

DOCKET NO. 2023-0847-DIS

PETITION FOR THE CREATION OF JOHNSON COUNTY MUNICIPAL UTILITY DISTRICT NO. 2	§ § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**THE CITY OF MANSFIELD'S
REPLY TO RESPONSE TO REQUEST FOR HEARING**

To the Members of the Texas Commission on Environmental Quality:

The City of Mansfield, Texas (“City”) files this Reply to Response to Request for Hearing in the above-entitled matter.

I. Introduction

A. Summary of Position

The City filed a proper request for a contested case hearing with the TCEQ Chief Clerk's office. For the reasons discussed herein, the City respectfully requests that the Commission grant the hearing request of the City and refer this matter to the State Office of Administrative Hearings (“SOAH”) for a contested case hearing.

B. Background

Cipriani Island Laguna Azure, LLC (“Petitioner”) filed a petition for the creation of Johnson County Municipal Utility District No. 2 (the “District”) pursuant to Article XVI, Section 59 of the Texas Constitution; Chapters 49 and 54 of the Texas Water Code; Title 30 of the Texas Administrative Code (“TAC”), Chapter 293; and the procedural rules of the TCEQ. The application was declared administratively complete on October 17, 2022. On April 1 and 8, 2023, the Notice of District Petition was published in the *Cleburne Times Review*. On March 28, 2023, the Johnson County Clerk posted the notice on the County's website. According to the notice, the proposed District would contain approximately 184 acres and would be located in Johnson County,

within the extraterritorial jurisdiction (“ETJ”) of the City of Mansfield. The comment and contested case hearing request periods ended on May 8, 2023. The City filed its Request for Contested Case Hearing on April 21, 2023. Petitioner filed its Petitioners Response to Hearing Requests on October 2, 2023 (“Response”). The Office of Public Interest Counsel filed its Office of Public Interest Counsel’s Response to Requests for Hearing on October 2, 2023. The Executive Director filed its Executive Director’s Response to Hearing Requests on October 2, 2023.

II. Applicable Law

A municipal utility district (“MUD” or a “district”) may be created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59, of the Texas Constitution. Tex. Water Code §54.011. Chapters 49 and 54 of the Texas Water Code and the Commission's administrative rules found at Title 30, Chapter 293, of the Texas Administrative Code govern petitions to create a MUD. A district shall be created for the following purposes:

- (1) the control, storage, preservation, and distribution of its storm water and floodwater, the water of its rivers and streams for irrigation, power, and all other useful purposes;
- (2) the reclamation and irrigation of its arid, semiarid, and other land needing irrigation;
- (3) the reclamation and drainage of its overflowed land and other land needing drainage;
- (4) the conservation and development of its forests, water, and hydroelectric power;
- (5) the navigation of its inland and coastal water;
- (6) the control, abatement, and change of any shortage or harmful excess of water;
- (7) the protection, preservation, and restoration of the purity and sanitary condition of water within the state; and
- (8) the preservation of all natural resources of the state.

Tex. Water Code §54.012.

The Commission shall grant the petition if it conforms to the requirements of §54.015 of the Texas Water Code and the project is feasible, practicable, necessary, and further, would be a

benefit to the land to be included in the district. Tex. Water Code §54.021(a). In determining if the project is feasible, practicable, necessary, and beneficial 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.

Tex. Water Code §54.021(b).

If the Commission finds that not all of the land proposed to be included in the district will be benefited by the creation of the district, it shall exclude all land not benefited and redefine the proposed district's boundaries accordingly. Tex. Water Code §54.021(c). If the petition does not conform to the requirements of §54.015 of the Texas Water Code or the project is not feasible, practicable, necessary, or a benefit to the land in the district, the Commission shall deny the petition. Tex. Water Code §54.021(d). The rights, powers, privileges, authority, and functions of a district shall be subject to the continuing right of supervision by the Commission. Tex. Water Code §54.024.

A person requesting a contested case hearing must make the request in writing within the time period specified in the notice and identify the requestor's personal justiciable interest affected by the application, specifically explaining the "requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will

be affected by the activity in a manner not common to members of the general public." 30 TAC §55.251(b)-(d).

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 members of the general public does not qualify as a personal justiciable interest." 30 TAC §55.256(a). Relevant factors to be considered in determining whether a person is affected include, but are not limited to:

- (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, safety, and 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) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC §55.256(c). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC §55.256(b).

The Commission shall grant a request for a contested case hearing if: (1) the request is made by the applicant or the ED; or (2) the request is made by an affected person, complies with the requirements of §55.251, is timely filed with the chief clerk, and is made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b).

III. Discussion

The City's request for contested case hearing should be granted because the City's request satisfies all of the requirements of 30 TAC §55.255(b)(2).

The City timely requested a hearing during the public comment period in this matter by filing a written request with the chief clerk within the time period specified in the public notice of application. *See* 30 TAC §55.255(b)(2)(A); *see also* 30 TAC §55.251(b) & (d).

The City's request included all information required to be included by 30 TAC §55.251(c)(1),(3) & (4), including the contact information for the City, a request for a contested case hearing, the City's personal justiciable interest affected by the application and explained in plain language the City's location and distance relative to the activity that is the subject of the application and how and why the City believes it will be affected by the activity in a manner not common to members of the public, and any other information specified in the public notice of application. *See* 30 TAC §55.255(b)(2)(A); *see also* 30 TAC §55.251(c).

Finally, the City's request was made pursuant to a right to hearing authorized by law because the City is an "affected person." *See* 30 TAC §55.255(b)(2)(A); *see also* 30 TAC §55.251(a). The City, along with other governmental entities, is expressly authorized to be an affected person under for purposes of requesting a contested case hearing, even though the City's justiciable interest is different than the justiciable interest that would typically be held by individuals. *See* 30 TAC §55.256(b). While all relevant factors should be considered when making an "affected person" determination, one of the enumerated factors specifically applies to governmental entities—the governmental entity's authority over or interest in the issues relevant to the application. *See* 30 TAC §55.256(c). The City's request for contested case hearing detailed the City's authority over and interest in the issues relevant to this application, showing itself to be an "affected person" for this application.

The City has shown that the proposed district is located within the City's extraterritorial jurisdiction, over which the City has authority to regulate development as well as exercise other

authority to protect the public health and safety, showing that the City has authority over issues relevant to this application. The Executive Director acknowledged in its response that “[i]t is undisputed that the proposed district is entirely within the extraterritorial jurisdiction of the City of Mansfield.” *See* Exec. Dir. Resp. to Hrg Req. at p.5.

The City’s interest in the issues relevant to this application is even greater. First, the City is interested in the issues relevant to the application because of its regulatory authority within its extraterritorial jurisdiction and a duty to ensure that the water and wastewater service furthers the public health and safety. Second, the City’s is interested in the issues relevant to the application because it has an interest in the regionalization of services in the area of the proposed district, in accordance with the State of Texas’ regionalization policy. The Public Interest Counsel noted that “[r]egionalization and the availability of comparable service from other systems are relevant to the Commission’s decision on creation of the District because these issues are informative of whether the District is necessary and would be a benefit to the land to be included in it.” *See* Off. of Pub. Int. Counsel’s Resp. to Req. for Hrg at p.8. Finally, Mansfield states that questions exist regarding issues that must be examined under TWC § 54.021(b)(2) and (3), such as the reasonableness of projected construction costs and whether the District will have unreasonable effects on water quality and groundwater level within the region.

The City concludes that, based on the City’s identified statutory authority over and interest in issues that are relevant to the creation of the District, the City has demonstrated that it qualifies as an affected person; and therefore, it is proper for the Commission to grant the City’s request for a contested case hearing.

IV. Response to Petitioner’s Reply

Petitioner raised throughout its presentation of the background the applicable law the

argument that the City is deemed to have “statutorily consented” to the creation of the District. Then in Part III of its Response, Petitioner presents two specific arguments for why the City’s request for a contested case hearing, in Petitioner’s opinion, fails to meet the legal parameters: (1) the City has statutorily consented to the creation of the District; (2) the removal of the property from the City’s extraterritorial jurisdiction nullifies the City’s status as an affected person; and (3) the City does not have a legal obligation to provide water or sewer service to the property. *See* Pet. Resp. to Hrg Req. at pp. 8-12. For the reasons discussed below, none of these arguments from Petitioner change the fact that the City is an affected person.

A. The City’s “Statutory Consent” is Only to Filing the Pending Application

Petitioner asserted in its Response that “the City’s failure to respond to the petition submitted to the City or to arrive at a mutually agreeable contract for water and sanitary sewer service serves as statutory consent by the City for creation of the District No. 1 pursuant to Tex. Local Gov’t Code §42.042(c) and Tex. Water Code §54.016(c), which is directly contrary to the City’s Hearing Request.” *See* Pet. Resp. to Hrg Req. at p.10. Petitioner seems to be making the argument that this “statutory consent” means that the City has waived its ability to make any further objections to the creation of the District; however, this is a misrepresentation of the legal effect of this “statutory consent.” Petitioner either failed to review or failed to consider the very next section, Section 42.042(d), Texas Local Government Code, which clearly specifies that the “consent to the creation of the political subdivision is only an authorization to initiate proceedings to create the political subdivision as provided by law.” Further, in the same section as the portion of the Texas Water Code cited by Petitioner—the very next sentence—this same clarification is included, yet Petitioner again either failed to review or failed to consider this language. *See* Tex. Water Code §54.016(c).

Contrary to Petitioner's representation, the City has the right to contest the creation of the District as an affected person under the law, even though the statute gives Petitioner the right to file this petition.

B. The City Remains an Affected Person After Potential Removal From ETJ

Petitioner raised in its Response that upon removal of the property from the City's extraterritorial jurisdiction the City would no longer be an interested person under the law. *See* Pet. Resp. to Hrg Req. at p. 9. However, if the property is removed from the City's extraterritorial jurisdiction, the City's interest in the issues relevant to this application does not go away. The City is a water and wastewater provider in the region and is a regional water and wastewater provider, whether through direct retail or wholesale service. The City's position as a regional water and wastewater provider makes the City interested in the issues relevant to this application because of the City's interest in the regionalization of water and wastewater system design, improvements and service throughout the region.

Further, the City's interest in the water and wastewater system design, improvements and service within the property will continue if the property is removed from the City's extraterritorial jurisdiction because the property will continue to be surrounded by the City's extraterritorial jurisdiction. The water and wastewater services within the property are still very important to the City's performance of its governmental function of protecting the public health and safety, even if this particular property in the middle of its extraterritorial jurisdiction is not subject to its subdivision regulations any longer.

Contrary to Petitioner's representation, based upon the law and the representations of both the Public Interest Counsel and the Executive Director, the City's status as an affected person would not be impacted if the property is removed from the City's extraterritorial jurisdiction. *See*

Off. Pub. Int. Counsel's Resp. to Req. for Hrg at pp. 8-9; Exec. Dir. Resp. to Hrg Req. at pp. 5-6.

C. City is Interested in Water and Wastewater Service to the Property

Finally, Petitioner asserts that the City cannot be an affected person because the City has no legal right or obligation to provide water or wastewater service to the property. *See* Pet. Resp. to Hrg Req. at 11-12. Petitioner's argument that the City's current CCN does not cover this property is a misdirection that confuses the issues. The reality is that the City is inherently interested in the creation of the District on the property and the provision of water and wastewater services on the property for all of the reasons that the City has asserted in its request for a contested case hearing and in this reply. The City's inherent interest in the issues related to this application have been recognized by the Texas Legislature when it gave the City a statutory right to consider whether it was appropriate to consent to the creation of the District and a statutory right to pursue an agreement to provide water and wastewater service to the property in the case that the City did not find it appropriate to consent to the creation of a new governmental entity and the creation of an additional utility provider that will be immediately adjacent to the City's corporate boundary. *See* Texas Local Government Code §42.042; *see also* Tex. Water Code §54.016. The Texas Legislature has further acknowledged the City's inherent interest in the issues relevant to this application by including the consideration of the availability of comparable service from other systems, including water districts, *municipalities*, and regional authorities, in the list of criteria to be considered when deciding whether or not to create the District. Tex. Water Code 54.021(b)(1).

Contrary to Petitioner's representation, whether or not the City has a legal right or obligation to provide water or wastewater service to the property does not have any material impact on the City's interest in the issues related to this application or the determination of whether the City is an affected person.

V. Conclusion

For the reasons set forth above, the City respectfully requests the Commission find that the City of Mansfield is an affected person, grant its hearing request, and refer the matter to SOAH for a contested case hearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2023, the City of Mansfield's Reply to Response to Request for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.



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