

**SOAH DOCKET NO. 582-24-15644
TCEQ DOCKET NO. 2023-1588-DIS**

PETITION OF HAYS COMMONS	§	BEFORE THE STATE OFFICE
LAND INVESTMENTS, LP	§	OF
FOR CREATION OF HAYS	§	ADMINISTRATIVE HEARINGS
COMMONS MUNICIPAL UTILITY	§	
DISTRICT	§	

ALIGNED PROTESTANTS’ EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Protestants Save Our Springs Alliance, Philip Brisky, Darlene and Michael Starr, Antonio Valdez, and Lydia Bryan Valdez (collectively, “Aligned Protestants”) submit the following exceptions to the Proposal for Decision (PFD) filed by the Administrative Law Judge (ALJ) relating to the Hays Commons Land Investment, LP’s (“Applicant”) Petition for the Creation of Hays Commons Municipal Utility District (“proposed district”) and continue to urge denial of the petition.

I. INTRODUCTION AND SUMMARY OF EXCEPTIONS

In consideration of the exceptions and arguments set forth herein, Aligned Protestants respectfully request that the ALJ amend the PFD to recommend denial of the petition. Should the ALJ not amend the PFD, Aligned Protestants request that the Commissioners of the Texas Commission on Environmental Quality not adopt the ALJs’ Order as presently proposed and attached to the PFD and adopt a revised Order denying the petition because the PFD improperly applies the law and TCEQ rules while the findings of fact include technical factual errors that require correction.

The PFD in this case relies on an interpretation of Texas Water Code § 54.021 that erases the plain language requirements of the statute. Aligned Protestants provide their exceptions to the PFD below to show that when the plain language of the Texas Water Code is applied to the petition for the proposed district, it must be found that the Applicant failed to meet its burden of proof for several issues. The PFD also fails to set out any guiding principles grounded in the statute for determining when the proposed district will have an unreasonable effect on any of the required factors. Further, the PFD impermissibly transfers the burden of proof on Protestants for several issues. 30 Tex. Admin. Code § 80.17. Additionally, the Findings of Fact attached to the PFD are not adequate to comply with the requirements of Tex. Gov. Code § 2001.141(d).

II. STANDARD OF REVIEW

The PFD, amendments to the PFD, and the order accompanying the PFD must be solely based on the record before the ALJ and include an explanation of the basis for the decision or amendment. Tex. Gov’t Code § 2003.047(m). An ALJ may amend her PFD in response to exceptions, replies or briefs filed by parties to a contested case hearing. 30 T.A.C. § 80.259. If the ALJ does not amend the PFD, the Commission may modify the ALJ’s order or proposed findings of fact and

conclusions of law if the Commission determines that: (1) the ALJ improperly applied or interpreted the law, agency rules or policies, or prior administrative decisions; (2) the ALJ based his decision on a prior administrative decision that is incorrect or should be changed; or (3) a finding of fact contains a technical error requiring correction. Tex. Gov't Code § 2001.058(e).

III. EXCEPTIONS TO THE PFD AND SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Findings of Fact.

Availability of Comparable Service from Other Systems

22. Water and wastewater service is not available from other systems.

This finding of fact is not supported by the evidence in the record. Despite the Applicant's conflicting claims, a careful reading of the evidence in the record shows that the Applicant is continuing to seek water and wastewater service from the City of Austin and continues to seek the City of Austin's consent to create a MUD that includes the proposed district at issue here. Tr. Vol. 1 at 43:23–44:7, 67:11–17.

The Applicant is not in limbo with the City of Austin, and the record does not show that the Applicant's request to the City of Austin was denied. It strains the record beyond reason to conclude that services are unavailable from the City of Austin based on the evidence in the record.

Additionally, Aligned Protestants request that the Court take judicial notice under Tex. R. Evid. 201 of a letter sent by the Applicant to the City of Austin's City Manager on May 21, 2025, attached as Exhibit 1 to this document. In the letter, the Applicant expresses its continued intent to receive water and wastewater services from the City of Austin, makes clear that the Applicant has always remained active at the negotiating table with the City of Austin, and states that the Applicant is willing to comply with the Save Our Springs Ordinance, facts that the Applicant's witnesses attempted to obfuscate or completely deny at the hearing and in their prefiled testimony. AppEX-2 (Ryan Prefiled Testimony) at 14:15–19, 15:17–18; Tr. Vol. 1 at 43:23–44:7, 67:11–17, 50:15–16. The Court may properly consider the letter under Tex. R. Evid. (24) since the letter contains statements made by the Applicant that run contrary to the Applicant's position and statements in this proceeding and hold the potential to negatively affect the Applicant's interests. While the Applicant failed to meet its burden of proof on this issue based on the record alone, Exhibit 1 further underscores the Applicant's failure.

Why would the Applicant continue to incur the costs of seeking services that are unavailable? The plain language of the Texas Water Code is clear, the Applicant cannot have it both ways.

Reasonableness of Projected Construction Costs, Projected Tax Rates, and Projected Water and Sewer Rates

23. The proposed construction costs set out in the preliminary engineering report, which total \$20,791,828, are reasonable.

This finding of fact and the PFD provide no basis for finding that the projected construction costs are for the proposed development are reasonable.

Moreover, the projected construction costs cannot be reasonable if they are based on a development scheme that is impossible under current applicable laws. It is arbitrary for the ALJ to allow the Applicant to cower behind speculative compliance with the rules of other jurisdictions to avoid providing evidence about the effects of the proposed district but to ignore a demonstrated failure of the Applicant to apply with the rules on this issue. Aligned Protestants' Closing at 4–9. The Applicant must show that the projected construction costs for the proposed district are reasonable, and the Applicant here failed to provide any evidence that the construction costs for a legitimate development plan are reasonable. While the projected constructions costs could be expected to change marginally throughout the life of the project, the Applicant still must provide a persuasive basis to justify the creation of a powerful governmental entity. As it stands, all the Applicant has provided is a mess.

And contrary to the PFD at 21, Aligned Protestants do not bear the burden to show that the costs are unreasonable, rather the Applicant bears the burden to show that the costs are reasonable, a burden which the Applicant failed to meet.

Effect on Groundwater Levels and Groundwater Recharge Capability

35. No facilities are planned that would have an unusual impact on groundwater recharge.

This finding of fact is not supported by the evidence in the record. As noted in the exceptions to findings of fact 36 and 37, the Applicant bears the burden of proof on this issue and failed to provide evidence that the proposed development and systems would not have an unreasonable effect on groundwater recharge.

36. The District's development plan includes considerable pervious surface in the form of open space, natural drainage corridors, and predominantly single-family residential land use.

This finding of fact is not supported by the evidence in the record. The maps provided in the Creation Report of the proposed district show large swaths of multi-family housing and only a small patch marked as single-family housing. APPEX-2-02 at 051–54. The Creation Report also contemplates major changes to runoff and drainage within the district by rerouting stormwater through storm sewers, water quality ponds, and detention facilities. APPEX-2-02 at 010. The Creation Report does not state that the proposed district plans to use natural drainage corridors, only that they are one of two options. *Id.* As to the point about pervious surface within the proposed district, the evidence in the record shows that the Applicant plans to do everything

within its power to avoid complying with impervious cover rules set out by two jurisdictions to protect the groundwater recharge and quality of the Edwards Aquifer. Tr. Vol. 1 at 145–46; 49:16–50:18; *but see* Exhibit 1. In addition to being unsupported by the evidence in the record, there is no evidence in the record to show that any of the factors listed in this finding of fact will cause the proposed district to not have an unreasonable effect on groundwater recharge capability.

37. Applicant established that the District and its system and subsequent development within the District will not have an unreasonable effect on groundwater levels in the region or recharge capability of a groundwater source.

In the PFD related to this finding of fact, the ALJ impermissibly shifted the burden of proof onto the Protestants in this case to show that the proposed district will have an unreasonable effect on groundwater by writing:

The development plan involves more impervious cover than would be allowed under Austin rules without a variance. Nevertheless, no evidence suggests that the development anticipated in the Petition and in the District’s development plan, which provides for considerable pervious surface, would lead to an unreasonable effect on groundwater levels or recharge. PFD at 29.

The burden in this case is on the Applicant to demonstrate that the proposed district will not have an unreasonable effect on groundwater levels or groundwater recharge. 30 Tex. Admin. Code § 80.17. Rather than placing the burden on Protestants to show that proposed district will have an unreasonable effect on groundwater, the Applicant must provide affirmative evidence demonstrating the anticipated development will not unreasonably impact groundwater, especially when the contemplated development will violate rules established to protect groundwater recharge. PFD at 29. A lack of evidence on an issue requires finding against the party who carries the burden of proof for that issue. The Applicant failed to meet its burden of proof on this issue; there is no evidence to show that the increase in impervious cover within the proposed district will not have an unreasonable effect on groundwater.

The PFD and these findings of fact also failed to consider whether the groundwater pumping proposed by the Applicant as part of the proposed district will have an unreasonable effect on groundwater levels. PFD at 28–29. But § 54.021 of the Texas Water Code requires TCEQ to consider whether the district and its system and subsequent development within the district will have an unreasonable effect on groundwater levels within the region and the recharge capabilities of groundwater sources. Which by its plain language requires consideration of proposed groundwater pumping. TCEQ’s eschewing of the statute’s plain language in the past does not require that the same mistake be made again. The plain language of the statute must be followed. When the evidence in the record is examined, it is abundantly clear that the Applicant cannot meet its burden of proof on this issue because the Applicant failed to provide evidence showing that the groundwater pumping contemplated in the Creation Report for the proposed district would not have an unreasonable effect on groundwater levels. *Compare* AppEx-5 (Khorzad Prefiled) at 8–9, with, AppEx-2-02 at 008.

Effect on Natural Run-off Rates and Drainage

38. Applicant intends to develop the property in compliance with Hays County, state, and federal stormwater regulations.

The Applicant did not provide any evidence or plans to show that the proposed district will comply with applicable regulations, so it is impossible to assess whether the proposed district will have an unreasonable effect on natural run-off rates or drainage because there is no information to assess on the current patterns or how the proposed district will affect them. The Applicant bears the burden of proof on this issue, so the Applicant needed to provide proof to meet its burden.

Effect on Water Quality

39. The Petition anticipates discharging treated wastewater and using that discharge to irrigate specific land.

This finding of fact presumes that the Applicant will violate its proposed Texas Land Application Permit (TLAP), which prohibits the discharge of pollutants, by discharging treated municipal sewage on the Edwards Aquifer Recharge Zone. PR-NH-10 at 254. And as the ED's witness testified, it is unreasonable for a permittee to violate the terms of a TCEQ permit. Tr. Vol. 1 at 194:9–14. Since the Court has found that the Applicant anticipates violating its permit, it cannot be said, based on the evidence in the record, that the proposed district will not have an unreasonable effect on water quality.

40. Applicant's discharge plan requires a separate TCEQ permit, and the application for that permit is separate from the Petition.

This finding of fact is extraneous and has no bearing on TCEQ's obligation to consider the unreasonable effects of the proposed district under Texas Water Code §54.021(b)(3)(f) in the present proceeding.

41. Applicant's plan to discharge water subject to a TCEQ permit is sufficient to meet its burden to show that the District and its system and subsequent development within the District will not have an unreasonable effect on water quality.

Section 54.021 of the Texas Water Code requires TCEQ to consider whether the district and its system and subsequent development within the district will have an unreasonable effect on water quality. While the PFD is correct in stating that the Applicant's TLAP application will be addressed in an additional proceeding, PFD at 25, the plain language of the statute requires TCEQ to consider in this current proceeding whether the district. The Texas Legislature mandated that TCEQ consider this important aspect of the proposed district here and now, accordingly TCEQ cannot shrink from its responsibility to protect water quality in the state nor can the Applicant meet its burden of proof by deferring consideration of this issue until after it is already granted immense political powers. The ALJ must evaluate whether the proposed district, its system, and subsequent development will have an unreasonable effect on water quality.

It is easy to see why the Applicant and the ED urge the Court to ignore the Texas Water Code and improperly delay consideration of the proposed district's effects on water quality since the Applicant fails to meet its burden of proof on the issue when the issue is considered in light of the evidence in the record. The evidence in the record shows that even TLAP permits properly issued by TCEQ over the Edwards Aquifer Recharge Zone cause pathogenic outbreaks that cause people to get sick, and the Applicant here has proposed a TLAP as part of its system in one of the most sensitive areas of the Edwards Aquifer Recharge Zone. PR-NH-1 (Hauwert Prefiled) at 010:1–12, PR-NH-1 at 010:15–011:2. Even with the risks to water quality posed by the proposed district, TCEQ did not even assess whether the proposed district would have an effect on water quality. Tr. Vol. 1 at 191:3–7. The Applicant, who bears the burden of proof, did not provide any evidence that the systems associated with its development will not have an unreasonable effect on water quality.

Complete Justification for Creation of the District

45. Applicant has shown that the District is feasible, practicable, necessary, and will benefit all of the land to be included in the District.

The Applicant failed to meet its burden of proof on the other issues in this proceeding, so it cannot be found to have fulfilled this requirement.

2. Conclusions of Law.

9. Applicant met its burden of proof regarding the availability of comparable service from other systems. Tex. Water Code § 54.021(b)(1).

For the reasons set out in the exceptions to finding of fact number 22, the Applicant failed to meet its burden on this issue.

10. Applicant met its burden of proof regarding reasonableness of projected construction costs, tax rates, and water and sewer rates. Tex. Water Code § 54.021(b)(2).

For the reasons set out in the exceptions to finding of fact number 23, the Applicant failed to meet its burden on this issue.

11. Applicant met its 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).

For the reasons set out in the exceptions to finding of fact numbers 35 36 37 38, 39, 40, 41, the Applicant failed to meet its burden on these issues.

13. Applicant met its burden of proof to show that the project and District are feasible, practicable, and necessary and would be a benefit to the land included in the District. Tex. Water Code § 54.021; 30 Tex. Admin. Code § 293.11(d)(5)(J).

For the reasons set out in the exceptions to finding of fact number 45, the Applicant failed to meet its burden on this issue.

14. Applicant's Petition should be granted.

This conclusion of law is unsupported by the record and the law. Because the Applicant failed to meet its burden of proof in these proceedings, the petition should be denied to protect water quality in the Edwards Aquifer and Little Bear Creek, to protect groundwater, and to protect the public from the creation of a powerful political entity when its creation is not reasonable or properly justified.

IV. CONCLUSION

For the foregoing reasons, Aligned Protestants request that the PFD and findings of fact and conclusions of law be amended to adhere to requirements of the Texas Water Code and deny the petition to create the proposed district.

Respectfully Submitted,

/s/ Victoria A. Rose
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following parties on this 24th day of June 2025.

/s/ Victoria Rose

Victoria Rose

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May 21, 2025

T.C. Broadnax, City Manager
City of Austin
P.O. Box 1088
Austin, Texas 78767

RE: Update to Hays Commons MUD Consent Application;
City of Austin File No. C12M-2024-003

Dear Mr. Broadnax:

I am writing on behalf of Hays Commons Land Investments, L.P., a Texas limited partnership, and WK281 Land Investments, LP, a Texas limited partnership (the “**Owners**”) as the owners of that certain 497.85-acre tract located partially within the extraterritorial jurisdiction (“**ETJ**”) of the City of Austin (the “**City**”) and partially within unincorporated Hays County, Texas. The Owners have proposed a single-family and commercial development of the property (the “**Project**”, also commonly referred to as “**Hays Commons**”) as more particularly described in the above-referenced City application. The Owners have been navigating the permitting and development process for Hays Commons over four years with the goal of bringing thoughtful, community-focused housing to Southwest Austin. The Project will bring together single family residential homesites, parks, open spaces, conservation lands, community amenities and commercial space that Austin residents will call home and importantly will keep the Property within the City’s subject jurisdiction allowing continued regulatory and environmental oversight and City financial benefits.

This vision has been advanced through significant planning and collaboration with City staff, and we are grateful to have received recommendations for approval from staff and several Boards and Commissions, including the Urban Transportation Commission, Parks and Recreation Board and the Codes and Ordinances Joint Committee. Despite this support, the SOS Amendment related to impervious cover originally proposed for Hays Commons reached an impasse after Planning Commissioners were advised against hearing the request for a code modification—effectively shutting down meaningful deliberation before we even had the opportunity to present the case.

Although the Project as originally proposed complied with virtually all City codes, including the Save Our Springs water quality treatment standards, based on feedback from certain City policymakers, we understand that the City prefers a path forward that does not include pursuing an amendment to the 15% impervious cover cap as we had originally proposed. As a result, we have identified an alternative proposal and today submitted and update to our application that fully aligns with the City’s development criteria. Specifically, the Owners are offering the following as an alternative option:

- **Limited Purpose Annexation and Zoning** of the entire 498-acre site into the City of Austin, expanding City regulatory oversight (instead of removal of the site from Austin’s ETJ under state law);
- **Adherence to the 15% net site area impervious cover cap** over the Recharge Zone in full compliance with the SOS Ordinance (i.e. no SOS code modification will be sought);

- **Full compliance with all other City environmental regulations**, including CEF buffers, creek setbacks, tree protection, and SOS water quality treatment standards;
- **Extension of centralized water and wastewater service** from the City of Austin, with Austin Water cost participation estimated at \$10 million per standard City policy;
- **Acquisition by the City of approximately 214.22 acres of conservation easement**, increasing the protected area from our previous offer of 157 acres (an increase of 36% in conservation easement space);
- **Elimination of use of groundwater wells and decentralized wastewater infrastructure utility service needs**, removing reliance on groundwater supply and TLAP permits or on-site treatment systems. Instead, we seek standard City utility service and cost participation with a utility plan that will not meaningfully encourage development over the Edward's Aquifer.

The Owners are committed to moving forward in a way that respects the direction City policymakers have indicated they would like us to take. Our new proposal fully complies with the SOS ordinance, follows standard City utility practices, and significantly increases the amount of conservation lands, while retaining and extending full City regulatory jurisdiction despite our rights under state law to remove the Property from the ETJ. We are hopeful that, considering our significant concessions and continued cooperation, the City will assist in expediting the remaining steps necessary to secure the required approvals.

In order to continue making progress on our non-City options, the Owners have also submitted an application for removal from the Hays County portion of the property from Austin's ETJ that has now become effective. In parallel, the TCEQ MUD application for Hays Commons is making its way toward approval in early June 2025. Should no clear path forward with the City emerge in the very near future, the Owner's only alternative will be to pursue full removal from the City of Austin and focus efforts on development under county and state regulations.

That alternative is not our preference. The Owners have consistently remained at the table and engaged in good faith with the City. Please accept this letter as our request for your support to amend the permitting and development process with the outlined concession and reestablish an expedited, constructive and collaborative dialogue with the City.

We appreciate your consideration and look forward to working together on a solution that supports thoughtful development and environmental stewardship in Southwest Austin.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Howard", is written over a light blue horizontal line.

Jeffrey S. Howard