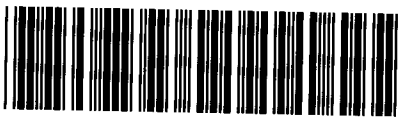

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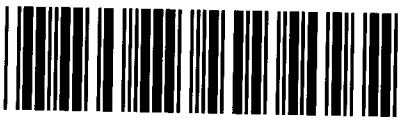

Item Number: 19

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd Legislature, Regular Session, transferred the functions relating to the economic regulation of water and sewer utilities from the TCEQ to the PUC effective September 1, 2014

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February 15, 2006

VIA HAND DELIVERY

Mr. Doug Holcomb
Texas Commission on Environmental Quality
Utilities & Districts Section
P.O. Box 13087, MC-153
Austin, Texas 78711-3087

Re: *Application from the City of Bonham, Certificate of Convenience and Necessity (CCN) No. 11186, to Obtain Dual Certification with a Portion of CCN No. 12406 from Southwest Fannin County SUD, to Obtain Dual Certification with a Portion of CCN No. 10170 from White Shed Water Supply Corporation, to Decertify a Portion of CCN No. 11753 from Bois D'Arc MUD, to Decertify a Portion of CCN No. 10155 from Ravenna Nunnelee Water Supply Corporation and to Amend CCN No. 11186 in Fannin County;* Application No. 35091-C

Application from the City of Bonham to Amend CCN No. 20460 in Fannin County; Application No. 35092-C

CN: 600435762; RN: 101396349 (water) and 101395853 (sewer)

Dear Mr. Holcomb,

This letter serves as a supplement to our November 1, 2005, letter to Ms. Karen Blaschke wherein the City of Bonham ("City") asserted that the City did not need to demonstrate landowner consent outside of its extraterritorial jurisdiction ("ETJ") in order for the Commission to consider the City's application to amend its water and sewer CCNs outside of its ETJ. The City asserted that the request to provide landowner consent for all proposed service area located outside of the City's current ETJ is not a legal requirement of the Commission's CCN application process. This understanding of the Commission's rules in relation to House Bill 2876 has been substantiated and supported through the Executive Director's response to a filing in another case, which was received yesterday.

In another case currently pending before the State Office of Administrative Hearings, I filed a Motion for Summary Disposition based on my understanding of the Executive Director's position that pending CCN applications would not be granted to municipal applicants if it contained service territory outside its ETJ. The Executive Director requested denial of the Motion for Summary Disposition, which is attached hereto as Attachment 1, by stating that it is the Commission's position that the preamble to the new Chapter 291 rules is not conclusive and that an application filed prior to January 1, 2006, is not governed by the rule package approved

by the Commission on December 14, 2005. This firm has requested a directive from the Commission on this new rule as it has consistently been this firm's position that this new rulemaking and HB 2876 cannot be retroactive to municipalities but only prospectively applied to applications filed after January 1, 2006. This position had not been clearly articulated by the Executive Director, until the attached response was received.

As I know that the Commission strives to consistently apply its rules and policies, I ask that you apply the Executive Director's position, as articulated in the attached document, to the above-referenced application. Without doubt, the Executive Director has clearly stated that municipal CCN applications filed prior to January 1, 2006, do not need to demonstrate ETJ boundaries or landowner consent outside the ETJ boundaries. Because of the Commission's desire to treat all applicants in a consistent manner, I request that the City's application be processed in an expedited manner under the TCEQ rules as they existed prior to the Commission's December 14, 2005, meeting. As such, the City may be granted an amendment to its water and sewer CCNs outside its ETJ boundaries without landowner consent. Please continue to process the above-referenced application in this manner, as it is consistent with the Executive Director's position.

Thank you very much for your attention to this matter.

Sincerely,

Arturo D. Rodriguez, Jr.

Attachment as stated in letter

cc: Mr. Glenn Shankle, Executive Director
Mr. Derek Seal, General Counsel
Mr. Blas Coy, Public Interest Counsel
Ms. Karen Blaschke
Mr. Pat Dillon
Mr. Blaine Hinds

SOAH DOCKET NOS. 582-05-7095 and 582-05-7096
TCEQ DOCKET NOS. 2005-0864-UCR and 2005-0863-UCR

APPLICATIONS OF THE CITY OF LEANDER TO AMEND WATER ~~CERTIFICATE OF CONVENIENCE~~ AND NECESSITY (CCN) NO. 10302 AND SEWER CCN NO. 20626 IN WILLIAMSON AND TRAVIS COUNTIES, AND OBTAIN DUAL CERTIFICATION WITH A PORTION OF THE CITY OF CEDAR PARK'S CCN NOS. 10160 AND 20580 IN TRAVIS COUNTY, TEXAS	§	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

THE EXECUTIVE DIRECTOR'S RESPONSE TO THE CITY OF LIBERTY HILL'S MOTION FOR PARTIAL SUMMARY DISPOSITION

COMES NOW, the representative for the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), and files the Executive Director's Response to the City of Liberty Hill's Motion for Partial Summary Disposition, and would respectfully show the following:

I. BACKGROUND

On January 25, 2006, the City of Liberty Hill ("Liberty Hill" or "Movant") filed a Motion for Partial Summary Disposition involving the portions of the application filed by the City of Leander ("Leander") to amend its water and sewer Certificates of Convenience and Necessity ("CCN") Nos. 10302 and 20626 ("Amended Applications") to add areas that are outside of Leander's ETJ. In Liberty Hill's Motion for Partial Summary Disposition they asserted that they should be granted a summary disposition on the portion of the Amended Applications because there

are no genuine issues as to any material fact and they also asserted that there were, "...no issues of law in the disputed area because there is not a valid application by Leander for that area," (*City of Liberty Hill's Motion for Partial Summary Disposition, See* Attachment ED-A, page 3).

II. ARGUMENT

The Executive Director disagrees with the motion for partial summary disposition, and recommends that Liberty Hill's motion be denied.

A. THE MOTION DOES NOT COMPLY WITH PROCEDURAL REQUIREMENTS

In Liberty Hill's request for summary disposition they raise the point that there are no genuine issues as to any material fact, and that they should be afforded a partial summary disposition as a matter of law. In order to receive relief for a summary disposition the movant must show the following, pursuant to Title 1, Chapter 155 of the Texas Administrative Code, Rule §155.57 (State Office of Administrative Hearings - Summary Disposition):

> (b) A motion for summary disposition shall state the specific grounds therefor.
>
> (1) A party may move with or without supporting affidavits for summary disposition upon all or any part of a contested case.
>
> (2) *The motion shall include a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence.* The failure to comply with the requirement of a separate fact statement may, in the judge's discretion, constitute sufficient grounds for the denial of the motion (Emphasis Added).

In this instance the Movant has failed to substantiate their motion, since they have failed to plead all material and undisputed facts to afford them a partial summary disposition as a matter of law. Liberty Hill has not attached any evidence of pertinent facts to show that the City of Leander has not received landowner consent beyond Leander's Extra Territorial Jurisdiction ("ETJ") as applicable

to the Amended Applications. Although Liberty Hill asserts that the City of Leander would not be permitted to amend their CCN beyond their ETJ without landowner consent they have not stated specific grounds nor substantiated this issue through factual evidence by reference within their pleading for a partial summary disposition. Thus, Liberty Hill has not met their burden by showing that there are no controverted issues of material facts to support their motion for partial summary disposition.

B. LIBERTY HILL HAS NOT SHOWN IT IS ENTITLED TO THE RELIEF REQUESTED AS A MATTER OF LAW

The City of Liberty Hill asserts that because of, "...the position of the Commission and the newly promulgated rules, there are no issues of law in the disputed area because there is not a valid application by Leander for that area," (*City of Liberty Hill's Motion for Partial Summary Disposition*, *See* Attachment ED-A, page 3). Liberty Hill must show that as a matter of law, it is entitled to the relief requested in its Motion for Partial Summary Disposition. In seeking to make this showing, Liberty Hill relies entirely upon a statement in the preamble to the Commission's adoption of amendments to CCN rules in 30 Texas Administrative Code, Chapter 291 to implement House Bill 2876. As discussed below, Liberty Hill has not met its burden on the Motion for Partial Summary Disposition.

In adopting the CCN rule amendments, the Commission did not state a position on whether House Bill 2876 would void a city's CCN located outside of its ETJ without landowner consent on an application that was submitted before January 1, 2006. Instead, the Commission deleted proposed rule language that would have stated that city CCN areas located outside their ETJ without landowner consent are void on September 1, 2005, the effective date of House Bill 2876. In the

preamble the Commission stated that "as a result of input and comments from affected parties and the public, the Commission recognizes the existence of interpretative differences in regard to CCNs outside cities' ETJs." The Commission then stated that, "the Commission will not take any affirmative action cities CCNs outside their ETJ until after January 1, 2008...[and that] [d]uring this period, the Commission will consider those portions of cities' pending CCN applications that are outside their ETJ only if they provide landowner consent for those areas." The Commission stated that it was taking this course of action "in order to conduct a study and to provide opportunities to cities to obtain any necessary landowner consent in these areas [and to] also allow the legislature to further consider this important issue."

In summary, the Commission did not state a position on the legal effect House Bill 2876 would have on cities' CCNs located outside of their ETJ without landowner consent that were granted on applications that were submitted before January 1, 2006. However, the Commission recognized that there were different legal interpretations on the effect of House Bill 2876 on those CCNs and, in recognition of the different legal interpretations, stated in the preamble an intended course of action until January 1, 2008 in which it would consider those portions of cities' pending CCN applications that are outside their ETJ only if they provide landowner consent, conduct a study on the issue, and allow cities the opportunity to obtain landowner consent. Since the Commission did not state a position on the legal effect of House Bill 2876 as stated above, but instead recognized that there were different interpretations, the Commission's preamble statement does not support the argument that Liberty Hill is entitled to the requested relief as a matter of law. Therefore, the Motion for Partial Summary Disposition should be denied.

III. CONCLUSION

The Executive Director respectfully requests that the Administrative Law Judge deny the City of Liberty Hill's Motion for Partial Summary Disposition in order to proceed with the evidentiary hearing on the current applications pending before SOAH.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Glenn W. Shankle
Executive Director

Robert Martinez, Director
Environmental Law Division

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2006, a true and correct copy of the foregoing document was delivered via facsimile, hand delivery, interagency mail, or deposit in the U.S. Mail to all persons on the attached mailing list.

Gabriel Soto, Staff Attorney
Environmental Law Division
Texas Commission on
Environmental Quality

MAILING LIST
City of Leander
SOAH Docket No. 582-05-7095 and 582-05-7096
TCEQ Docket No. 2005-0864-UCR and 2005-0854-UCR

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SOAH DOCKET NO. 582-05-7095 AND 582-05-7096
TCEQ DOCKET NO. 2005-0864-UCR and 2005-0863-UCR

APPLICATION OF THE CITY OF LEANDER TO AMEND WATER CERTIFICATE OF CONVENIENCE AND NECESSITY (CCN) NO. 10032 AND SEWER CCN NO. 20626 IN WILLIAMSON AND TRAVIS COUNTIES, AND OBTAIN DUAL CERTIFICATION WITH A PORTION OF THE CITY OF CEDAR PARK'S CCN NOS. 10160 AND 20580 IN TRAVIS COUNTY	§	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

CITY OF LIBERTY HILL'S MOTION FOR PARTIAL SUMMARY DISPOSITION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The City of Liberty Hill ("Liberty Hill" or "City") hereby files its Motion for Partial Summary Disposition in the above referenced matter. Liberty Hill's Motion is brought pursuant to 30 TEX. ADMIN. CODE § 80.137 and TEX. R. CIV. P. 166 (a). Liberty Hill asserts that there are no genuine issues as to any material fact regarding any of the issues discussed below and that Liberty Hill is entitled to partial summary disposition as a matter of law on all issues expressly set out in this motion.

I. BACKGROUND

This proceeding involves an application filed by the City of Leander ("Leander") with the Texas Commission on Environmental Quality ("TCEQ" or "Commission") to amend its water and sewer certificates of convenience and necessity ("CCN") Nos. 10032 and 20626, respectively. On September 15, 2005, Liberty Hill filed its *Motion to Abate Proceedings and Motion to Certify Questions to the Texas Commission on Environmental Quality* based on proposed rules to implement House Bill 2876. Such rules held that as of September 1, 2005, all CCNs outside of a municipalities' extraterritorial jurisdiction would be void. On December 14,

EXHIBIT
ED - A

2005, the Commission held an agenda on adoption of their proposed rules. Commissioner Marquez included a new statement that was added to the preamble of the new rules, Texas Administrative Code, Title 30, Chapter 291, which provides: "As a result of input and comments from affected parties and the public, the commission recognizes the existence of interpretive differences in regard to CCNs outside cities' ETJs. Therefore, the commission will not take any affirmative action on cities' CCNs outside their ETJ until after January 1, 2008, in order to conduct a study and to provide opportunities to cities to obtain any necessary landowner consent in those areas. This will also allow the legislature to further consider this very important issue. During this period, the commission will consider those portions of cities' pending CCN applications that are outside their ETJ only of they provide landowner consent for those areas."[1] The Commission voted unanimously to include this language into the preamble of said rules.

On December 19, 2005, Leander filed its prefiled testimony and attached as Exhibit AP 12B, a map which clearly depicts Leander's ETJ, city limits, and requested sewer CCN amendment. Exhibit AP 12B shows that most of the disputed area between Leander and Liberty Hill lies outside of Leander's ETJ. All exhibits are incorporated herein by reference.

On January 19, 2006, Liberty Hill filed its prefiled testimony of Mr. Kerry Maroney, Liberty Hill Exhibit LH-2, and attached Attachment KDM-13 which shows the ETJ of Liberty Hill. As can be seen when comparing the two maps, most of the disputed area lies outside of Leander's ETJ and inside of Liberty Hill's ETJ. Also attached to Liberty Hill Exhibit LH-2 is Attachment KDM-10 which is the preamble to the rules of the Commission, which became effective January 6, 2006. All exhibits are incorporated herein by reference.

[1] 30 Tex. Reg. 8961 (Dec. 30, 2005).

It has been expressly stated by staff members of the water utilities division of the Commission that it is the Executive Director's and the Commission's policy that *all* pending applications must demonstrate landowner consent for any CCN area being sought outside of the City's ETJ, *regardless of what date the application was filed.*

II. ARGUMENT AND AUTHORITIES

Summary disposition shall be rendered if the pleadings and other case documents show there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion.[2] As can be seen in Leander's Exhibit AP 12B and Liberty Hill's Exhibit LH-2, Attachments KDM-10 and KDM-13, because of the position of the Commission and the newly promulgated rules, there are no issues of law in the disputed area because there is not a valid application by Leander for that area. Additionally, Liberty Hill requested that Leander provide all requests for water and/or sewer service in the disputed area. Leander has not produced any written requests for service in the disputed area. In fact, during the deposition of Mr. Wayne Watts a map was presented for Mr. Watts to mark where requests had been received. Mr. Watts was not able to identify any requests received in the northwest area, or the disputed area. This map was attached to Liberty Hill's Exhibit LH-2, Attachment KDM-12. No genuine issues as to any material fact regarding any of the issues in this proceeding exist as it relates to the area requested by Leander outside its ETJ and Liberty Hill is entitled to partial summary disposition as a matter of law on all issues expressly set out in this motion. Liberty Hill is entitled to partial summary disposition as to the area in dispute between Leander and Liberty Hill, otherwise knows as the "Northwest CCN area."

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[2] 30 TEX. ADMIN. CODE § 80.137.

III. PRAYER

For the reasons stated herein, Liberty Hill respectfully requests that its Motion for Partial Summary Disposition be in all things granted and that the disputed area between Leander and Liberty Hill be removed from this proceeding. Liberty Hill further prays for any additional relief to which it is justly entitled.

Respectfully submitted,

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ATTORNEYS FOR THE CITY OF LIBERTY HILL, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January 2006, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following:

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