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Bobby Janecka, *Commissioner*
Catarina R. Gonzales, *Commissioner*
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 8, 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 LUND
FARM MUNICIPAL UTILITY DISTRICT
TCEQ DOCKET NO. 2024-0672-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 "Pranjal".

Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2024-0672-DIS

PETITION FOR THE CREATION	§	BEFORE THE TEXAS
OF LUND FARM MUNICIPAL	§	COMMISSION ON
UTILITY DISTRICT	§	ENVIRONMENTAL QUALITY

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) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this response to requests for hearing in the above-captioned matter.

I. Introduction

A. Summary of Position

For the reasons detailed below, OPIC respectfully recommends the Commission grant the hearing requests of John Carlson, Margery Carlson, and Mitchell Schroeder. OPIC further recommends that the Commission refer this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing and deny the hearing request of Gary Johnson.

B. Background

Lund Farm Investment LLC (Petitioner) filed a petition for creation of Lund Farm Municipal Utility District (District) pursuant to Article III, Section 52 and Article XVI, Section 59 of the Texas Constitution; Chapters 49 and 54 of the Texas Water Code (TWC); 30 Texas Administrative Code (TAC) Chapter 293; and the

procedural rules of the TCEQ. The application was declared administratively complete on September 27, 2023. The Notice of District Petition was published on January 17, 2024. The comment and contested case hearing request periods ended on February 16, 2024.

According to the notice, the proposed District would contain approximately 569.739 acres of land, located within Bastrop and Travis Counties, and a portion of the land to be included in the proposed District is within the extraterritorial jurisdiction (ETJ) of the City of Elgin.¹ The petition further states that, if approved, the proposed District will construct, purchase, acquire, maintain, extend and improve land, easements, works, improvements, facilities, plants, equipment and appliances. The Commission received timely comments and hearing requests from John and Margery Carlson, Mitchell Schroeder, and Gary Johnson.

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, and TWC § 54.011. 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,

¹ The notice states that the City of Elgin has consented to creation of and inclusion of the land within the District.

- 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 the 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). *See also* 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 Executive Director (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

John and Margery Carlson

The Commission received timely hearing requests from John and Margery Carlson (the Carlsons).² The Carlsons co-own agricultural property located immediately north of the proposed District and development across Lund Road. Mr. Carlson lives on the property as his homestead, and Margery Carlson visits regularly to participate in family farm operations. The Carlsons raised numerous concerns including lack of personal notice of the proposed MUD, potential governmental annexation of their property for Lund Road expansion, parts of the proposed development being in the floodplain, the proposed District not being entirely within the City of Elgin's ETJ as claimed, potential increase in population density, proposed lot sizes not complying with applicable city or county ordinances, potential impact on the natural run-off and drainage, increased pressure on the local school system, effects on water quality, potential increase in water and wastewater usage and needs, increased road traffic and insufficient road infrastructure, issues with tax assessment, and insufficient fire and emergency services.

² John Carlson submitted hearing requests on behalf of himself and his mother, Margery Carlson.

The hearing request further stated that the petition is flawed, containing errors and omissions, and fundamentally fails to demonstrate that the organizing of the District as requested is feasible and practicable, necessary, or beneficial for the included land. To support this argument, the hearing request detailed various issues related to drainage and natural run-off rates, water, wastewater, water quality, subsidence, recreational facilities, and the developers' lack of qualifications.

The address provided by the Carlsons is approximately 0.04 miles from the proposed District's boundaries as confirmed by the map prepared by the ED's staff. Their concerns include issues that are within the Commission's jurisdiction to address in the context of a district creation. The Commission is required to consider water quality and natural run-off rates and drainage. TWC § 54.021(b)(3)(E), (F). Their concerns, in combination with their close proximity to the proposed District, increase the probability that they will be affected in a way not common to members of the general public. Finally, a reasonable relationship exists between their water quality concerns and the creation of the proposed District. Therefore, OPIC concludes that the Carlsons have successfully demonstrated that they qualify as affected persons in this matter.

Mitchell Schroeder

The Commission received a timely hearing request from Mitchell Schroeder. Ms. Schroeder raised concerns regarding water quality, effluent discharge into Elm Creek, flooding, and impacts on electricity and roads. The

address she provided is approximately 0.489 miles from the proposed District's boundaries, as confirmed by the map prepared by the ED's staff.

As explained *supra*, when considering a petition for creation of a district, the TWC requires the Commission to determine whether the district, its systems, and subsequent development will have an unreasonable effect on water quality. TWC § 54.021(b)(3)(F). Ms. Schroeder's concerns, in combination with her close proximity to the proposed District, increases the likelihood that she will be affected in a way not common to members of the general public. Further, a reasonable relationship exists between her water quality concerns and the creation of the proposed District. Therefore, OPIC finds that Ms. Schroeder has successfully demonstrated that she qualifies as affected person in this matter.

Gary Johnson

The Commission received a timely hearing request from Gary Johnson, submitted on behalf of himself, his wife Barbara Johnson, and his son, Terry Johnson (collectively referred to as the Johnsons). Mr. Johnson expressed concerns regarding traffic, drainage, runoff, water quality, and emergency services. The hearing request stated that their family farm is located on Skog Road, several miles northwest of the proposed development. The hearing request also included a residential address in Austin for Mr. Johnson and Mrs. Johnson, and an address in Elgin for Terry Johnson. However, the ED's map indicates that the hearing request did not provide any addresses suitable for mapping purposes.

While many of the Johnsons' concerns include interests protected by the law under which the application will be considered, they have not provided adequate address information to determine their proximity to the proposed district to analyze whether a reasonable relationship exists between their claimed interests and the regulated activity. *See* 30 TAC § 55.256(c)(3). Without location information, OPIC cannot determine if the Johnsons will be affected in a way not common to members of the general public. *See* 30 TAC § 55.256(a). Therefore, OPIC cannot recommend that the Johnsons qualify as affected persons.

IV. Conclusion

For the reasons set forth above, OPIC respectfully recommends the Commission find that John Carlson, Margery Carlson, and Mitchell Schroeder qualify as affected persons, grant their hearing requests, and refer the matter to SOAH for a contested case hearing. OPIC further recommends the Commission deny the hearing request of Gary Johnson.³

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

[Signature on Next Page]

³ OPIC notes that if any hearing request is granted and not withdrawn prior to concerning of a SOAH hearing, any person whose request is denied by the Commission may request party status at the preliminary hearing. 30 TAC § 55.211(e).

By: Pranjal

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2024, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

Pranjal
Pranjal M. Mehta

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TCEQ DOCKET NO. 2024-0672-DIS

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