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PUBLIC UTILITY COMMISSION

APPLICATION OF WOLFE & PUBLIC UTILITY COMMISSION OF  
AIRPARK CIVIC CLUB, INC. TO & TEXAS

OBTAIN A WATER CERTIFICATE  
OF CONVENIENCE AND  
NECESSITY IN BRAZORIA COUNTY

### RESPONDANT'S REPLY BRIEF

Over the past thirty plus years, Wolfe Airpark's Civic Club has ignored both the deed restrictions requirement that no direct billing for water can be made and the State of Texas instruction that no direct billing for water can be made without a CCN and water meters.

The requirement of the Deed Restrictions prohibited billing for water without a State Approved Water System. The State Department of Health clearly defined the Civic Club's water system as a "Public Water Supply" and specifically NOT a "State Approved Water System" (definition found in Respondent's Supplement 9 of initial brief). The system does not and has never has met the requirements of a State Approved Water System such as two wells and two operators.

The Civic Club has ignored the State's instructions and instead directly billed for water. The original approval engineer, the Health Department, and the TCEQ all explained to the Civic Club multiple times that "no direct billing for water can occur until the system has installed water meters (Respondent's Initial Brief Supplement 3). The applicant is now claiming that it has always had an approved water system (which it never has) and that there have never been any problems with quality

or quantity (which there always have been). To this day the Applicant has not installed any water meters in the neighborhood.

The Applicant has placed most of their "claims to have corrected all violations" into the report dated 2008 (applicant's exhibit 11) that supposedly retracts all previous complaints and violations. The applicant's attorney, John Hampton, presented only the first page of this report during presentation to the Administrative Judges which gives a false impression. Instead, the second page explains EXACTLY why the violations were withdrawn by explaining in detail how the civic club's representative (at that time apparently John Heitz) told them how all expenses for the water system were covered in the lot assessments and there was not any direct billing for water which is a complete falsehood. If there was no direct billing for water there would be no reason for water meters. Ultimately, the Applicant has circumvented the requirement for State Approved Water System by mislabeling a water bill as a separate HOA assessment fee but only billing the fee to the lots attached to the water system instead of all lots.

This omission totally invalidates the claim that the 2008 report negated prior violations, concerns, or the claims made by myself, a Texas Registered Professional Engineer. Note, nothing had been corrected. The investigator had been given totally false information concerning the operation of the water system and how the costs of operation of the water system were handled, i.e., no direct billing for water when in actuality the civic club had always billed directly for water.

Falsely stating that there was no billing for water meant that there was no need for water meters, etc. None of the rules for operation had changed, none of the previous violations had been corrected, and the "reasons" for withdrawing the violations listed were strictly due to the Applicant's

misrepresentations. If you remove the 2008 inspection report from the applicant's excuses, it is evident that the civic club has NEVER, at any time, operated within State requirements.

The Applicant's consistent misrepresentations goes back to the very beginning and is highlighted by the 2006 TCEQ investigation which revealed that the civic club had been untruthful all along to the State that the system only had 11 connections, when in reality, it had 36 at time of inspection putting it into a completely different class of regulation. (Respondents' initial brief supplement 1) At the same time it was revealed that the civic club was falsifying that it was a water supply corporation (which it is not) instead of a civic association. It also highlights the fact that the civic association complied with none of the violations that had been ongoing and are still ongoing today. The civic club has never had the legal right to directly bill for water but always has anyway.

There is a vast difference between a water corporation which is selling water to whatever customers it can service with the water supply corporation's equipment and a civic association who does not exist outside the legal description of the subdivision. On both the North and South sides of the property the civic association is attempting to sell water outside their legal existence. (legal description in Respondent's initial brief supplement 8)

Probably nothing could highlight the Applicant's misrepresentation to the State more than the annual financial statements submitted for a CCN and supplied as evidence in this case. Once again, the civic club is not a water supply corporation and does not have independent finances other than the civic association itself. The civic club's annual budget for 2006 (Respondent's initial brief supplement 2) shows only \$500 for the water system while John Heitz testified that all the money collected from the direct billing for water and then some was used to maintain the water system.

In contrast, he also testified that the only major repair to the system was a pump motor replaced in 2003. It should be obvious that tens of thousands of dollars (hundreds of thousands over the

history of the water system) has been directly billed for water use in excess over the actual operational cost of the water system. This fact invalidates the financial data submitted to obtain a CCN.

The Applicant has stressed repeatedly how the system has always been operated correctly and has had no problems. Supplement 5 of the Respondent's initial brief shows just how far from reality their claims are by the water well operator explaining that the TCEQ will start inspecting weekly instead of monthly so that chlorination will have to be provided for the other three weeks. The lack of chlorination is a major violation of the health code and resulted in massive amounts of black bacterial matter growing within the distribution system which still, to this day, occasionally turns the water black and plugs the resident's (such as mine) water filters as the black material falls off the interior of the piping. Somehow the applicant expects the court to believe that a stack of test data where the chemical analysis passes indicates that it always passes when, in reality, it only means it passed that day.

The applicant wants the Court to believe that all documents before 2008 are meaningless and have no bearing on the application. This is ridiculous as all have a bearing on the application as they show the Applicant's lack of credibility by presenting false financial documents.

Another prime example of Applicant's untruthfulness is the various statements by Hampton and Heitz that the commercial property to the North has always been a part of the subdivision (lots 153 through 157 are specifically excluded in the legal description) and they have always been supplied with and paid for water. In reality, the civic club sued the commercial property to the North and got a court judgment prohibiting their use of the subdivision property.

The unsigned copy of the judgment that the applicant's attorney refers to (as if it is invalid Respondent's supplement 4 in the initial brief) is well known to the civic club as the suit was brought by the civic club and they have the original signed copy of the judgment. This one item is clear evidence of perjury as are the financial statements, and the false statements to the TCEQ.

The overall design and operation of any public water system of this type is governed by the rules of the Texas Administrative Code. The commission staff's approval of the application is based upon false information supplied by the applicant. It is also NOT based on the last minute submittal of the Respondents' direct testimony which, according to Rachel Robles, the State received after the commission staff was finished writing their reports. The commission's Engineer's report was also based on applicant's false information and omits glaring violations of the Texas Administrative Code

#### APPLICANT'S VIOLATIONS OF TEXAS ADMINISTRATIVE CODE REQUIREMENTS

All water systems in Texas of this type are required to be designed and certified by a Texas Professional Engineer with his seal present on the certification. Supplement 7 of the respondent's initial brief is the original certification by C. B. Walker PE of Orbit Engineering. ***The certification is valid only for 22 connections and only for the piping configured at that time. The TAC clearly states that any changes from the original design, any signs or reports of under capacity, or growth beyond the size already approved, will require evaluation and recertification by a Texas Professional Engineer.*** To date, The Applicant has not submitted any approval or re-certification by a Texas Professional Engineer for a system that has now expanded to 44 connections.

The TAC requirements that a Professional Engineer approve all systems and revisions to systems is to prevent the submission of unreliable information by non-engineers as happened in this case. The commission's staff is not capable, and as stated clearly in the TAC, are not responsible for the design and rely on the Texas PE to design and certify a system that meets State requirements. Indeed page 19 of the Respondent's Initial Brief goes into detail how 30 TAC 70.4 handles "A private individual with information demonstrating Possible violations of law within the commission's jurisdiction ..." should be handled. In this case, virtually all the information supplied to the State by the Applicant is false.

The applicant's theory that all my complaints are invalid due to the TCEQ withdrawing objections later (due to the applicant giving false information to the TCEQ) is false because the TCEQ was given false information by the Applicant. For example, the TCEQ withdrew the need for a CCN, a rate structure, and water meters because the applicant claimed there was never any direct billing for water which has never been true. The Applicant claimed the civic club has always billed pro rata expenses to the connections (which are prohibited by the deed restrictions) when in fact the financials were falsified to show vastly more water system expense than actually occurred. In the event the TCEQ is given false information to make a decision to withdraw a violation, it does not make the violation go away. It simply means the provider of the false information should be referred for criminal investigation.

The applicant is desperate to remove my testimony from the record and to invalidate all violations from the history of the water system. The number of dubious statements made by both Hampton and Heitz are simply too vast to include in any brief but essentially encompass the entire volume of submitted financial data, technical data, and historical data. Sadly, the presentation of false information has always worked to get the TCEQ inspectors "off their back" although nothing compares to the amount of false information supplied to the State in this application for a CCN.

Since I am not an attorney, I am unfamiliar with much of the protocol and I clearly misunderstood the Applicants request for time extension which led to my last minute direct testimony. How much effect this had on the commission staff not using my testimony in their recommendation for approval of the CCN is unknown but appears to be considerable. Had a Profession Engineer reviewed and supplied the design as is required by the TAC, the data reviewed by the commission staff would have been credible. Regardless, the Applicant has the **burden of proof** in this matter and has failed to meet that burden because it has not presented any report or re-evaluation from a Licensed Professional Engineer regarding what they are asking for.

Although it is clear to me how the provisions of the TAC apply to the design, redesign, and reapproval of the water system is supposed to work, it is unclear to me how the State actually enforces the provisions of the TAC. Obviously, the TCEQ does not make criminal referrals to State agencies for falsification of the water system documents as the civic club has been caught multiple times and the civic club simply lies their way out by promising to comply (but never does) or pretending the operation of the system is something other than it actually is, such as the 2008 inspection report the applicant claims solves all their violation issues and the 2015 inspection report (detailed on page 20 of the Respondent's Initial Brief) where the applicant gives extensive false information to the TCEQ to avoid . It appears to me the proper entity for criminal referral for investigation would clearly be the administrative judges in this case.

It also appears to me the court should take my testimony seriously which is why the TAC requires a PE, such as myself, to review and certify the system in exactly the way outlined in the 30 TAC 290.39. No PE in the State of Texas would falsely give the type of testimony I have given in this case without expecting to have their license removed immediately. The intent of the TAC clearly is to have these matters supervised by individuals qualified in the design and operation of public water systems (Texas Professional Engineers), not attorneys such as John Hampton representing parties such as John Heitz who have clear conflicts of interest where the legal operation of a public water system prevents their personal property offsite from illegally attaching to the water system they pretend to represent. It also affects the ability to transfer vast sums of money from the owners of the water system to others required to pay annual assessments to the civic association, which in this case, is another huge conflict of interest. John Heitz's testimony that the billed water costs have always been pro rata to the cost of operation is so false as to make verification of falsehood easy. The sum total of billed water is vastly greater than documented costs.



It should be noted that the cost of mowing grass, essential to the operation of the commercial operations to the North improperly using the airport's facilities, are eighteen times the cost of operation of the water system in 2006. The costs reported by John Heitz for operation of the civic association are hardly more than the cost of operation of only the water system. He reports now that the cost of the water system has grown more than twenty fold. The math doesn't work by a mile. (Refer supplement 2 Respondent's initial brief)

## CONCLUSIONS

1. The falsification of financial data to the State essentially makes the application illegal and meaningless. The falsification of operational data such as reported problems and legal authority to serve attached areas does the same. The 30 TAC 70.4 details a criminal referral for investigation in this situation. It would appear the Administrative Judges are the proper vehicle for that referral.
2. The operation of a system built beyond the limits outlined in the original State approval require another evaluation by a qualified PE and sealed documentation of any and all changes to the system. The PE evaluation is required by the 30 TAC 290.39.
3. There is no specific reason the current system cannot operate as originally approved until a PE has certified the present system WITH WHATEVER ADDITIONAL EQUIPMENT AND MODIFICATIONS ARE REQUIRED. The current design is approved for 22 connections.
4. The falsification of financial data would require reapplication for a CCN with actual data.
5. The TAC makes it clear that a report of inadequate water supply is evidence to be taken seriously. I understand that the normal rules of court testimony would indicate that the Respondent, being a Texas Profession Civil Engineer, should be considered an expert witness. The fact that I am also a resident of the subdivision with history going back to the construction

of the facilities around 1981 would make me a fact witness beyond the time period the Applicant has been present. I have certified that the water pressure does not meet State requirements and that biological contamination occurs due to historic lack of chlorination. Supplement 5 of Respondent's initial brief is testimony by the well operator that historic chlorination levels have not been maintained.

6. There is no provision in the TAC that allows an attorney to provide interpretation of the TAC rules concerning water systems and John Hampton's misrepresentations of the meanings of the TAC rules should be ignored. The conflicts of interest of John Hampton and John Heitz should be taken seriously as their positions benefit the commercial interests to the North of the subdivision, not the subdivision which they claim to represent.
7. The current approval for a CCN by the commission staff and the comment therein that the problems I have identified can be handled later by the TCEQ are incorrect. The Applicant has made it clear that approval of this application for a CCN indicates that the system is currently designed and operated properly and no design issues exist. Under such circumstances, the TCEQ would not be expected to follow up, in any way, the need for a design review by a PE if the applicant can claim that their system now meets all requirements as they have falsely claimed due to the 2008 and 2015 TCEQ inspection reports. Since the TCEQ reports are based on false information from the applicant, you end up with a circular argument that the system is approved because it was approved. The fact that all approvals are based on false information is lost.
8. It should be noted that the documents the Applicant wants to have removed from the record or ignored by the court are documents obtained from the Applicant at an earlier date. The fact that these documents prove the level of falsehood in the Applicant's application and testimony show the level of bad faith being exhibited by both the applicant and the applicant's attorney.

9. The approval of a CCN to supply water outside the legal description of the subdivision would represent an encumbrance which can only be approved by 100% of the lot owners which has never happened. THE CIVIC ASSOCIATION DOES NOT HAVE THE AUTHORITY TO OPERATE, IN ANY WAY, OUTSIDE THE LEGAL DESCRIPTION OF THE SUBDIVISION. THE APPLICANT IS NOT A WATER SUPPLY CORPORATION WITHOUT BOUNDS OF OPERATION. Operation of the water system outside the legal description of the subdivision creates a liability upon the subdivision lot owners and gives access to subdivision property to persons who do not actually own any of the property.
10. Perhaps the greatest misrepresentation by the Applicant is the demand that the Court ignore all of the Respondent's testimony because the current lawsuit involving the overloading and false billing of the existing water well was covered in an earlier 1984 lawsuit against the developer, Frank Wolfe. The deposition of Frank Wolfe (Respondent's Supplement 3 Initial Brief) makes clear Frank Wolfe had nothing to do with the Civic Club billing for water. The Applicant was present at the deposition and was provided a copy.

#### REQUESTS TO THE ADMINISTRATIVE JUDGES

I would respectfully request that this Court deny Applicant's request until it complies with the Texas Administrative Code that a Professional Engineer submit a design, re-evaluation, report or the like for a system that is safe, reliable, and consistent for the homeowners..

A motion to require a Professional Engineer to comply with the requirements of the TAC will be made in addition to the requirement for the CCN application to be resubmitted afterwards with financial data verified by a CPA.

Respectfully submitted,

By Joe Walker PE

Texas license No. 80873

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this document has been provided on August 16, 2018 to the Administrative Judges, John Hampton, Rachel Robles, and the central records department of the State of Texas

By Joe Walker PE

A handwritten signature in black ink, appearing to read "Joe Walker", written over the printed name.

Signed Certificate of Service attached as separate document

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MOTION TO REQUIRE ENGINEER'S STUDY AND TO REFER APPLICANT TO  
CRIMINAL INVESTIGATION

Documentation

As is documented in the Initial and Reply Brief by Joe Walker PE, the rules for submission of plans for public water systems 30 TAC 290.39 by the Texas Administrative Code will not be considered unless they have been prepared and sealed by a Texas Professional Engineer who has reviewed the site and the documents provided to this Court. The current application does not match the original engineer's approval document so therefore requires another review by a Texas Professional Engineer. Please note the original engineer's approval was only for one well and 22 connections. TCAQ rough estimates that the current system MAY handle as many as 33 is irrelevant since the system is now experiencing pressure problems and has 42 connections.

**30 TAC 290.39 General Provisions as follows:**

**“(d) Submission of plans.**

**(1) Plans, specifications, and related documents will not be considered unless they have been prepared under the direction of a licensed professional engineer. All engineering documents must have engineering seals, signatures, and dates affixed in accordance with the rules of the Texas Board of Professional Engineers.**

(2) Detailed plans must be submitted for examination at least 30 days prior to the time that approval, comments or recommendations are desired. From this, it is not to be inferred that final action will be forthcoming within the time mentioned.

(3) The limits of approval are as follows.

**(A) The commission's public drinking water program furnishes consultation services as a reviewing body only, and its licensed professional engineers may neither act as design engineers nor furnish detailed estimates.**

(B) The commission's public drinking water program does not examine plans and specifications in regard to the structural features of design, such as strength of concrete or adequacy of reinforcing. Only the features covered by this subchapter will be reviewed.

**(C) The consulting engineer and/or owner must provide surveillance adequate to assure that facilities will be constructed according to approved plans and must notify the executive director in writing upon completion of all work.** Planning materials shall be submitted to the Texas Commission on Environmental Quality, Water Supply Division, MC 159, P.O. Box 13087, Austin, Texas 78711-3087.

(e) Submission of planning material. In general, the planning material submitted shall conform to the following requirements.

(1) Engineering reports are required for new water systems and all surface water treatment plants. **Engineering reports are also required when design or capacity deficiencies are identified in an existing system. The engineering report shall include, at least, coverage of the following items:**

**(A) statement of the problem or problems;**

**(B) present and future areas to be served, with population data;**

**(C) the source, with quantity and quality of water available;**

**(D) present and estimated future maximum and minimum water quantity demands;**

**(E) description of proposed site and surroundings for the water works facilities;**

**(F) type of treatment, equipment, and capacity of facilities;**

**(G) basic design data, including pumping capacities, water storage and flexibility of system operation under normal and emergency conditions; and**

**(H) the adequacy of the facilities with regard to delivery capacity and pressure throughout the system.**

(2) All plans and drawings submitted may be printed on any of the various papers which give distinct lines. All prints must be clear, legible and assembled to facilitate review.

(A) The relative location of all facilities which are pertinent to the specific project shall be shown.

(B) The location of all abandoned or inactive wells within 1/4-mile of a proposed well site shall be shown or reported.

**(C) If staged construction is anticipated, the overall plan shall be presented, even though a portion of the construction may be deferred.**

**(D) A general map or plan of the municipality, water district, or area to be served shall accompany each proposal for a new water supply system."**

Specifically, item e.1 above that **"Engineering reports are also required when design or capacity deficiencies are identified in an existing system."** Both design and capacity deficiencies have been officially reported by Joe Walker PE. However, the deficiencies should be obvious when the Applicant is requesting approval for a system with 42 connections that was only designed for a maximum of 22. (Please refer to supplement 7 to the Joe Walker PE initial brief in this case). The above requirements by the Texas Administrative Code are specifically included to prevent the argument for a defective system by someone unqualified to do so as is happening in this case. Neither John Heitz nor John Hampton are Texas Professional Engineers and are not qualified to testify as to the appropriateness of the current application for a CCN.

## **REFERRAL FOR CRIMINAL INVESTIGATION**

The magnitude of false statements in the Application for CCN is so vast as to indicate a criminal prosecution investigation is indicated. **30 TAC 70.4 which states "(a) A private individual with information demonstrating possible violations of law within the commission's jurisdiction should notify the executive director (ED). The ED may initiate an administrative enforcement action or he/she may refer to the appropriate prosecuting authority a civil or criminal enforcement action."**

Virtually all of the discussion on pages 1 through 23 of the Joe Walker PE Initial Brief details false statements by both John Heitz and John Hampton in the initial application, financial submittals, and verbal testimony. The false statements are perjury, the financials are falsifying documentation to the state, and the improper operation of the water system in direct contradiction to instructions by the TCEQ is public endangerment. Several of supplements in the Joe Walker PE Initial Brief back up these allegations. Of special note are the financial statements

(provided to me by the Wolfe Airpark Civic Club) showing total water system annual cost as low as \$500 while testimony under oath by John Heitz claim the costs are many, many times those statements and the billing costs have **always** been “pro rata”. Pro rata means the **actual costs** were split among the users of the system which was never done and would be in violation of the deed restrictions anyway. The numbers given to the State by John Heitz are vastly inflated to disguise the fact that, in reality, the civic club directly billed for water continuously for decades in amounts vastly above what the actual costs really were. John Heitz falsified the application to reflect an excuse to bill more than required to operate the system. Please note the water system is not operated by a water corporation, it is owned and operated by the homeowners’ association as a public water supply owned by a Texas Non Profit. Although direct billing for water has gone on for decades, doing so was in violation of both TCAQ rules and the civic association deed restrictions.

Of particular note is the Applicant’s claim that the TCAQ report of 2015 somehow absolves them of all previous violations and provides a comprehensive inspection of the facilities is telling. The notes taken by the inspector clearly indicate that Mr. Heitz falsely claimed that all water system expense was included in the annual assessments to all lot owners including those not connected to the water system (indicating no direct billing to those served with water had occurred and therefore giving the inspector a completely false view of the financial operation of the water system). The civic club’s direct billings for water violates both the TCAQ rules and the deed restrictions resulting in hundreds of thousands of dollars being illegally “cost shifted” to help the multiple lots owners at the expense of the home owners.

The Texas Administrative Code requires persons that report reasons for the TAC to refer a situation to appropriate law enforcement agencies for investigation to provide access and



cooperate fully with said law enforcement agencies. Please note that I am prepared to cooperate fully with law enforcement to the extent required and requested.

The Applicant is using a false claim that an earlier developer lawsuit for not completing the subdivision somehow covers all claims against the civic club for improper direct billing for water when the developer never had anything to do with billing for water (please refer Frank Wolfe's deposition, supplement 3 in Joe Walker's initial brief).

I humbly request the Honorable Judges take this motion seriously. As the physicians' creed states "do no harm.", professional engineers swear to protect the public. It is assumed that if the State's engineer who reviewed this CCN application was a civil engineer instead of an electrical engineer and if she had experience in the requirements of the TAC provisions I have brought to the PUC's attention, her report would read differently. In any case, the TAC provisions override all others for requiring an engineer's review and action to be taken when "possible violations of the law..." are found give specific solutions hereby requested.

Sworn this day the 16<sup>th</sup> day of August, 2018 and copies sent to John Hampton, Melissa Ethridge, and Rachael Robles on the 16th day of August by Joe Walker PE

(Signature statement copied with signature and added as attachment)

## MOTIONS

Motion to require a Professional Engineer and Certified Public Accountant review the water system and these court proceedings before resubmittal of application for CCN.

Approved this \_\_\_\_\_ day of \_\_\_\_\_ by Judge \_\_\_\_\_

### ***And or alternately***

Motion to direct Respondent to refer John Heitz and John Hampton for criminal investigation by appropriate agency.

Approved this \_\_\_\_\_ day of \_\_\_\_\_ by Judge \_\_\_\_\_

### ***And or alternately***

Motion to refer John Heitz and John Hampton to criminal investigation to appropriate agency with Court handling the referral.

Approved this \_\_\_\_\_ day of \_\_\_\_\_ by Judge \_\_\_\_\_

### ***And or alternately***

Motion to limit the connections of Wolfe Airpark subdivision to 22 connections until a reapplication for CCN is approved.

Approved this \_\_\_\_\_ day of \_\_\_\_\_ By Judge \_\_\_\_\_

Respectfully submitted this 16<sup>th</sup> day of August, 2018 by

Joe Walker PE

Respectfully submitted,

By Joe Walker PE

Texas license No. 80873

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this document has been provided on August 16, 2018 to the Administrative Judges, John Hampton, Rachel Robles, and the central records department of the State of Texas

By Joe Walker PE

A handwritten signature in black ink, appearing to read "Joe Walker", written over a horizontal line.

Signed Certificate of Service attached as separate document