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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 15, 2024

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: IN THE MATTER OF THE PETITION FOR CREATION OF
PERSIMMON MUNICIPAL UTILITY DISTRICT
TCEQ DOCKET NO. 2023-1665-DIS**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Jessica M. Anderson".

Jessica M. Anderson, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-1665-DIS

**PETITION FOR THE CREATION
OF PERSIMMON MUNICIPAL
UTILITY DISTRICT**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUESTS FOR HEARING**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this Response to Requests for Hearing on the petition in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

The Commission received requests for a contested case hearing from concerned members of the public and a governmental entity regarding the application for the creation of Persimmon Municipal Utility District (Persimmon MUD or District). For the reasons discussed herein, OPIC respectfully recommends that the Commission grant the hearing requests of Art Arizpe, Michael Baran, Darren Bien, Debra Dulski, Connie Faber, David Fletcher, Carol Gee, Gerald Haschke, Bryan Huddleston, Shawna-Lee Huskey, Jeffrey C. Kaufman, Stephen Kent Kinslow, Marta E. Knight, Brett Koger, Aimee Lakey, Phillip Lakey, Jesus Mares, Elena Mares-Coyote, Sharon Neukam, Connie Nicholson, Cynthia C. Pasadeos, Robin Perry, Scott Perry, Roxanne Rios, Kody Schouten, Kathy Sellstrom, Nathan Sewell, Sara Shannon, Natalie Gilmer Shebel, Mary Ann

Sullivan, Martha Terrel, Sandra Twidwell, James Van Eyk, Kerri Webb, and the City of Buda. OPIC further recommends that the Commission deny all other hearing requests.

B. Background

Bailey Land Investments, LP, a Texas limited partnership and Armbruster Land Investments, LP, a Texas limited partnership (Petitioners) filed a petition for creation of Persimmon MUD with the TCEQ pursuant to Article XVI, Section 59 of the Texas Constitution; Chapters 49 and 54 of the Texas Water Code (TWC); Title 30 of the Texas Administrative Code (TAC), Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioners hold title to a majority in value of the land to be included in the proposed District; (2) there are two lienholders, International Bank of Commerce and Labenski Branch, LP, a Texas limited partnership, on the property to be included in the proposed District, and information provided indicates that the lienholders consent to the creation of the proposed District; (3) the proposed District will contain approximately 459 acres located within Hays County; and (4) the land within the proposed District is within the extraterritorial jurisdiction (ETJ) of the City of Buda.

The petition was declared administratively complete on June 16, 2023, and the Notice of District Petition was published on August 24, 2023. According to the notice, the proposed District will purchase, construct, acquire, repair, extend, and improve land, easements, works, improvements, facilities, plants, equipment, and appliances necessary to: (1) provide a water supply for municipal

uses and commercial purposes; (2) collect, transport, process, dispose of and control all domestic, industrial, or communal wastes whether in fluid, solid, or composite state; (3) gather, conduct, divert, and control local stormwater or other local harmful excesses of water in the proposed District and the payment of organization expenses, operational expenses during construction, and interest during construction; (4) design, acquire, construct, finance, improve, operate, and maintain macadamized, graveled, or paved roads, or improvements in aid of those roads; and (5) provide such other facilities, systems, plants, and enterprises as shall be consonant with all of the purposes for which the proposed District is created. The comment period ended on September 25, 2023.

II. APPLICABLE LAW

A municipal utility district may be created under and subject to the authority, conditions, and restrictions of Article XVI, Section 59, of the Texas Constitution. Chapters 49 and 54 of the TWC and the Commission's administrative rules found at Title 30, Chapter 293, of the TAC 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.

TWC § 54.012.

To create a MUD, a petition requesting creation shall be filed with the Commission. TWC § 54.014. The petition shall be signed by a majority in value of the holders of title of the land within the proposed district, as indicated by the tax rolls of the central appraisal district. *Id.* Among other things, the petition shall: (1) describe the boundaries of the proposed district by metes and bounds or by lot and block number; (2) state the general nature of the work proposed to be done, the necessity for the work, and the cost of the project as then estimated by those filing the petition; and (3) include a name of the district which shall be generally descriptive of the locale of the district. TWC § 54.015. *See also* 30 TAC § 293.11(a) and (d).

If all of the district is proposed to be located outside corporate limits of a municipality, the commissioners court of the county in which the district is to be located may review the petition for creation and other evidence and information relating to the proposed district that the commissioners consider necessary. TWC § 54.0161(a). If the commissioners court votes to make a recommendation to the Commission, the commissioners court shall submit to the Commission, at least 10 days before the date set for the hearing on the petition, a written opinion stating whether or not the county would recommend the creation of the proposed district and stating any findings, conclusions, and other information that the commissioners court thinks would assist the Commission in making a

final determination on the petition. TWC § 54.0161(b). The Commission shall consider the written opinion submitted by the county commissioners. TWC § 54.0161(c).

The Commission shall grant the petition if it conforms to the requirements of § 54.015 and the project is feasible, practicable, necessary, and further, would be a benefit to the land to be included in the district. TWC § 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.

TWC § 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.

TWC § 54.021(c). If the petition does not conform to the requirements of TWC § 54.015 or the project is not feasible, practicable, necessary, or a benefit to the land in the district, the Commission shall deny the petition. TWC § 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. TWC § 54.024.

The applicant must publish notice of the petition to create a district once a week for two consecutive weeks in a newspaper regularly published or circulated in the county where the district is proposed to be located not later than the 30th day before the date of the Commission's decision on the application. TWC §§ 49.011(b) and 54.018. Additionally, the applicant must post notice of the petition on the bulletin board used for posting legal notices in each county in which all or part of the proposed district is to be located. 30 TAC § 293.12(b)(2). The Commission shall hold a public hearing if requested by the Commission, Executive Director, or an "affected person" under the factors in 30 TAC, Chapter 55. TWC § 49.011(c). *See also* 30 TAC § 55.250 (applying rules governing contested case hearings to applications declared administratively complete after September 1, 1999). Affected persons must file their hearing requests during the 30 days following the final notice publication date. TWC § 49.011(c); 30 TAC § 293.12(c).

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

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. ANALYSIS OF HEARING REQUESTS

A. Affected persons within one mile of the MUD boundary

The following individuals each timely requested a hearing during the public comment period: Art Arizpe, Michael Baran, Darren Bien, Debra Dulski, Connie Faber, David Fletcher, Carol Gee, Gerald Haschke, Bryan Huddleston, Shawna-Lee Huskey, Jeffrey C. Kaufman, Stephen Kent Kinslow, Marta E. Knight, Brett Koger, Aimee Lakey, Phillip Lakey, Jesus Mares, Elena Mares-Coyote, Sharon Neukam, Connie Nicholson, Cynthia C. Pasadeos, Robin Perry, Scott Perry, Roxanne Rios, Kody Schouten, Kathy Sellstrom, Nathan Sewell, Sara Shannon, Natalie Gilmer Shebel, Mary Ann Sullivan, Martha Terrel, Sandra Twidwell, James Van Eyk, and Kerri Webb.

In their requests, these individuals raised concerns regarding the proposed District's potential impacts on water quality, land elevation, subsidence, groundwater levels, groundwater recharge capability, and natural runoff rates. Furthermore, the properties of these individuals are less than one mile from the proposed District boundary.

The concerns expressed by these individuals regarding water quality, land elevation, subsidence, groundwater, and runoff, when combined with their proximities to the proposed District boundary, give each of these requestors a personal justiciable interest in this matter which is not common to the general public. Also, the requestors' concerns are interests protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of a municipal utility district. Finally,

the location of the requestors' homes increases the likelihood of impacts to health, safety, and use of their properties. Therefore, OPIC finds that these individuals qualify as affected persons.

B. Affected governmental entity

The Commission received timely hearing requests on behalf of the City of Buda from Alan Bojorquez and Representative Erin Zwiener. Buda's hearing request stated that the proposed District is located partially in Buda's ETJ. Further, the proposed District would contain 178.6 acres that are subject to Buda's Certificate of Convenience and Necessity for water service. Buda raised concerns about groundwater, subsidence, natural runoff rates, and water quality.

Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b). Additionally, a relevant factor for determining whether governmental entities qualify as affected persons is their statutory authority over or interest in the issues relevant to the application. 30 TAC § 55.256(c)(6). Further, Buda has statutory authority to protect public health and safety and regulate development within its ETJ. *See* Tex. Loc. Gov't Code §§ 42.001, 212.044. Buda's concerns are relevant to the Commission's final determination on the petition. Based on the City of Buda's identified interests and the proposed District's location partially within its ETJ, OPIC finds that Buda has demonstrated that it qualifies as an affected person in this matter.

C. Unaffected persons within one mile of the MUD boundary

Several requestors with properties less than one mile from the proposed District boundary failed to raise concerns that are interests protected by the law under which this application is considered or failed to do so in a timely manner. In their hearing requests, Gail Hall, Virginia Jurika, and Blythe Powell did not articulate any specific ways in which they would be affected by the proposed District. Thomas L. Hall exclusively raised concerns outside of TCEQ's jurisdiction, including lot sizes, population density, traffic, quality of life, noise and light pollution, and crime. Susan Hernandez and Doug Walker failed to make timely comments and hearing requests. Given these requestors' failure to articulate concerns that would be protected by the law under which this application is considered, or their failure to do so in a timely manner, OPIC recommends that the Commission find that Gail Hall, Thomas L. Hall, Virginia Jurika, Blythe Powell, Susan Hernandez, and Doug Walker do not qualify as affected persons.

D. Unaffected persons further than one mile from the MUD boundary

According to the map prepared by the Executive Director's staff, several requestors listed property addresses 1.15 miles or further from the proposed District boundary. These requestors are James Flores, JP Kirksey, and Janet Pierce. OPIC recognizes that under 30 TAC § 55.256(c)(2), there are no distance restrictions or other limitations imposed by law on affected interests in this matter. However, given the intervening distance between the remaining properties and the location of the proposed District, OPIC finds that there is a

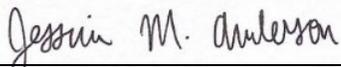
diminished likelihood that the regulated activity will impact health, safety, or use of their properties. *See* 30 TAC § 55.256(c)(4). Further, at distances beyond 1.15 miles, these requestors lack the proximity needed to establish a reasonable relationship between their claimed interests and the regulated activity. *See* 30 TAC § 55.256(c)(3). Accordingly, OPIC must respectfully recommend that none of these requestors qualify as affected persons.

IV. CONCLUSION

For the foregoing reasons, OPIC respectfully recommends the Commission find that Art Arizpe, Michael Baran, Darren Bien, Debra Dulski, Connie Faber, David Fletcher, Carol Gee, Gerald Haschke, Bryan Huddleston, Shawna-Lee Huskey, Jeffrey C. Kaufman, Stephen Kent Kinslow, Marta E. Knight, Brett Koger, Aimee Lakey, Phillip Lakey, Jesus Mares, Elena Mares-Coyote, Sharon Neukam, Connie Nicholson, Cynthia C. Pasadeos, Robin Perry, Scott Perry, Roxanne Rios, Kody Schouten, Kathy Sellstrom, Nathan Sewell, Sara Shannon, Natalie Gilmer Shebel, Mary Ann Sullivan, Martha Terrel, Sandra Twidwell, James Van Eyk, Kerri Webb, and the City of Buda qualify as affected persons, grant their hearing requests, and refer the matter to the State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

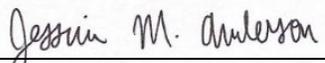
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By: 

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2024, the original of the Office of Public Interest Counsel's 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.



Jessica M. Anderson

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TCEQ DOCKET NO. 2023-1665-DIS

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REQUESTER(S):

See attached list.

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