developer's finances? The Protestant is not suggesting that a final project be necessary to create a MUD. But what should be required is that an applicant provide the concept of a development that demonstrates that the underlying property may feasibly support development.

If the proposed project details and the information submitted in the Petition in the municipal utility district creation process do not have to demonstrate the ultimate feasibility of the proposed district, what is the value in conducting a feasibility study in the first place? The County is asking that the TCEQ deny the Petition as recommended by the ALJs because the Applicant has not proven that development on the underlying property is legally feasible.

II. Exceptions to the PFD

a. Exceptions to the PFD's analysis and recommendations regarding the reasonableness of projected water and sewer rates.

Protestant excepts to the conclusion of the ALJs that the proposed District's projected water and sewer rates are reasonable. The Applicant did not to provide enough information to reasonably assess the water and wastewater rates in order to determine reasonableness (County Exhibit 4 – 37:15 to 38:4). Because insufficient information was provided on the water and sewer rates, the Applicant has not met its burden under Texas Water Code section 54.021(b)(2) to establish the reasonableness of the projected rates. In sum, because the cost estimates in the preliminary

engineering report are understated by such a significant degree, neither the projected construction costs nor the corresponding tax rates and water and sewer rates are reasonable. Applicant has thus failed to meet its burden under Tex. Water Code § 54.021(b)(2).

Therefore, the County excepts to and recommends the amendment of Findings of Fact No. 29, as follows:

> "29. The proposed water and sewer rates are not reasonable."

The County also excepts to and recommends amendment of Conclusion of Law No 11. As follows:

> "11. Applicant has not met his burden of proof regarding reasonableness of projected tax rates and water and sewer rates. Tex. Water Code § 54.021(b)(1)."

b. Exceptions to the PFD's analysis and recommendations regarding whether the proposed District and the systems and subsequent development within the proposed District will have an unreasonable effect on land elevation and subsidence within the region.

Protestant excepts to conclusion of the ALJs that the Applicant met is burden regarding whether the proposed district will have an unreasonable effect on land elevation and subsidence within the region. The Applicant failed to offer any meaningful evaluation of the proposed District's effects on land elevation and subsidence and only offered conclusory, single sentence assurances that these issues will be of no concern. Applicant's Exhibit 8 – Page 14. In the PFD, the ALJs admit that the Applicant's expert offers opinions that are "somewhat conclusory," yet still concluded that the Applicant met its burden without any supporting evidence or information. The Applicant has not carried its burden on these issues as conclusory statements are not evidence. County Exhibit 4 – 38:6 to 39:2; *Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004); *Lenox Barbeque and Catering, Inc. v. Metropolitan Transit Auth. of Harris* County, 489 S.W.3d 529, 535 (Tex. App. – Houston [14th Dist.] 2016, no pet.; Tex. R. Evid. 401. Additionally, the Applicant's broad and unsupported assurances regarding subsidence are not logical. The Applicant has presented a plan that would utilize 18 public water supply groundwater

wells on a 181.6-acre tract of land, but his expert could not confirm the number of wells needed nor where such wells would be physically located. *See* Tr. 83:1-6 (Farah). The Applicant provides no information or evidence regarding how this plan to use a large number of groundwater wells would impact subsidence in the area. To carry its burden, the Applicant needed to provide more explanation and evidence regarding whether or not the proposed District and the systems and subsequent development within the District will have an unreasonable effect on land elevation and subsidence – especially because the Applicant plans to use numerous groundwater wells in the proposed District to provide water service. The Applicant has thus not met its burden.

Therefore, the County excepts to and recommends the amendment of Findings of Fact Nos. 32 and 33, as follows:

> "~~32. Subsidence is not prevalent, anticipated, or reasonably a predictable concern in the area.~~
>
> 33. The District, and the systems and subsequent development within the District, will ~~not~~ have an unreasonable effect on land elevation or subsidence."

The County also excepts to and recommends amendment of Conclusion of Law No 12. as follows:

> "12. Applicant has not met his burden of proving that the District, its systems, and subsequent development will not have an unreasonable effect on land elevation, subsidence, groundwater levels and recharge capability within the region, natural run-off rates and drainage, water quality, or total tax assessments on all land located within the District. Tex. Water Code § 54.021(b)(3)."

c. Exceptions to the PFD's analysis and recommendations regarding whether the proposed District and the systems and subsequent development within the proposed District will have an unreasonable effect on groundwater levels and groundwater recharge capability within the region.

Protestant excepts to the conclusion of the ALJs that the Applicant met its burden on the issue of whether the proposed District will have an unreasonable effect on groundwater levels and recharge within the region. Applicant's statements regarding these issues are conclusory and show

that the Applicant failed to conduct any real analysis on the District's impact on groundwater levels and recharge. County Exhibit 4 – 39:4-10; 39:20 to 40:4. Because the Applicant proposes to use groundwater to supply the development, an analysis of the impact of that production should have been provided. In fact, the uncontroverted evidence shows that the amount of groundwater that the proposed District and subsequent development will produce on the 181.6-acre tract is 14.1 times more than the groundwater production the Prairielands Groundwater Conservation District ("Prairielands GCD") has determined is reasonable. County Exhibit 1 – 12:1-12 (Lupton). Pumping 14.1 times more groundwater than the groundwater district has determined to be reasonable would have significant impacts on groundwater levels in the area. County Exhibit 1 – 12:9-12 (Lupton). These impacts would be unreasonable. County Exhibit 4 – 39:4-18 (Hendricks). Further, because the ED relied only upon the preliminary engineering report as presented and conducted no independent analysis of the issue, the ED likewise did not conduct any analysis of the proposed District's impact on groundwater levels and recharge. Tr. 165:24 – 166:20 (Walker). The ALJs are also relying on Applicant's statement that the proposed District will have more green space than a typical development, but as frequently noted by the Applicant, the plans for the proposed development are at such an early stage that impacts cannot be assessed. Here the Applicant offers only conclusory statements regarding the proposed development that are not realistic nor feasible, such that the Applicant cannot demonstrate that the proposed development will not have an unreasonable effect on groundwater levels and groundwater recharge capability within the region. Therefore, the Applicant did not meet its burden on this issue under section 54.021 of the Water Code.

Therefore, the County excepts to and recommends the amendment of Findings of Fact Nos. 34, 35, 36, and 37, as follows:

"~~34. The District will have more green space than what is typical in a residential development, with at least 9.03 acres of park area planned.~~

35. The impervious cover from the single-family residential lots planned in the District will ~~not~~ have a~~ny~~ greater effect on groundwater levels or recharge capacity of groundwater in the region than any other typical single-family development.

~~36. The Commission does not regulate groundwater and does not consider the source of a proposed MUD's water supply in evaluating how groundwater levels and recharge capability may be impacted.~~

37. The District, and the systems and subsequent development within the District, will ~~not~~ have an unreasonable effect on groundwater level within the region and recharge capability of a groundwater source."

The County also excepts to and recommends amendment of Conclusion of Law No 12. as follows:

"12. Applicant has not met his burden of proving that the District, its systems, and subsequent development will not have an unreasonable effect on land elevation, subsidence, groundwater levels and recharge capability within the region, natural run-off rates and drainage, water quality, or total tax assessments on all land located within the District. Tex. Water Code § 54.021(b)(3)."

The ALJs cite to the Commission's changes to the PFD in the matter for *The Petition by Highland Lakes Midlothian I, LLC for the Creation of Highland Lakes Municipal Utility District No. 1 of Ellis County*, quoting Chairman Jon Nierman in stating that the Commission did not believe that the legislature "intended TCEQ to regulate groundwater through the creation of MUDs." Commissioners' Agenda Meeting, October 25, 2023, Agenda Item 2, beginning at 1:03:44. *Available at* https://www.youtube.com/watch?v=RgtQnKn8g_c. (discussing *Petition for the Creation of Highland Lakes Municipal Utility District No. 1 of Ellis County*, SOAH Docket No. 582-22-07138, TCEQ No. 2022-0532-DIS). However, this Application is distinguished from the narrative in the *Highland Lakes* matter. In *Highland Lakes*, the discussion centered on the quality of the groundwater being pumped by the retail water provider – Mountain Peak Special

Utility District. However, in this matter, the County is not protesting the use or quality of groundwater. Instead, Protestant is challenging the Applicant's proposal to use 18 domestic water supply wells on 10-acre tracts with a limited capacity of 25,000 gallons per day – a plan that is not legally allowed or feasible. The Applicant proposes this excessive number of domestic water wells because, as Protestant explained in its closing arguments, it believes that domestic water wells are exempt from permitting under Texas Water Code § 36.117(b) and the rules of the Prairielands GCD. However, these proposed wells would not be used for domestic use, but as a public water system. Tr. 35:9-12. Prairielands GCD has rules that define "domestic use" as the "use of groundwater by an individual or a household to support domestic activity," and specifically states that "[d]omestic use does not include use by or for a public water system." *See* Rule 1.1(15), Prairielands GCD Rules for Water Wells in Ellis, Hill, Johnson and Somervell Counties (effective September 18, 2023).[1] Thus, the Applicant relies on a plan to provide water through wells that are not exempt from permitting, and based on a plan provided in the Preliminary Engineering Report that prohibited under Prairieland GCD's rules. And although Applicant could request a variance from Prairieland GCD's rule, Applicant has no assurances it would receive such a variance and it's not likely that a groundwater district would grant a variance to such an egregious attempt to try to circumvent the Texas Water Code. Thus, the County protests the legal feasibility of the District based upon the infeasibility of the water supply source proposed by the Applicant. The County is not protesting the lawful use of groundwater or any issue related to groundwater quality. Thus, the Commission's analysis relating to the *Highland Lakes* matter is not applicable.

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[1] Prairielands GCD's rules are available at https://www.prairielandsgcd.org/wp-content/uploads/2024/01/Prairielands-GCD-Rules-as-Amended-and-Effective-September-18-2023-1.pdf. The ALJs may take judicial notice of these publicly available rules. *See* TEX. R. EVID. 201(b); 30 TEX. ADMIN. CODE § 80.127.

d. **Exceptions to the PFD's analysis and recommendations regarding whether the proposed District and the systems and subsequent development within the proposed District will have an unreasonable effect on natural run-off rates and drainage within the region**.

The County excepts to the conclusion of the ALJs that the Applicant met its burden of proof to demonstrate that the proposed District and the systems and subsequent development within the District will not have an unreasonable effect on natural run-off rates and drainage. Again, the preliminary engineering report contains little substantive information about runoff and storm drainage, merely concluding that it will be detained and conveyed to properties downstream. Applicant Exhibit 8 – Page 14; County Exhibit 4 – 40:6-11. The preliminary engineering report does not provide any information about the natural run-off rates before development in order to compare with the post development rates, and it offers little substantive information on how the proposed District and subsequent development will impact natural runoff rates and drainage. County Exhibit 4 – 40:11-18. The ED's analysis is similarly conclusory because it relied entirely on the preliminary engineering report, and abdicates its responsibility for reviewing the effects on run-off and drainage to Ellis County. (ED-AP-1, 16:24 – 17:16 (Walker)).

The Applicant has not provided enough information to accurately assess the impacts of the proposed development on drainage. Thus, the Applicant has failed to meet its burden of proof to show that the proposed District and subsequent development will not have an unreasonable effect on the natural run-off rates and drainage.

Therefore, the County excepts to and recommends the amendment of Findings of Fact Nos. 40, 41, and 42, as follows:

> "~~40. The system will be designed to carry the runoff from a 100-year storm, in compliance with the applicable design criteria established by Ellis County, and will be constructed and operated in compliance with all federal, state, and local requirements~~.

~~41. The system will maintain post-development flows at or below pre-development conditions and maintain velocities at or below non-erosive levels.~~

42. The District, and the systems and subsequent development within the District, will ~~not~~ have an unreasonable effect on natural run-off rates and drainage."

The County also excepts to and recommends amendment of Conclusion of Law No 12. as follows:

"12. Applicant has not met his burden of proving that the District, its systems, and subsequent development will not have an unreasonable effect on land elevation, subsidence, groundwater levels and recharge capability within the region, natural run-off rates and drainage, water quality, or total tax assessments on all land located within the District. Tex. Water Code § 54.021(b)(3)."

e. Exceptions to the PFD's analysis and recommendations regarding whether the proposed District and the systems and subsequent development within the proposed District will have an unreasonable effect on water quality within the region.

The County excepts to the conclusion of the ALJs that the Applicant has met its burden of proof that the proposed District and its systems and subsequent development within the District will not have an unreasonable effect on water quality, drainage, and stormwater quality within the region. As with the other criteria, the preliminary engineering report is conclusory and provides no substantive assessment of the water quality impacts to support such a conclusion. County Exhibit 4 – 40:20 to 41:5. The County has shown that the proposed source of drinking water is groundwater, which in this area contains concentrations of dissolved mineral solids that are higher than the receiving water quality standards in sulfates, chloride, and total dissolved solids. County Exhibit 14 –8:10-15 (Osting). To meet drinking water standards for human consumption, the water will need to be treated to secondary treatment concentration levels. *Id*. at 8:19-21. Once the water is used within the household, it will be drained into the sewer collection system, then sent to a wastewater treatment plant to be treated before being discharged into the receiving streams. *Id*. at 8:23-9:2. When the source water contains high ratios of dissolved minerals like the groundwater

in this area does, it must be specially treated to ensure that it does not impair the receiving streams. Id. at 9:2 – 10:5. Here, the Applicant has proposed no such specialized treatment method to achieve the necessary water quality standards to ensure the water quality in the receiving streams is not impaired. *Id*. at 10:6-16. Through this expert analysis, the County has shown that the proposed District will have an unreasonable effect on water quality as proposed and will also have an unreasonable effect on stormwater quality because no non-point source stormwater quality controls are proposed or evaluated.

In making their determination, the ALJs agreed with the Applicant that the above analysis by the County's expert is "speculative," and to be addressed in proceedings related to the Applicant's wastewater permit. However, the ALJs mischaracterize Mr. Osting's analysis. In determining the impact of the proposed development on water quality, the source water for the water supply to the development is an important factor. Contrary to the conclusion of the ALJs, the Protestants offer valid and uncontroverted evidence that water quality in the region will be negatively impacted by the proposed District. Therefore, the Applicant has failed to meet its burden to show that the proposed District will not have an unreasonable impact on water quality.

Therefore, the County excepts to and recommends the amendment of Findings of Fact Nos. 46 and 47, as follows:

> "~~46. The Commission has a separate permitting process for wastewater treatment plants and does not regulate those matters as part of the MUD-approval process.~~
>
> 47. The District, and the systems and subsequent development within the District, will ~~not~~ have an unreasonable effect on water quality."

The County also excepts to and recommends amendment of Conclusion of Law No 12. as follows:

> "12. Applicant has not met his burden of proving that the District, its systems, and subsequent development will not have an unreasonable effect on land elevation, subsidence, groundwater levels and recharge capability within the region, natural run-off

rates and drainage, water quality, or total tax assessments on all land located within the District. Tex. Water Code § 54.021(b)(3)."

f. Exceptions to the PFD's analysis and recommendations regarding whether the proposed District and the systems and subsequent development within the proposed District will have an unreasonable effect on total tax assessments on all land located within the proposed district.

The County excepts to the conclusion of the ALJs that the Applicant has met its burden of proof to establish that the proposed District will not have an unreasonable effect on the total tax assessments on land within the proposed District because the Applicant has not provided adequate information to make such a determination and has provided cost estimates that are less than reasonable and customary projections of costs of the proposed facilities.

The County demonstrated that the Applicant has substantially undervalued the estimated construction costs of the infrastructure necessary for water, wastewater, and drainage facilities within the proposed District. These higher costs have an impact on the MUD's financial modeling and could result in an effective tax rate substantially higher than the tax rate proposed by the Applicant.

The ALJs erroneously agree with the Executive Director's assertion that, because the TCEQ reviews tax rates for each bond issuance, the proposed District will not have an unreasonable tax rate and that even though the Applicant has not met its burden on proving that cost estimates are reasonable, the cited tax rate is still reasonable. The proposed tax rate is not based on any realistic data, and instead is just a number the Applicant placed in the Petition to check a box. TCEQ does review tax rates as a part of the bond process, but when this bond review is conducted infrastructure has *already been constructed* within the MUD. This means that if the costs can't be supported by the tax rate, the development could be put in financial jeopardy. The

purpose of the review of the tax rate at the MUD creation stage is to examine whether a reasonable tax rate will support the planned infrastructure. In this situation, the County has shown that the proposed development will have an unreasonable impact on the total tax assessment on land in the District, and the Applicant has not met its burden.

Therefore, the County excepts to and recommends the amendment of Findings of Fact Nos. 26, 27, and 49, as follows:

> " ~~26. The District's total overlapping tax rate will be approximately $2.25 per $100. This compares favorably to the overlapping tax rates in other districts and residential developments in the market.~~
>
> 27. The District's proposed tax rates are not reasonable.
>
> 49. The District, and the systems and subsequent development within the District, will ~~not~~ have an unreasonable effect on total tax assessments on all land located within the proposed district."

The County also excepts to and recommends amendment of Conclusion of Law No 12. as follows:

> "12. Applicant has not met his burden of proving that the District, its systems, and subsequent development will not have an unreasonable effect on land elevation, subsidence, groundwater levels and recharge capability within the region, natural run-off rates and drainage, water quality, or total tax assessments on all land located within the District. Tex. Water Code § 54.021(b)(3)."

III. Conclusion

The County respectfully requests that the TCEQ grant its exceptions and amend the PFD with the corrections as set out above. The Protestant respectfully requests any other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on September 26, 2024, a true and correct copy of the above and foregoing document was served on all parties via electronic filing service provider and to all persons listed below via electronic mail.

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