Vineyard Ridge Subdivision House Well - Aquifer Test (June 2, 2016)

Date and Time	Time Since Pump Start (min)	Time Since Pump Stop (min)	PW House Well Temperature (F)	PW House Well Water Level (ft. bgs)	PW House Well Water Level (ft. MSL)	PW House Well Drawdown (ft.)	Pump Rate (gpm)	Specific Capacity (gpm/ft.)	OW Shed Well Water Level (ft. MSL)	OW Shed Well Drawdown (ft.)	Comments
6/6/2016 21:23	6374	4200	68.90	175.47	1592.53	3.72			1617.06	-2.48	
6/6/2016 22:23	6434	4260	68.90	175.41	1592.59	3.66			1617.04	-2.46	
6/6/2016 23:23	6494	4320	68 91	175.37	1592.63	3.62			1617.09	-2.51	
6/7/2016 0:23	6554	4380	68.90	175.33	1592.67	3.58			1617 12	-2.54	
6/7/2016 1:23	6614	4440	68.90	175.04	1592.97	3.29			1617.11	-2.53	
6/7/2016 2:23	6674	4500	68.90	174.99	1593.01	3.24			1617.10	-2.52	
6/7/2016 3:23	6734	4560	68.91	175.07	1592.93	3.32			1617.08	-2.50	
6/7/2016 4:23	6794	4620	68.91	174.83	1593.17	3.08			1617.18	-2.60	
6/7/2016 5:23	6854	4680	68.90	174.76	1593.25	3.01			1617.06	-2.48	
6/7/2016 6:23	6914	4740	68.91	174.90	1593 10	3 15			1617.21	-2.63	
6/7/2016 7:23	6974	4800	68.91	174.66	1593.34	2.91			1617.19	-2.61	
6/7/2016 8:23	7034	4860	68.90	174.85	1593.15	3.10			1617.14	-2.56	
6/7/2016 9:27	7098	4924	68.91	174.61	1593.39	2.86			1617.13	-2.55	

Note: bgs = below ground surface Column Pipe Diameter = 2 1/2-inch Horsepower = 10 HP
MSL = Mean Sea Level Pump Setting = 273 ft

Wet Rock Groundwater Services, LLC
Groundwater Specialists
317 Ranch Road 620 South, Suite 203
Austin, Texas 78734
Ph: 512.773.3226
www.wetrockgs.com

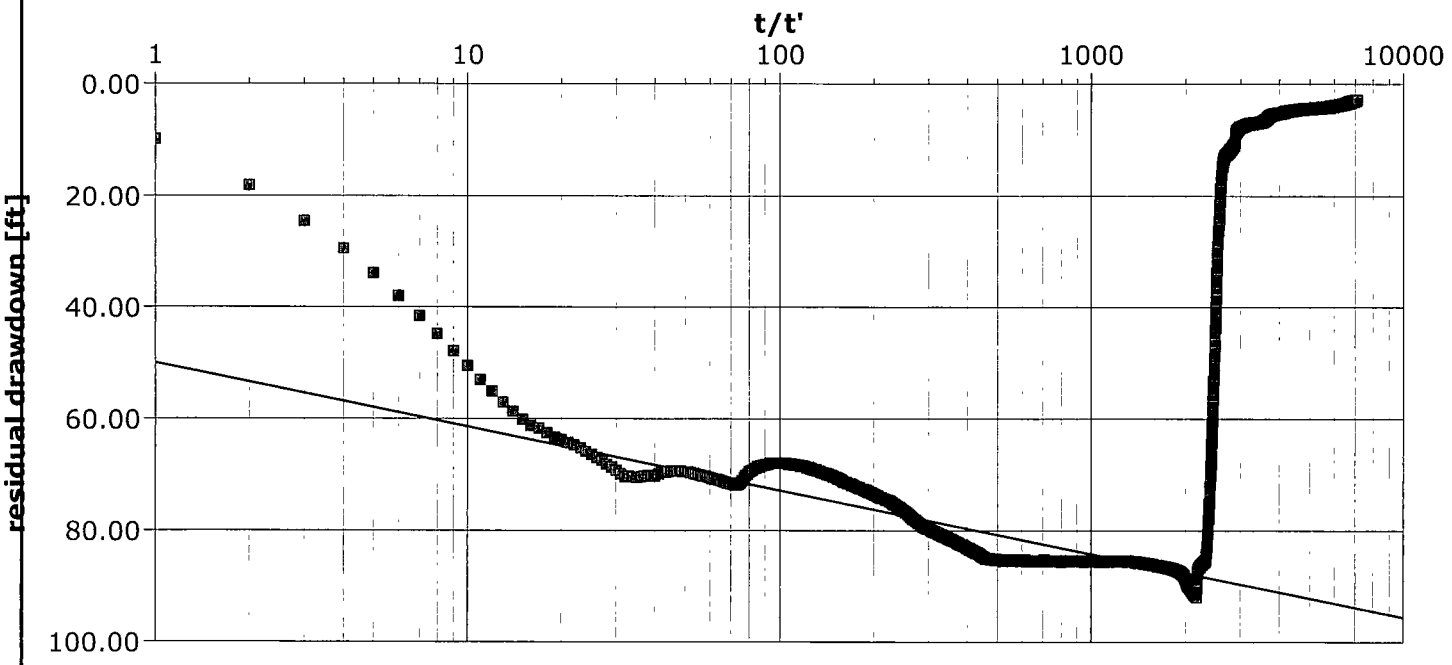
Pumping Test Analysis Report

Project: Vineyard Ridge Subdivision

Number: 083-001-16

Client: Lone Star Land Partners

Location: Gillespie County, Texas	Pumping Test: House Well	Pumping Well: House Well
Test Conducted by: KK		Test Date: 6/2/2016
Analysis Performed by: BB	Cooper-Jacob	Analysis Date: 6/14/2016
Aquifer Thickness: 131.25 ft	Discharge Rate: 52 [U.S. gal/min]	



Calculation using COOPER & JACOB

Observation Well	Transmissivity [ft²/d]	Hydraulic Conductivity [ft/d]	Storage coefficient	Radial Distance to PW [ft]	
House Well	1.61×10^{2}	1.23×10^{0}			

Appendix D

Well Efficiency Calculation

Wet Rock Groundwater Services, L.L.C.
Groundwater Specialists
TBPG Firm No: 50038
317 Ranch Road 620 South, Suite 203
Austin, Texas 78734 • Ph: 512-773-3226
www.wetrockgs.com

Well Efficiency Calculations
House Well

From: *Driscoll, F.G., 1986: Groundwater and Wells: second Ed. Pp.575-579*

Well Efficiency = (Actual specific capacity / Theoretical specific capacity)

Actual Specific Capacity = Q/s

Where: Q = Discharge of well, in gpm; and
s = drawdown, in feet

Actual Specific Capacity = 52 gpm / 91.98 ft = 0.57 gpm/ft

Theoretical Specific Capacity = $\frac{Q}{s} = \frac{T}{264 \log \frac{0.3Tt}{r^2 S}} = \frac{T}{2000}$

Where: T = Transmissivity, in gpd/ft
t = Time of pumping, in days
S = Storage Coefficient, = 1.0×10^{-4}
r = radius of well, in ft.

Theoretical Specific Capacity = $\frac{1204.28}{264 \log \frac{0.3(1204.28)(1.51)}{0.25^2 (0.0001)}}$ = **0.574**

Efficiency = Actual Specific Capacity / Theoretical Specific Capacity = 0.57 / 0.574 = **99.3%**

Appendix E

Water Quality Report

Environmental Laboratory Services
The Solution Lab

LCRA Environmental Laboratory Services
3505 Montopolis Drive
Austin, TX 78744
Phone: (512)356-6022
Fax (512)356-6021

ANALYTICAL RESULTS

Workorder: Q1622392

Lab ID: **Q1622392001** Date Received: 6/7/2016 15:00 Matrix: Drinking Water
Sample ID: **VINYARD RIDGE** Date Collected: 6/7/2016 12:00 Sample Type: SAMPLE
Project ID: **APEX SAMPLES**

Parameters	Results	Units	LOD	LOQ	ML	DF	Prepared	By	Analyzed	By	Qual
INORGANICS											
Analysis Desc: E2340B, Hardness			Preparation Method: E2340B, Hardness								
			Analytical Method: E2340B, Hardness								
Hardness, Calcium	244	mg/L				1	06/17/16 10:02	CW	06/17/16 10:02	CW	
Analysis Desc: E200.7 Metals, Trace Elements			Preparation Method: E200.7 Prep								
			Analytical Method: E200.7 Metals, Trace Elements								
Calcium Total	97.8	mg/L	0.0700	0.200		1	06/08/16	BS	06/09/16 15:41	MV	N
Iron Total	<0.0500	mg/L	0 0200	0:0500		1	06/08/16	BS	06/09/16 15:41	MV	
Sodium Total	28.3	mg/L	0.200	0.500		1	06/08/16	BS	06/09/16 15:41	MV	
Analysis Desc: E200.8, ICP-MS			Preparation Method: E200.8, ICP-MS Prep								
			Analytical Method: E200.8, ICP-MS								
Aluminum Total	0.0145	mg/L	0.00400	0.0100		1	06/08/16	BS	06/09/16 18:10	SLW	
Arsenic Total	<0.00200	mg/L	0.000700	0.00200	0.01	1	06/08/16	BS	06/09/16 18:10	SLW	
Copper Total	0.00354	mg/L	0.000400	0.00100	1.3	1	06/08/16	BS	06/09/16 18:10	SLW	
Lead Total	0.00172	mg/L	0.000400	0.00100	0.015	1	06/08/16	BS	06/09/16 18:10	SLW	
Manganese Total	0.00155	mg/L	0.000400	0.00100		1	06/08/16	BS	06/09/16 18:10	SLW	
Zinc Total	0.369	mg/L	0.00200	0.00400		1	06/08/16	BS	06/09/16 18:10	SLW	
Analysis Desc: E300.0, Anions			Preparation Method: E300.0, Anions								
			Analytical Method: E300.0, Anions								
Chloride	62.6	mg/L	1.00	1.00		1	06/07/16 16:04	FO	06/07/16 16:04	FO	
Fluoride	0.536	mg/L	0.0100	0 0100	4	1	06/07/16 16:04	FO	06/07/16 16:04	FO	
Nitrite (as N)	<0.0100	mg/L	0.000800	0.0100	1	1	06/07/16 16:04	FO	06/07/16 16:04	FO	
Nitrate (as N)	22.0	mg/L	0.0200	0.100	10	10	06/07/16 18:05	FO	06/07/16 18:05	FO	M
Sulfate	41.9	mg/L	1.00	1.00		1	06/07/16 16:04	FO	06/07/16 16.04	FO	
TOTAL DISSOLVED SOLIDS											
Analysis Desc: SM2540C, TDS			Preparation Method: SM2540C, TDS								
			Analytical Method: SM2540C, TDS								
Total Dissolved Solids(TDS)	600	mg/L	10.0	25.0		10	06/08/16 13:05	ADG	06/08/16 13:05	ADG	
ALKALINITY											

LCRA Environmental Laboratory Services
3505 Montopolis Drive
Austin, TX 78744
Phone (512)356-6022
Fax (512)356-6021

ANALYTICAL RESULTS

Workorder: Q1622392

Lab ID: **Q1622392001** Date Received: 6/7/2016 15:00 Matrix: Drinking Water
Sample ID: **VINYARD RIDGE** Date Collected: 6/7/2016 12:00 Sample Type: SAMPLE
Project ID: **APEX SAMPLES**

Parameters	Results	Units	LOD	LOQ	ML	DF	Prepared	By	Analyzed	By	Qual
Analysis Desc: SM2320B, Alkalinity			Preparation Method: SM2320B, Alkalinity								
			Analytical Method: SM2320B, Alkalinity								
Total Alkalinity	358	mg/L	20.0	20.0		1	06/16/16	ADG	06/16/16	ADG	N
pH											
Analysis Desc: SM4500-H+B, pH			Preparation Method: SM4500-H+B, pH								
			Analytical Method: SM4500-H+B, pH								
pH	7.61	pH	0.00	0.00		1	06/14/16	ADG	06/14/16	ADG	N
Temperature	18.1	C				1	06/14/16	ADG	06/14/16	ADG	N

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ANALYTICAL RESULTS

Workorder: Q1622392

Lab ID:	**Q1622392002**	Date Received:	6/7/2016 15:00	Matrix:	Drinking Water
Sample ID.	**VINYARD RIDGE**	Date Collected:	6/7/2016 12:00	Sample Type:	SAMPLE
Project ID:	**APEX SAMPLES**				

Parameters	Results	Units	LOD	LOQ	ML	DF	Prepared	By	Analyzed	By	Qual
Total Coliform by Colilert											
Analysis Desc: SM9223, IDEXX	Preparation Method: SM9223, IDEXX										
	Analytical Method: SM9223, IDEXX										
Total Coliform	Absent	P/A	1.00	1.00		1	06/07/16 16:28	BS	06/07/16 16:28	BS	
Ecoli	Absent	P/A	1.00	1.00		1	06/07/16 16:28	BS	06/07/16 16:28	BS	

Appendix F

Distance Drawdown Assumptions

Wet Rock Groundwater Services, L.L.C.
Groundwater Specialists
TBPG Firm No: 50038
317 Ranch Road 620 South, Suite 203
Austin, Texas 78734 • Ph: 512-773-3226
www.wetrockgs.com

Assumptions for Estimating Drawdown Calculations

From: *Driscoll, F.G., 1986: Groundwater and Wells: second Ed. Pp.235*

The following assumptions apply:

Uncontrollable and unknown factors such as:

- future pumpage from the aquifer or from interconnected aquifers from area wells outside of the subdivision or any other factor that cannot be predicted that will affect the storage of water in the aquifer;
- long-term impacts to the aquifer based on climatic variations; and
- future impacts to usable groundwater due to unforeseen or unpredictable contamination.

Estimates of drawdown are based upon the following assumptions.

- Total daily water demand (Entire subdivision) = 43.86 acre-feet/yr (total water demand from one public supply well) = 39,160 gallons per day (gpd);
- Total daily water demand (per housing unit) = 0.27 acre-feet/yr = 244.75 gpd;
- The public supply well will be pumped at 50 gpm for 13.05 hours per day for a total daily volume of 39,160 gallons.

The edge of the cone of depression was estimated by taking the distance from the pumped well where the drawdown flattened out and was minimal.

The following assumptions are used in derivating the Theis equation:

- The water bearing formation is uniform in character and the hydraulic conductivity is the same in all directions;
- The formation is uniform in thickness and infinite in areal extent;
- The formation receives no recharge from any source;
- The pumped well penetrates, and receives water from, the full thickness of the water bearing formation;
- The water removed from storage is discharges instantaneously when the head is lowered;
- The pumping well is 100% efficient;
- All water removed from the well comes from aquifer storage;
- Laminar flow exists throughout the well and aquifer; and
- The water table or potentiometric surface has no slope.

111

Exhibit "9"

PWS_0860144_CO_20170530_Plan Ltr

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 30, 2017

Mr. Garrett D. Keller, P.E.
Matkin-Hoover Engineering, Inc.
8 Spencer Road
Boerne, Texas 78006

Re: Vineyard Ridge Water Supply - Public Water System ID No. 0860144
Proposed New Water System
Engineer Contact Telephone: (830) 249-0600
Plan Review Log No. P-03312017-204
Gillespie County, Texas

CN605360155; RN109798421

Dear Mr. Keller:

On March 31, 2017, the Texas Commission of Environmental Quality (TCEQ) received planning material with your letter dated March 30, 2017 along with revisions dated May 23, 2017 for the proposed New Water System. Based on our review of the information submitted, the project generally meets the minimum requirements of Title 30 Texas Administrative Code (TAC) Chapter 290 - Rules and Regulations for Public Water Systems and is **conditionally approved for construction** if the project plans and specifications meet the following requirement(s):

1. Four corrosive indices (Modified Larson's Ratio Langelier Saturation Index, Ryznar Stability Index and the Aggressive Index) will be used to calculate corrosivity of the water from new source(s). Corrosive or aggressive water could result in aesthetic problems, increased levels of toxic metals, and deterioration of household plumbing and fixtures. **If the water appears to be corrosive**, the system will be required to conduct a study and submit an engineering report that addresses corrosivity issues or may choose to install corrosion control treatment **before use may be granted**. All changes in treatment require submittal of plans and specifications for approval by TCEQ.

2. The copy of the recorded deed and map demonstrates that the public water system owns the well property and all surrounding acreage at this time and intends to provide sanitary control and access to the wells via easements once the property is developed. Draft easements were provided as part of the submittal (see 30 TAC §290.41(c)(1)(F)(iv)(I)-(II)). For any real property within 150 feet of the well not owned by the public water system, a sanitary control easement or sanitary control easements as filed at the county courthouse (bearing the county clerk's stamp) shall be obtained, as described in 30 TAC §290.41(c)(1)(F). Please provide a copy of the recorded deed and a map showing all land owned by the public water system within 150 feet of the well and for any land within 150 feet of the well not owned by the public water system (or to be sold as property is developed) provide copies of all recorded sanitary control easements with the well completion materials. Should there be property within 150 feet of the well for which a sanitary control easement cannot be obtained an exception may be required as described below.

3. The PWS has applied to the Public Utility Commission (PUC) for a Certificate of Convenience and Necessity (CCN) for the system. The system should obtain a CCN prior to providing water service to customers.

Exceptions to the above rules must be requested in writing and must be substantiated by carefully documented data. The request for an exception shall precede the submission of engineering plans and specifications for a proposed project for which an exception is being requested as required in 30 TAC Section 290.39 (l)(1). Written exception request must be submitted to the TCEQ's Technical Review and Oversight Team (TROT) at the following address:

Technical Review and Oversight Team, MC-159
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

For information about the exception process, please go to the URL below:

http://www.tceq.texas.gov/drinkingwater/trot/exception

Please note that an "Exception Request Form" must be completed for all exception submittals.

If after you have reviewed the information available at the webpage above you have a question regarding the exception process, please call (512) 239-4691 and ask to speak to a member of the TROT about exceptions.

Texas Water Code Section 36.0015 allows for the creation of groundwater conservation districts (GCDs) as the preferred method of groundwater management. GCDs manage groundwater in many counties and are authorized to regulate production and spacing of water wells. **Public water systems drilling wells within an existing GCD are responsible for meeting the GCD's requirements.** The authorization provided in this letter does not affect GCD authority to manage groundwater or issue permits.

The design engineer or water system representative is required to notify the Plan Review Team in writing by fax at (512) 239-6972 or by emailing David.Yager@Tceq.Texas.Gov and cc: vera.poe@tceq.texas.gov at least 48 hours before the well casing pressure cementing begins. If pressure cementing is to begin on Monday, then they must give notification on the preceding Thursday. If pressure cementing is to begin on Tuesday, then they must give notification on the preceding Friday.

The TCEQ does not approve this well for use as a public water supply at this time. We have enclosed a copy of the "Public Well Completion Data Checklist for Interim Approval (Step 2)". We provide this checklist to help you in obtaining approval to use this well.

The submittal consisted of 10 sheets of engineering drawings, technical specifications and an engineering summary. The proposed project consists of:

- Two (2) public water supply well drilled to 400 feet with 180 linear feet (lf) of 6.625-inch outside diameter (od) steel casing and pressure-cemented 180 lf;

- 220 linear feet of 6.25-inch underream bare hole with no gravel pack;

- The wells are rated for 50 gallons per minute (gpm) yield with a 7.5 horsepower, submersible pump set at 334 feet deep. Well No. 1 has a design capacity of 50 gpm at 384 feet total dynamic head (TDH) and Well No. 2 has a design capacity of 50 gpm at 392 TDH.

- One (1) 43,000 gallon American Water Works Association (AWWA) D-103 Factory-Coated Bolted Carbon Steel Ground Storage Tank;

- One (1) 4,000 gallon American Society of Mechanical Engineers (ASME) Section VIII, Division I, Hydropneumatic Pressure Tank;

- Two (2) 160 gallon per minute (gpm) service pumps;

- One (1) Disinfection system consisting of two (2) 10 pound per day gas chlorinators and two (2) 150 lb. bottles of chlorine gas;

- 4,188 lf of 6-inch AWWA C900 Polyvinyl Chloride (PVC) DR 18 raw water transmission main;

- 730 lf of 4-inch AWWA C900 PVC DR 18 raw water transmission main;

- 10,678 lf of 6-inch AWWA C900 PVC DR 18 Distribution Main;

- 7,565 lf of 4-inch AWWA C900 PVC DR 18 Distribution Main;

- 5,144 lf of 2-inch Schedule 40 ASTM D1785 PVC Distribution Line;

- Various valves, fittings, and related appurtenances.

This approval is for the construction of the above listed items only. Any wastewater components contained in this design were not considered.

The Vineyard Ridge Water System public water system provides water treatment.

The project is located approximately 6 miles north of Stonewall, Texas and 0.40 miles west of the intersection of North Grape Creek Road and Elm Ridge Road in Gillespie County, Texas.

An appointed engineer must notify the TCEQ's Region 11 Office in Austin at (512) 339-2929 when construction will start. Please keep in mind that upon completion of the water works project, the engineer or owner will notify the commission's Water Supply Division, in writing, as to its completion and attest to the fact that the completed work is substantially in accordance with the plans and change orders on file with the commission as required in 30 TAC §290.39(h)(3).

Please refer to the Plan Review Team's Log No. **P-03312017-204** in all correspondence for this project.

Please Note for Future Submittals: In order to determine if a new source of water or a new treatment process results in corrosive or aggressive finished water that may endanger human health, we are requesting additional sampling and analysis of lead, alkalinity (as calcium carbonate), calcium (as calcium carbonate) and sodium in addition to the required chemical test results for public water system new sources. We are requiring these additional sampling results as listed in our currently revised checklists (Public Well Completion Data Checklist for Interim Use - Step 2 and Membrane Use Checklist - Step 2) which can be found on TCEQ's website at the following address:

https://www.tceq.texas.gov/drinkingwater/udpubs.html

Please include these additional sampling results in well completion submittals, membrane use submittals, and other treatment process submittals.

New surface water sources will need to also include lead, total dissolved solids, pH, alkalinity (as calcium carbonate), chloride, sulfate, calcium (as calcium carbonate) and sodium with the analysis required in 30 TAC Section 290.41(e)(1)(F).

Please complete a copy of the most current Public Water System Plan Review Submittal form for any future submittals to TCEQ. Every blank on the form must be completed to minimize any delays in the review of your project. The document is available on TCEQ's website at the address shown below. You can also download the most current plan submittal checklists and forms from the same address.

https://www.tceq.texas.gov/drinkingwater/udpubs.html

For future reference, you can review part of the Plan Review Team's database to see if we have received your project. This is available on TCEQ's website at the following address:

https://www.tceq.texas.gov/drinkingwater/planrev.html/#status

You can download the latest revision of 30 TAC Chapter 290 - Rules and Regulations for Public Water Systems from this site.

If you have any questions concerning this letter or need further assistance, please contact David Ygaer at 512-239-0605 or by email at David.Yager@Tceq.Texas.Gov or by correspondence at the following address:

Plan Review Team, MC-159
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Sincerely,

David H. Yager, P.E.
Plan Review Team
Plan and Technical Review Section
Water Supply Division
Texas Commission on Environmental Quality

Vera Poe, P.E., Team Leader
Plan Review Team
Plan and Technical Review Section
Water Supply Division
Texas Commission on Environmental Quality

VP/DY/db

Enclosure: "Public Well Completion Data Checklist for Interim Approval (Step 2)"

cc: Vineyard Ridge Water System, Attn. Brent Taylor, P. O. Box 631 Spicewood, Texas 78669

bcc: TCEQ Central Records PWS File 0860144
TCEQ Region No. 13 Office - San Antonio
TCEQ PWSINV, MC-155
Public Utility Commission; Attn: Tammy Benter

Public Well Completion Data Checklist
For Interim Approval (Step 2)

Texas Commission on Environmental Quality
Water Supply Division
Plan Review Team MC-159
P.O. Box 13087, Austin, Texas 78711-3087

Public Water System I.D. No._____
TCEQ Log No. P-_____

The following list is a brief outline of the "Rules for Public Water Systems", 30 TAC Chapter 290 regarding proposed Water Supply Well Completion. Failure to submit the following items may delay project approval. Copies of the rules may be obtained from **Texas Register, 1019 Brazos St, Austin, TX, 78701-2413, Phone: (512) 463-5561** or downloaded from the website:
http://www.tceq.texas.gov/rules/indxpdf.html

Any well proposed as a source of water for a public water supply **must have plans approved for construction** by TCEQ. Please include the well construction approval letter with your submittal of well completion data listed below must be submitted for TCEQ evaluation. Based on this submitted data, interim approval may be given for use of the well.

1. ☐ Site map(s) at appropriate scales showing the following: [§290.41(c)(3)(A)]
   - ☐ (i) Final location of the well with coordinates;
   - ☐ (ii) Named roadways;
   - ☐ (iii) All property boundaries within 150 feet of the final well location and the property owners' names;
   - ☐ (iv) Concentric circles with the final well location as the center point with radii of 10 foot, 50 foot, 150 foot, and ¼ mile;
   - ☐ (v) Any site improvements and existing buildings;
   - ☐ (vi) Any existing or potential pollution hazards; and
   - ☐ (vii) Map must be scalable with a north arrow.
2. ☐ A copy of the recorded deed of the property on which the well is located showing the Public Water System (PWS) as the landowner, and/or any of the following: [§290.41(c)(1)(F)(iv)]
   - ☐ (i) Sanitary control easements (filed at the county courthouse and bearing the county clerk's stamp) covering all land within 150 feet of the well not owned by the PWS (for a sample easement see TCEQ Form 20698);
   - ☐ (ii) For a political subdivision, a copy of an ordinance or land use restriction adopted and enforced by the political subdivision which provides an equivalent or higher level of sanitary protection to the well as a sanitary control easement; and/or
   - ☐ (iii) A copy of a letter granting an exception to the sanitary control easement rule issued by TCEQ's Technical Review and Oversight Team.
3. ☐ Construction data on the completed well: [§290.41(c)(3)(A)]
   - ☐ (i) Final installed pump data including capacity in gallons per minute (gpm), total dynamic head (tdh) in feet, motor horsepower, and setting depth;
   - ☐ (ii) Bore hole diameter(s) (must be 3" larger than casing OD) and total well depth;
   - ☐ (iii) Casing size, length, and material (e.g. 200 lf of 12" PVC ASTM F480 SDR-17);
   - ☐ (iv) Length and material of any screens, blanks, and/or gravel packs utilized;

- ☐ (v) Cementing depth and pressure method (one of the methods in latest revision of AWWA Standard A-100, Appendix C, excluding the dump bailer and tremie methods);
- ☐ (vi) Driller's geologic log of strata penetrated during the drilling of the well;
- ☐ (vii) Cementing certificate; and
- ☐ (viii) Copy of the official State of Texas Well Report (some of the preceding data is included on the Well Report).

4. ☐ A U.S. Geological Survey 7.5-minute topographic quadrangle map (include quadrangle name and number) or a legible copy showing the location of the completed well; [§290.41(c)(3)(A)]
5. ☐ Record of a 36-hour continuous pump test on the well showing stable production at the well's rated capacity. Include the following: [§290.41(c)(3)(G)]
   - ☐ (i) Test pump capacity in gpm, tdh in feet, and horsepower of the pump motor;
   - ☐ (ii) Test pump setting depth;
   - ☐ (iii) Static water level (in feet); and
   - ☐ (iv) Draw down (in feet).
6. ☐ Three bacteriological analysis reports for samples collected on three successive days showing raw well water to be free of coliform organisms. Reports must be for samples of raw (untreated) water from the disinfected well and submitted to a laboratory accredited by TCEQ, accredited to perform these test; and [§290.41(c)(3)(F)(i)]
7. ☐ Chemical analysis reports for well water samples showing the water to be of acceptable quality for the most problematic contaminants listed below. Reports must come from a laboratory accredited by TCEQ; accredited to perform these test. Maximum contaminant level (MCL) and secondary constituent level (SCL) units are in mg/l (except arsenic). [§290.41(c)(3)(G) and§290.104 and §290.105]

MCL	PRIMARY	SCL	SECONDARY	SCL	SECONDARY	SCL	SECONDARY
10 (as N)	Nitrate	0.2	Aluminum	5.0	Zinc	300	Sulfate
1 (as N)	Nitrite	1.0	Copper	1,000	Total Dissolved Solids	300	Chloride
10 µg/l	Arsenic	0.3	Iron	2.0	Fluoride	≥ 7.0	pH
4.0	Fluoride	0.05	Manganese	N/A	Lead		

Corrosive Water Parameters	
Parameter	**Units**
Alkalinity as $CaCO_3$	mg/l
Calcium as $CaCO_3$	mg/l
Sodium	mg/l

All systems located in a high-risk county (see page 3) shall submit radiological analysis reports for water samples showing the water to be of acceptable quality for the contaminants listed below. Reports must come from a TCEQ accredited laboratory for interim use of the well.

MCL	CONTAMINANT
15 pCi/L	Gross alpha
5 pCi/L	Radium-226/228
50 pCi/L	Beta particle
30 µg/L	Uranium

WHERE: pCi/L = pico curies per liter, µg/L = micrograms per liter

Please be aware when you review your radiological data that if the report has gross alpha over 15 pCi/L and individual uranium isotopes are not reported, you will have to resample or reanalyze and resubmit radionuclide results. If you see gross alpha plus radium-228 over 5 pCi/L, and don't have radium-226, you will have to resample or reanalyze and resubmit complete results.

LIST OF COUNTIES WHERE RADIONUCLIDE TESTING IS REQUIRED

Please be aware that we have added the requirement for analysis for **radionuclides** for high-risk counties. For elevated levels of any contaminants found in a test well, treatment or blending may be required.

COUNTY	STATE CODE #
Atascosa	007
Bandera	010
Bexar	015
Bosque	018
Brazoria	020
Brewster	022
Burnet	027
Concho	048
Culberson	055
Dallam	056
Dawson	058
Erath	072
Fort Bend	079
Frio	082
Garza	085
Gillespie	086
Gray	090
Grayson	091
Harris	101

COUNTY	STATE CODE #
Hudspeth	115
Irion	118
Jeff Davis	122
Jim Wells	125
Kendall	130
Kent	132
Kerr	133
Kleberg	137
Liberty	146
Llano	150
Lubbock	152
McCulloch	154
Mason	160
Matagorda	161
Medina	163
Midland	165
Montgomery	170
Moore	171

COUNTY	STATE CODE #
Parker	184
Pecos	186
Polk	187
Presidio	189
Refugio	196
San Jacinto	204
San Saba	206
Tarrant	220
Travis	227
Tyler	229
Upton	231
Val Verde	233
Victoria	235
Walker	236
Washington	239
Wichita	243
Williamson	246
Zavala	254

Exhibit "10"

Wet Rock Groundwater Services, L.L.C.
Groundwater Specialists
TBPG Firm No: 50038
317 Ranch Road 620 South, Suite 203
Austin, Texas 78734 • Ph: 512-773-3226
www.wetrockgs.com

April 4, 2017

Mr. Paul Tybor
Hill Country Underground Water Conservation District
508 S. Washington
Fredericksburg, Texas 78624

RE: Vineyard Ridge Subdivision – Hill Country UWCD Permit Application

Dear Mr. Tybor:

Enclosed is the Vineyard Ridge Subdivision permit application for two permitted municipal supply wells within the Hill Country Underground Water Conservation District (HVUWCD). The permit is being submitted on behalf of the developer of the subdivision, Vineyard Ridge, LLC. A groundwater availability report for the property was submitted and approved by HCUWCD in October 2016. In the report, it was estimated that the subdivision would utilize 44 acre-feet/year. This estimate was based on data supplied by HCUWCD, assuming an average of 2.75 persons per household (160 connections) using 89 gallons of water per day. After our discussions in April 2017, we agreed that if the subdivision were to reach full build out of 160 lots the estimated water use could be as high as 56.5 acre-feet/year. This estimate was based on an average of 3 persons per household (160 connections) using 105 gallons of water per day.

The applicant would like to request a total of 60 acre-feet/year. The additional volume above the maximum usage estimation of 56.5 acre-feet/year will insure that the future residents have adequate water supply for domestic use and for the possible need of additional water during adverse events such as fire suppression.

Plans and specifications have been submitted to the Texas Commission on Environmental Quality (TCEQ) for the public water system and the public supply wells. An application for a Certificate of Convenience and Necessity (CCN) has been submitted to the Public Utility Commission (PUC) of Texas to acquire the rights to serve water to the future residents of the subdivision. Once the wells are approved for construction by the TCEQ, the wells will be constructed and a 36-hour pump test will be conducted while monitoring one additional well located on the property. The data from these two pump tests will be submitted to HCUWCD upon completion of the testing.

Included with the application form are the required maps, a preliminary plat, a preliminary drought management plan, a preliminary conservation plan, and a preliminary leak detection plan.

I appreciate your time and assistance with this project. Please call me at 512-906-6291 if you have any questions or require additional information.

Respectfully,

Bryan W. Boyd, P.G.
Wet Rock Groundwater Services, LLC.
Ph: 512-906-6291
Email: b.boyd@wetrockgs.com

ENCL:

Attachment 1

Permitted Well Application for Municipal Use

Hill Country Underground Water Conservation District
Permitted Well Application
Municipal Use

508 South Washington- Fredericksburg, Texas 78624
Phone #830.997.4472; Fax #830.997.6721

PERMITS ARE ONLY ISSUED TO THE OWNER OF THE PROPERTY WHERE THE WELL IS OR WILL BE LOCATED.

Instructions: This application is used for a permitted well for municipal use. Municipal use is water used in municipalities or subdivisions serviced by a retail public utility. Within sixty (60) days after the General Manager has determined the application is administratively complete it will be placed as an agenda item at a board meeting date when the application will be reviewed by the board. Board meeting dates are subject to change.

The application must be completed for the Board to consider at their board meeting. Faxes will be accepted, however the District must receive the original application within 10 working days from the date the fax was sent. An application fee in the amount of $250.00 and deposit fee in the amount of $100.00 must also accompany the permit application, however no deposit fee is required if the well has already been drilled. The deposit fee will be refunded to the applicant when all required well information is supplied to the District or if the application is denied both the application fee and deposit fee will be refunded.

Please Complete The Following:

1. Applicant Data:

A. Name:
Municipality Water or Retail Public Utility:
Vineyard Ridge, LLC

Representative Name:
Davy Roberts

B. Address:
Mailing Address: PO Box 1987 Marble Falls, TX 78654

C. Telephone Number: 800-511-2430 Alternate Number: 281-705-0214

2. General Information

A. State the size of the following areas:

1) The total acreage within the corporate boundary of a municipality or retail public utility: 660 acres

2) The total acreage of those lots identified in a platted subdivision which will be added to the existing service of the servicing municipality or retail public utility: 660 acres

3) The total acreage, based on ½ acre per connection of a retail public utility outside municipal corporate boundaries within the District: The maximum number of connections/lots is 160 resulting in 80 acres

4) Contiguous area on which the well is located: 660 acres

B. State the last five year average annual amount of water used by the municipality or retail public utility: Not applicable - new subdivision and public water system

C. State all presently owned (developed and/or undeveloped) sources of water available for the amount cited on 2B:

1) Groundwater N/A - new water system acre feet per year

2) Surface _____ acre feet per year

3) Treated _____ acre feet per year

D. State the amount of additional water over the amount given in 2B that is requested for in this permit: 60 acre feet per year

E. State the total number of existing wells used to provide the amount of water in 2B: 2 public supply wells will be constructed to serve the subdivision

F. State the total number of new or existing wells to be used to provide the amount of water requested in 2D: 2 new wells

3. Well Location Information:

A. Property Address and/or general direction of existing or proposed well(s): The property is located along North Grape Creek road, approximately 14 miles northeast of the City of Fredericksburg in eastern Gillespie County.

B. Location and use of produced water:
Attach a map or plat drawn on a scale that adequately details the proposed project and show the actual or anticipated location of the existing or proposed well(s). Show the exact boundaries of property.

Distance from property lines to well: Well No. 1 - 1655 ft. Well No. 2 - 1224 ft.

Actual Pumping Capacity Of Well	Minimum Distance From Existing Permitted Wells and Between Proposed Permitted Wells	Distance From Property Line
Less than 17.36 gpm	150 feet	100 feet
17.36-200 gpm	300 feet	100 feet
200-400 gpm	750 feet	200 feet
400-800 gpm	1200 feet	400 feet
>800 gpm	1500 feet	400 feet

4. **Location of Adjacent Permitted Wells:**
With assistance from the District, attach a map or plat drawn on a scale that adequately identifies all permitted wells within a one-mile radius of the proposed or existing well.

5. **Water Conservation Plan**
Current per capita water demand N/A - new system gal/day.

Estimated usage at full build out:
105 gal/day person x 3 persons/household x 160 connections = 50,400 gal/day

Please attach all adopted water conservation and drought management plans along with what water conservation goals permittee has established, and what measures and time frames are necessary to achieve the permittee's established water conservation goals.

6. **Leak Detection**

A. Date of last leak detection program:
New system - not yet constructed

B. Percent of leakage:

C. Frequency of leak detection program:

D. Method used in leak detection:

E. Attach any leak detection program.

7. **Texas Commission On Environmental Quality (TCEQ)**
Have plans been submitted to TCEQ for proposed community water system?
[X] yes [ ] no
If yes, has approval been received? [ ] yes [X] no

8. **Other:**
If the water is to be resold to others, attach a description of the service area population, metering, leak and repair program, is this a platted development, delivery and distribution system including number of connections, information on customer's water demands (per capita water use), water use data, wastewater data, and water conservation measures and a water conservation and drought or emergency water management plan identifying trigger conditions and means of implementation and enforcement:

The District shall determine whether the application, maps, and other materials comply with requirements of this rule. The District may require amendment of the application, maps, or other materials to achieve necessary compliance.

Permit to drill a well is valid for 6 months only from date of approval. Permits to drill a well may be extended upon reasonable cause for an additional six months after which time the application process must be re-initiated.

I, the undersigned applicant hereby certify that I have read the foregoing statements and, to the best of my knowledge and belief, all data therein contained are true and correct and complies with all District Rules.

Executed this ____ day of

Applicant

4/12/17
Date

DAVY ROBERTS
Printed Name

PRESIDENT
Title

STATE OF TEXAS
COUNTY OF GILLESPIE

This instrument was acknowledged before me on the day 12th of April, 2017 by

MICHELLE ANN FERGUSON
Notary Public, State of Texas
Comm. Expires 01-14-2021
Notary ID 129265542

Notary Public In and For
State of Texas

Please initial in the space provided indicating that you have received, read and understood the District Rules. _____

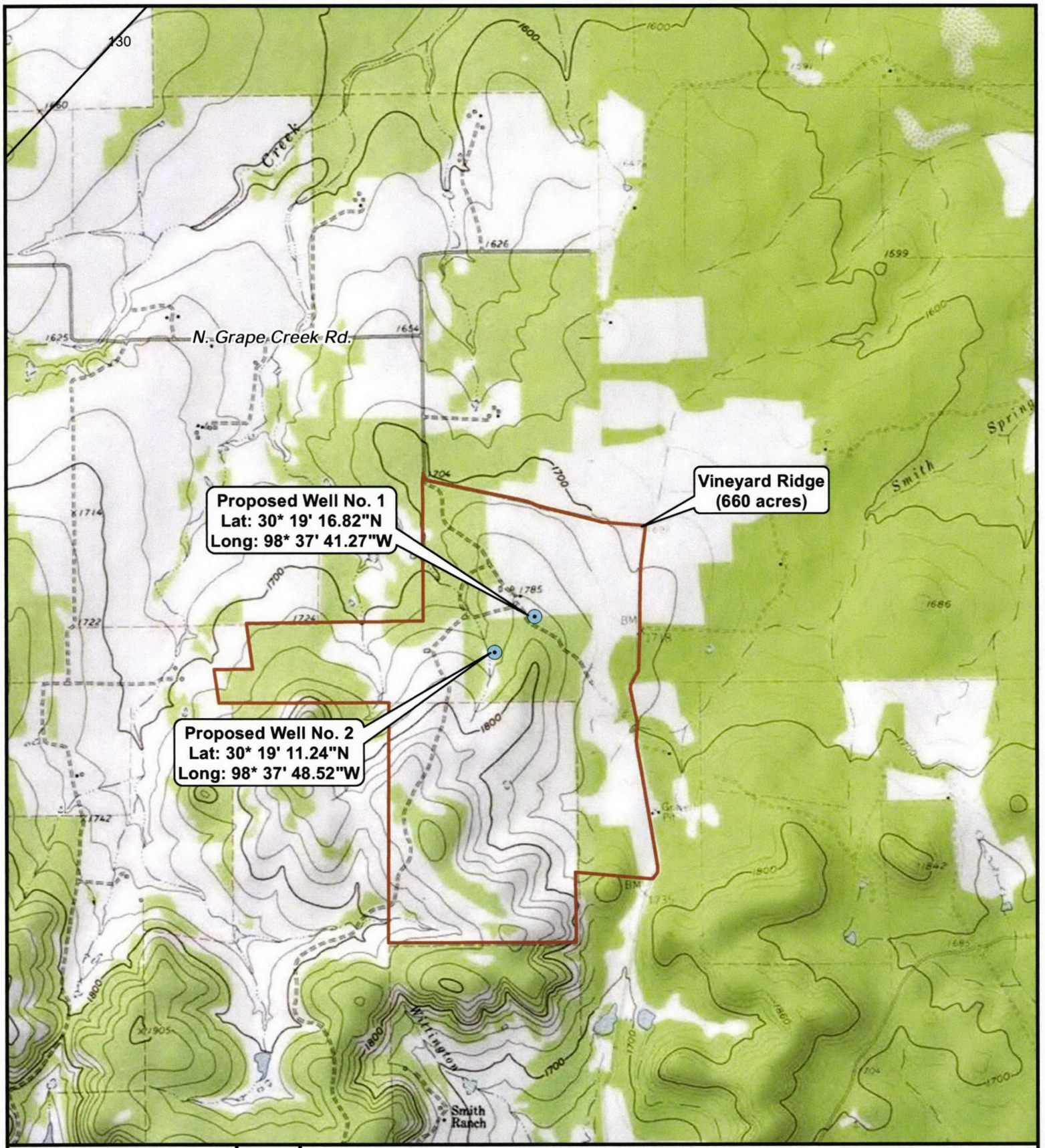
Fee: $_____ Fee Paid/Received:_____

For District Use Only

Permit No.:_____
Date Submitted:_____
Date Document Completed:_____
Hearing Date:_____
Approved:_____ Denied:_____
Permitted Volume:_____
Permitted Use:_____
Renewal Date:_____

Attachment 2

Location Map



Scale: 0 1,000 2,000 Feet

Drawn By: BB Date: 4-3-17

Quad Name and No:
Cave Creek School, TX 30098-C6

Projection:
UTM NAD 83 Zone 14

Vineyard Ridge Subdivision Well Nos. 1 & 2: Well Location Map

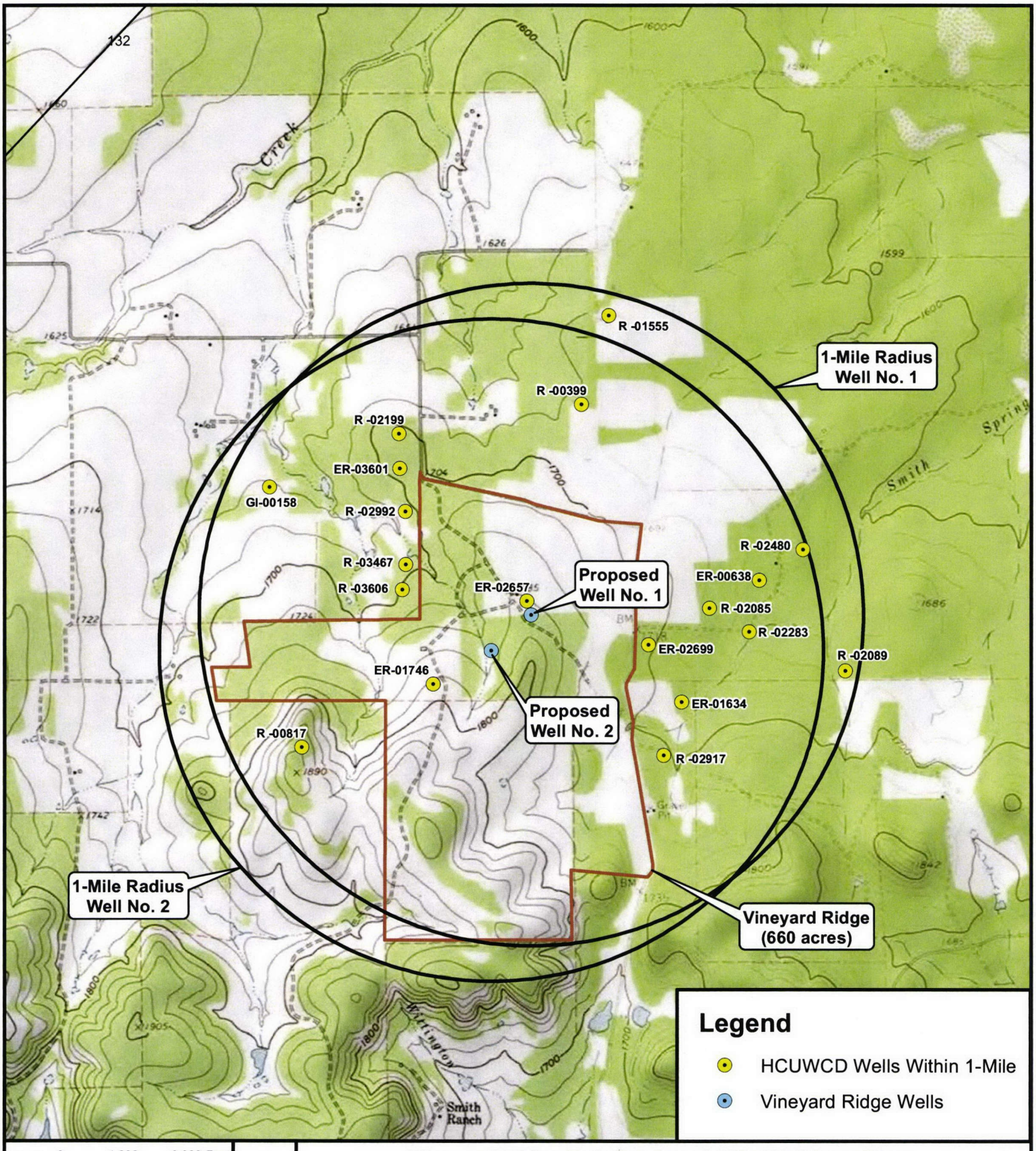
Vineyard Ridge Subdivision

Gillespie County, Texas

Wet Rock Groundwater Services, L.L.C.
Groundwater Specialists
TBPG Firm No: 50038
317 Ranch Road 620 South, Ste. 203
Austin, Texas 78734 Ph: 512.773.3226
www.wetrockgs.com

Attachment 3

Map of Adjacent Well Locations



Scale: 0 1,000 2,000 Feet

Drawn By: BB Date: 4-3-17

Quad Name and No:
Cave Creek School, TX 30098-C6

Projection:
UTM NAD 83 Zone 14

Vineyard Ridge Subdivision: 1-Mile Well Locations

Vineyard Ridge Subdivision

Gillespie County, Texas

Wet Rock Groundwater Services, L.L.C.
Groundwater Specialists
TBPG Firm No: 50038
317 Ranch Road 620 South, Ste. 203
Austin, Texas 78734 Ph: 512.773.3226
www.wetrockgs.com

Attachment 4

Preliminary Conservation Plan

Preliminary Water Conservation Plan

- Education material on water conservation for residents
- Recommended landscaping irrigation times and schedules
- Encourage use of low flow plumbing fixtures
- Encourage residents to utilize native landscaping and/or xeriscaping
- Implement leak detection program throughout the water system
- Conduct water usage/loss audits to insure beneficial use
- Provide water conservation awareness signage during times of drought

Attachment 5

Preliminary Leak Detection Plan

Preliminary Leak Detection Plan

- Driving distribution system on a weekly basis to visual inspect for possible leaks
- Analyzing the water loss percentage on a monthly basis
- Utilizing outside leak detection consultants when losses are detected but visual inspections are unable to reveal location of leaks

Attachment 6

Preliminary Drought Management Plan

DROUGHT CONTINGENCY PLAN
FOR

Vineyard Ridge, LLC
(Name of Utility)

14246 E. US Hwy 290, Stonewall, TX 78671
(Address, City, Zip Code)

TBA
(CCN#)

TBA
(PWS #s)

February 2017
(Date)

Section 1 Declaration of Policy, Purpose, and Intent

In cases of extreme drought, periods of abnormally high usage, system contamination, or extended reduction in ability to supply water due to equipment failure, temporary restrictions may be instituted to limit non-essential water usage. The purpose of the Drought Contingency Plan is to encourage customer conservation in order to maintain supply, storage, or pressure or to comply with the requirements of a court, government agency or other authority.

Please note: Water restriction is not a legitimate alternative if a water system does not meet the Texas Commission on Environmental Quality's (TCEQ) capacity requirements under normal conditions **or** if the utility fails to take all immediate and necessary steps to replace or repair malfunctioning equipment.

I, Davy Roberts (print name), being the responsible official for Vineyard Ridge, LLC (Name of utility), **request a minor tariff amendment to include the enclosed Drought Contingency Plan.**

(Signature)

2-8-17
(Date)

Section 2 Public Involvement

Opportunity for the public to provide input into the preparation of the Plan was provided by:
(Check at least one of the following)

Scheduling and providing public notice of a public meeting to accept input on the Plan.

The meeting took place at:

Date: _____ Time: _____ Location: _____

Mailed survey with summary of results **(attach survey and results)**

Bill insert inviting comment **(attach bill insert)**

Other method At this time there is no customer base as the CCN and PWS are in the approval stages. Upon approval, customers will be invited to provide comment via bill insert surveys.

Section 3 Public Education

The Vineyard Ridge, LLC (*name of utility*) will periodically provide the public with information about the Plan, including information about the conditions under which each stage of the Plan is to be initiated or terminated and the drought response measures to be implemented in each stage.

Drought plan information will be provided by:
(check at least one of the following)

public meeting

press releases

utility bill inserts

other _____

Section 4 Coordination with Regional Water Planning Groups

The service area of the Vineyard Ridge, LLC (*name of your utility*) is located within Regional Water Planning Group (RWPG) K.
Vineyard Ridge, LLC (*name of your utility*) has mailed a copy of this Plan to the RWPG.

Section 5 Notice Requirements

Written notice will be provided to each customer **prior to implementation or termination of each stage of the water restriction program**. Mailed notice must be given to each customer 72 hours prior to the start of water restriction. If notice is hand delivered, the utility cannot enforce the provisions of the plan for 24 hours after notice is provided. The written notice to customers will contain the following information:

1. the date restrictions will begin,
2. the circumstances that triggered the restrictions,
3. the stages of response and explanation of the restrictions to be implemented, and,
4. an explanation of the consequences for violations.

The utility must notify the TCEQ by telephone at (512) 239-4691, or electronic mail at *watermon@tceq.state.tx.us* prior to implementing Stage III and must notify in writing the Public Drinking Water Section at MC - 155, P.O. Box 13087, Austin, Texas 78711-3087 within five (5) working days of implementation including a copy of the utility's restriction notice. The utility must file a status report of its restriction program with the TCEQ at the initiation and termination of mandatory water use restrictions (i.e., Stages III and IV).

Section 6 Violations

First violation - The customer will be notified by written notice of their specific violation.

Subsequent violations:

a. After written notice, the utility may install a flow restricting device in the line to limit the amount of water which will pass through the meter in a 24-hour period. The utility may charge the customer for the actual cost of installing and removing the flow restricting device, not to exceed $150.00.

b. After written notice, the utility may discontinue service at the meter for a period of seven (7) days, or until the end of the calendar month, whichever is LESS. The reconnect fee of the utility will apply for restoration of service.

Section 7 Exemptions or Variances

The utility may grant any customer an exemption or variance from the drought contingency plan for good cause **upon written request**. A customer who is refused an exemption or variance may appeal such action of the utility in writing to the Texas Commission on Environmental Quality. The utility will treat all customers equally concerning exemptions and variances, and shall not discriminate in granting exemptions and variances. No exemption or variance shall be retroactive or otherwise justify any violation of this Plan occurring prior to the issuance of the variance.

Section 8 Response Stages

Unless there is an immediate and extreme reduction in water production, or other absolute necessity to declare an emergency or severe condition, the utility will initially declare Stage I restrictions. If, after a reasonable period of time, demand is not reduced enough to alleviate outages, reduce the risk of outages, or comply with restrictions required by a court, government agency or other authority, Stage II may be implemented with Stage III to follow if necessary.

STAGE I - CUSTOMER AWARENESS

Stage I will begin:

Every April 1st, the utility will mail a public announcement to its customers. No notice to TCEQ required.

Stage I will end:

Every September 30th, the utility will mail a public announcement to its customers. No notice to TCEQ required.

Utility Measures:

This announcement will be designed to increase customer awareness of water conservation and encourage the most efficient use of water. A copy of the current public announcement on water conservation awareness shall be kept on file available for inspection by the TCEQ.

Voluntary Water Use Restrictions:

Water customers are requested to voluntarily limit the use of water for non-essential purposes and to practice water conservation.

STAGE II - VOLUNTARY WATER CONSERVATION:

Target: Achieve a 5 **percent reduction in** daily water demand **(example: total water use, daily water demand, etc.)**

The water utility will implement Stage 2 when any one of the selected triggers is reached:

Supply-Based Triggers: (check at least one and fill in the appropriate value)

Well level reaches _____ ft. mean sea level (m.s.l.)
Overnight recovery rate reaches _____ ft.
Reservoir elevation reaches _____ ft. (m.s.l.)
Stream flow reaches _____ cfs at USGS gage # _____
Wholesale supplier's drought Stage 2

_____

Annual water use equals 85 % of well permit/Water Right/purchased water contract amount
Other _____

Demand- or Capacity-Based Triggers: (check at least one and fill in the appropriate value)

Drinking water treatment as % of capacity _____ %
Total daily demand as % of pumping capacity 85 %
Total daily demand as % of storage capacity _____ %
Pump hours per day _____ hrs.
Production or distribution limitations.
Other _____

Upon initiation and termination of Stage II, the utility will mail a public announcement to its customers. No notice to TCEQ required.

Requirements for Termination:

Stage II of the Plan may end when all of the conditions listed as triggering events have ceased to exist for a period of three (3) consecutive days. Upon termination of Stage II, Stage I becomes operative.

Utility Measures:

Visually inspect lines and repair leaks on a daily basis. Monthly review of customer use records and follow-up on any that have unusually high usage.

Describe additional measures, if any, to be implemented directly by the utility to manage limited water supplies and/or reduce water demand. Examples include: reduced or discontinued flushing of water mains, activation and use of an alternative supply source(s); use of reclaimed water for non-potable purposes.

The second water source for Vineyard Ridge, LLC (*name of utility*) is: (check one)

(Other well)
Interconnection with other system
Purchased water
Other
_____

Voluntary Water Use Restrictions:

1. Restricted Hours: Outside watering is allowed daily, but only during periods specifically described in the customer notice; between 10:00 p.m. and 5:00 a.m. for example; or

2. Restricted Days/Hours: Water customers are requested to voluntarily limit the irrigation of landscaped areas with hose-end sprinklers or automatic irrigation systems. Customers are requested to limit outdoor water use to **Mondays for water customers with a street address ending with the numbers 1, 2, or 3, Wednesdays for water customers with a street address ending with the numbers 4, 5, or 6, and Fridays for water customers with a street address ending with the numbers 7, 8, 9, or 0.** Irrigation of landscaped areas is further limited to the hours of 12:00 midnight until 10:00 a.m. and between 8:00 p.m. and 12:00 midnight on designated watering days. However, irrigation of landscaped areas is

permitted at anytime if it is by means of a hand-held hose, a faucet-filled bucket or watering can of five (5) gallons or less, or drip irrigation system; or

3. Other uses that waste water such as water running down the gutter.

STAGE III - MANDATORY WATER USE RESTRICTIONS:

Target: Achieve a 10 percent reduction in daily water demand (example: total water use, daily water demand, etc.)

The water utility will implement Stage III when any one of the selected triggers is reached:

Supply-Based Triggers (check at least one and fill in the appropriate value)

Well level reaches _____ ft. (m.s.l.)
Overnight recovery rate reaches _____ ft.
Reservoir elevation reaches _____ ft. (m.s.l.)
Stream flow reaches _____ cfs at USGS gage # _____
Wholesale supplier's drought Stage III
_____
Annual water use equals 90 % of well permit/Water Right/purchased water contract amount.
Other _____

Demand- or Capacity-Based Triggers (check at least one and fill in the appropriate value)

Drinking water treatment as % of capacity _____ %
Total daily demand as % of pumping capacity 90 %
Total daily demand as % of storage capacity _____ %
Pump hours per day _____ hrs.
Production or distribution limitations.
Other _____

Upon initiation and termination of Stage III, the utility will mail a public announcement to its customers. Notice to TCEQ required.

Requirements for Termination:

Stage III of the Plan may end when all of the conditions listed as triggering events have ceased to exist for a period of three (3) consecutive days. Upon termination of Stage III, Stage II becomes operative.

Utility Measures:

Visually inspect lines and repair leaks on a regular basis. Flushing is prohibited except for dead end mains.

Describe additional measures, if any, to be implemented directly by the utility to manage limited water supplies and/or reduce water demand. Examples include: activation and use of an alternative

supply source(s); use of reclaimed water for non-potable purposes; offering low-flow fixtures and water restrictors.

Mandatory Water Use Restrictions:

The following water use restrictions shall apply to all customers.

1. Irrigation of landscaped areas with hose-end sprinklers or automatic irrigation systems **shall be limited to Mondays for water customers with a street address ending with the numbers 1, 2, or 3, Wednesdays for water customers with a street address ending with the numbers 4, 5, or 6, and Fridays for water customers with a street address ending with the numbers 7, 8, 9, or 0.** Irrigation of landscaped areas is further limited to the hours of 12:00 midnight until 10:00 a.m. and between 8:00 p.m. and 12:00 midnight on designated watering days. However, irrigation of landscaped areas is permitted at anytime if it is by means of a hand-held hose, a faucet-filled bucket or watering can of five (5) gallons or less, or drip irrigation system.

2. Use of water to wash any motor vehicle, motorbike, boat, trailer, airplane or other vehicle is prohibited except on designated watering days between the hours of 12:00 midnight and 10:00 a.m. and between 8:00 p.m. and 12:00 midnight. Such washing, when allowed, shall be done with a hand-held bucket or a hand-held hose equipped with a positive shutoff nozzle for quick rinses. Vehicle washing may be done at any time on the immediate premises of a commercial car wash or commercial service station. Further, such washing may be exempted from these regulations if the health, safety, and welfare of the public are contingent upon frequent vehicle cleansing, such as garbage trucks and vehicles used to transport food and perishables.

3. Use of water to fill, refill, or add to any indoor or outdoor swimming pools, wading pools, or ■Jacuzzi• type pool are prohibited except on designated watering days between the hours of 12:00 midnight and 10:00 a.m. and between 8:00 p.m. and 12:00 midnight.

4. Operation of any ornamental fountain or pond for aesthetic or scenic purposes is prohibited except where necessary to support aquatic life or where such fountains or ponds are equipped with a recirculation system.

5. Use of water from hydrants or flush valves shall be limited to maintaining public health, safety, and welfare.

6. Use of water for the irrigation of golf courses, parks, and green belt areas are prohibited except by hand-held hose and only on designated watering days between the hours 12:00 midnight and 10:00 a.m. and between 8:00 p.m. and 12:00 midnight.

7. The following uses of water are defined as non-essential and are prohibited:

    a. wash down of any sidewalks, walkways, driveways, parking lots, tennis courts, or other hard-surfaced areas;
    b. use of water to wash down buildings or structures for purposes other than immediate fire protection;
    c. use of water for dust control;

d. flushing gutters or permitting water to run or accumulate in any gutter or street;
e. failure to repair a controllable leak(s) within a reasonable period after having been given notice directing the repair of such leak(s); and
f. any waste of water.

STAGE IV - CRITICAL WATER USE RESTRICTIONS:

Target: Achieve a 15 percent reduction in daily water demand (example: total water use, daily water demand, etc.)

The water utility will implement Stage IV when any one of the selected triggers is reached:

Supply-Based Triggers: (check at least one and fill in the appropriate value)

Well level reaches _____ ft. (m.s.l.)
Overnight recovery rate reaches _____ ft.
Reservoir elevation reaches _____ ft. (m.s.l.)
Stream flow reaches _____ cfs at USGS gage # _____
Wholesale supplier•s drought Stage IV
_____
Annual water use equals 95 % of well permit/Water Right/purchased water contract amount
Supply contamination
Other _____

Demand- or Capacity-Based Triggers: (check at least one and fill in the appropriate value)

Drinking water treatment as % of capacity _____ %
Total daily demand as % of pumping capacity 95 %
Total daily demand as % of storage capacity _____ %
Pump hours per day _____ hrs
Production or distribution limitations
System outage
Other _____

Upon initiation and termination of Stage IV, the utility will mail a public announcement to its customers. Notice to TCEQ required.

Requirements for Termination:

Stage IV of the Plan may be rescinded when all of the conditions listed as triggering events have ceased to exist for a period of three (3) consecutive days. Upon termination of Stage IV, Stage III becomes operative.

Operational Measures:

The utility shall visually inspect lines and repair leaks on a daily basis. Flushing is prohibited except for dead end mains and only between the hours of 9:00 p.m. and 3:00 a.m. Emergency interconnects or alternative supply arrangements shall be initiated. All meters shall be read as often as necessary to insure compliance with this program for the benefit of all the customers. *Describe additional measures, if any, to be implemented directly to manage limited water supplies and/or reduce water demand.*

Mandatory Water Use Restrictions: (all outdoor use of water is prohibited)

1. Irrigation of landscaped areas is absolutely prohibited.

2. Use of water to wash any motor vehicle, motorbike, boat, trailer, airplane or other vehicle is absolutely prohibited.

SYSTEM OUTAGE or SUPPLY CONTAMINATION

Notify TCEQ Regional Office immediately.

If you have any questions on how to fill out this form or about the Investor Owned Utility program, please contact us at 512/239-_____.

Individuals are entitled to request and review their personal information that the agency gathers on its forms. They may also have any errors in their information corrected. To review such information, contact us at 512-239-3282.

Attachment 7

Vineyard Ridge Plat

GENERAL NOTES

1 ALL VEHICLES AND/OR PERSONNEL OF GILLESPIE COUNTY WHEN ON OFFICIAL BUSINESS MAY USE THE PRIVATE STREETS OF VINEYARD RIDGE FOR ANY PURPOSE AT ANY TIME WITHOUT LIABILITIES AND MAY REMOVE ANY AND ALL OBSTRUCTIONS OF ANY TYPE IN THE PRIVATE STREETS AND ASSESS THE COST OF THE REMOVAL TO THE OWNER OR OWNERS OF THE OBSTRUCTION
2 THE STREETS SHOWN ON THIS PLAT ARE PRIVATE STREETS AND ARE ALSO DESIGNATED AS DRAINAGE ELECTRIC GAS TELEPHONE CABLE T V WATER AND SANITARY SEWER EASEMENTS SUCH AREAS SHALL BE DEEMED TO HAVE BEEN DEDICATED TO THE PUBLIC FOR SUCH EASEMENTS AND PRIVATE STREETS
3 BLOCKING THE FLOW OF WATER OR CONSTRUCTION OF IMPROVEMENTS IN DRAINAGE EASEMENTS AND FILLING OR OBSTRUCTION OF THE FLOODWAY IS PROHIBITED THE EXISTING CREEKS OR DRAINAGE CHANNELS TRAVERSING ALONG OR ACROSS THE PROPERTY WILL REMAIN AS OPEN CHANNELS AND WILL BE MAINTAINED BY THE INDIVIDUAL OWNERS OF THE LOT OR LOTS THAT ARE TRAVERSED BY OR ADJACENT TO THE DRAINAGE COURSES ALONG OR ACROSS SAID LOTS GILLESPIE COUNTY WILL NOT BE RESPONSIBLE FOR THE MAINTENANCE AND OPERATION OF SAID DRAINAGE WAYS OR THE CONTROL OF EROSION GILLESPIE COUNTY WILL NOT BE RESPONSIBLE FOR ANY DAMAGE PERSONAL INJURY OR LOSS OF LIFE OR PROPERTY OCCASIONED BY FLOODING OR FLOODING CONDITIONS
4 FOR RESIDENTIAL LOTS FINISHED FLOOR ELEVATIONS MUST BE A MINIMUM OF 8 INCHES ABOVE ADJACENT FINISHED GRADE
5 THIS SUBDIVISION IS NOT ENCROACHED BY A ZONE A FLOOD AREA AS DENOTED HEREIN AND AS DEFINED BY FEDERAL EMERGENCY MANAGEMENT ADMINISTRATION FLOOD HAZARD BOUNDARY MAP COMMUNITY PANEL NUMBERS 48171C0350C & 48171C0325C DATED EFFECTIVE OCTOBER 18 2001
6 THERE IS HEREBY DEDICATED A 15 PUBLIC UTILITY EASEMENT ADJACENT TO ALL STREET RIGHTS OF WAY
7 DOUBLE SWING GATES SHALL BE INSTALLED WHEREVER FENCES CROSS UTILITY AND DRAINAGE EASEMENTS
8 GILLESPIE COUNTY AND THE HILL COUNTRY UNDERGROUND WATER CONSERVATION DISTRICT MAKE NO REPRESENTATION OR GUARANTEE AS TO WATER QUALITY OR THAT A PRESENT OR FUTURE ADEQUATE WATER SUPPLY EXISTS
9 GILLESPIE COUNTY SHALL NOT BE RESPONSIBLE FOR MAINTENANCE OF PRIVATE STREETS DRIVES EMERGENCY ACCESS EASEMENTS RECREATION AREAS AND OPEN SPACES THE PROPERTY OWNERS IN THIS SUBDIVISION SHALL BE RESPONSIBLE FOR THE MAINTENANCE OF PRIVATE STREETS ROADS DRIVES EMERGENCY ACCESS EASEMENTS RECREATION AREAS AND OPEN SPACES AND SAID OWNERS AGREE TO INDEMNIFY AND SAVE HARMLESS GILLESPIE COUNTY FROM ALL CLAIMS DAMAGES AND LOSSES ARISING OUT OF OR RESULTING FROM PERFORMANCE OF THE OBLIGATIONS OF SAID OWNERS SET FORTH IN THIS PARAGRAPH
10 THIS PLAT VACATES AND REMOVES ALL EXISTING ELECTRIC AND TELEPHONE EASEMENTS THAT CURRENTLY ARE LOCATED WITHIN THE LOTS AS SHOWN ON THIS DOCUMENT
11 THIS SUBDIVISION IS WITHIN THE FREDERICKSBURG INDEPENDENT SCHOOL DISTRICT
12 ELECTRIC SERVICE PROVIDED BY CENTRAL TEXAS ELECTRIC COOP INC
13 RURAL MAILBOXES SHALL BE SET THREE FEET FROM THE EDGE OF PAVEMENT OR BEHIND CURBS WHEN USED ALL MAILBOXES WITHIN COUNTY ARTERIAL RIGHT-OF-WAY SHALL MEET THE CURRENT TXDOT STANDARDS ANY MAILBOX THAT DOES NOT MEET THIS REQUIREMENT MAY BE REMOVED BY GILLESPIE COUNTY
14 EXCEPT AS SHOWN ALL CORNERS ARE 1/2" IRON RODS
15 SEWER SERVICE WILL BE PROVIDED BY ON-SITE SEWER FACILITIES
16 ON NORTH GRAPE CREEK ROAD RIGHT OF WAY DEDICATION FOR WIDENING ROADWAYS OR IMPROVING DRAINAGE SHALL BE MAINTAINED BY THE LANDOWNER UNTIL ROAD OR DRAINAGE IMPROVEMENTS ARE ACTUALLY CONSTRUCTED ON THE PROPERTY THE COUNTY WILL BE RESPONSIBLE FOR RELOCATING THE EXISTING FENCE OUTSIDE OF THE RIGHT-OF-WAY DEDICATION WHEN FUTURE IMPROVEMENTS ARE CONSTRUCTED OR THE EXISTING FENCE IS REPLACED A FIVE STRAND BARBED WIRE FENCE WILL BE PROVIDED IF THE ADJACENT HOMEOWNER OR HOMEOWNERS ASSOCIATION DESIRES A DIFFERENT TYPE OF FENCE THE EQUIVALENT COST FOR A FIVE STRAND BARBED WIRE FENCE WILL BE PAID BY THE COUNTY

RIGHT OF WAY AGREEMENT

GRANTED UNTO CENTRAL TEXAS ELECTRIC COOPERATIVE INC A TEXAS CORPORATION WHOSE POST OFFICE ADDRESS IS FREDERICKSBURG TEXAS AND ITS SUCCESSORS OR ASSIGNS AN EASEMENT AS FOLLOWS GRANTORS HEREBY DEDICATE PERPETUAL EASEMENTS FOR THE INSTALLATION AND MAINTENANCE OF UTILITIES AND ALL NECESSARY APPURTENANCES THERETO WHETHER INSTALLED IN THE AIR UPON THE SURFACE OR UNDERGROUND ALONG AND WITHIN TEN (10) FEET OF THE REAR FRONT AND SIDE LINES OF ALL LOTS AND/OR TRACTS AND IN THE STREETS ALLEYS BOULEVARDS LANES AND ROADS OF THE SUBDIVISION AND TEN (10) FEET ALONG THE OTHER BOUNDARIES OF ALL STREETS BOULEVARDS LANES AND ROADS WHERE PROPERTY LINES OF INDIVIDUAL LOTS AND/OR TRACTS ARE DEEDED TO THE CENTER LINE OF SAID AVENUES AND TWENTY (20) FEET ALONG THE ENTIRE PERIMETER OF SAID SUBDIVISION AND WITH THE AUTHORITY TO PLACE CONSTRUCT OPERATE MAINTAIN RELOCATE AND REPLACE THEREON AN ELECTRIC DISTRIBUTION LINE OR SYSTEM THE EASEMENT RIGHTS HEREIN GRANTED INCLUDE THE PRIVILEGE OF ANCHORING ANY SUPPORT CABLES OR OTHER DEVICES OUTSIDE SAID EASEMENT WHEN DEEMED NECESSARY BY THE UTILITY TO SUPPORT EQUIPMENT WITHIN SAID EASEMENT AND THE RIGHT TO INSTALL WIRES AND/OR CABLES OVER SOME PORTIONS OF SAID LOTS AND/OR TRACTS NOT WITHIN SAID EASEMENT SO LONG AS SUCH ITEMS DO NOT PREVENT THE CONSTRUCTION OF BUILDINGS ON ANY OF THE LOTS AND/OR TRACTS OF THIS SUBDIVISION NOTHING SHALL BE PLACED OR PERMITTED TO REMAIN WITHIN THE EASEMENT AREAS WHICH MAY DAMAGE OR INTERFERE WITH INSTALLATION AND MAINTENANCE OF UTILITIES THE EASEMENT AREAS OF EACH LOT AND/OR TRACTS AND ALL IMPROVEMENTS WITHIN IT SHALL BE MAINTAINED BY THE OWNER OF THE LOT EXCEPT FOR THOSE IMPROVEMENTS WITHIN IT SHALL BE MAINTAINED BY THE OWNER OF THE LOT EXCEPT FOR THOSE IMPROVEMENTS FOR WHICH AN AUTHORITY OR UTILITY COMPANY IS RESPONSIBLE UTILITY COMPANIES OR THEIR EMPLOYEES SHALL HAVE ALL THE RIGHTS AND BENEFITS NECESSARY AND CONVENIENT FOR THE FULL ENJOYMENT OF THE RIGHTS HEREIN GRANTED INCLUDING BUT NOT LIMITED TO THE FREE RIGHT TO INGRESS TO AND EGRESS FROM SAID RIGHT OF WAY AND EASEMENTS AND THE RIGHT FROM TIME TO TIME TO CUT AND TRIM TREES UNDERGROWTH AND OTHER OBSTRUCTIONS THAT MAY INJURE ENDANGER OR INTERFERE WITH THE OPERATION OF SAID INSTALLATIONS THE DEVELOPER AND/OR LANDOWNER SHALL BE RESPONSIBLE FOR REMOVAL OF ANY OR ALL LIMBS DEBRIS BRANCHES OR BRUSH THAT MUST BE CUT IN ORDER TO CLEAR THE RIGHT-OF WAY FOR NEW CONSTRUCTION OR MAINTENANCE OF ANY LINES CONSTRUCTED ON THE PROPERTY

APPROVED VARIANCES

1 A VARIANCE TO THE SUBDIVISION REGULATIONS FOR GILLESPIE COUNTY SECTION 3 4 ACCESS TO PERMITTED ROADS IN ACCORDANCE WITH THE VARIANCE THE MINIMUM LOT FRONTAGE FOR THIS SUBDIVISION IS 150 FEET ON ALL ROADS AND 80 FEET ON CUL DE SACS (TURNING CIRCLE)
2 A VARIANCE TO THE STANDARD 75 FOOT PROPERTY LINE SETBACKS WITHIN GILLESPIE COUNTY FOR ON-SITE SEPTIC FACILITIES (OSSF) ALL OSSF SETBACKS THIS DEVELOPMENT SHALL MEET THE MINIMUM REQUIREMENTS PER 30 TAC CHAPTER 285 91(10)

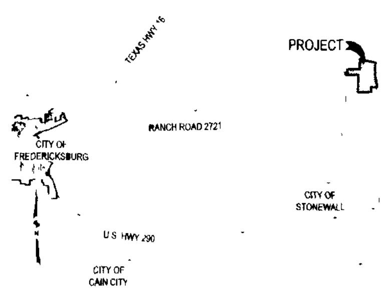
SANITARY CONTROL EASEMENT

PURPOSE RESTRICTIONS AND USES OF EASEMENT
1 THE PURPOSE OF THIS EASEMENT IS TO PROTECT THE WATER SUPPLY OF THE WELL DESCRIBED AND LOCATED BELOW BY MEANS OF SANITARY CONTROL
2 THE CONSTRUCTION EXISTENCE AND/OR OPERATION OF THE FOLLOWING WITHIN A 150-FOOT RADIUS OF THE WELL DESCRIBED AND LOCATED BELOW ARE PROHIBITED SEPTIC TANK OR SEWAGE TREATMENT PERFORATED DRAINFIELDS AREAS IRRIGATED BY LOW DOSAGE LOW ANGLE SPRAY ON-SITE SEWAGE FACILITIES ABSORPTION BEDS EVAPOTRANSPIRATION BEDS ABANDONED INOPERATIVE OR IMPROPERLY CONSTRUCTED WATER WELLS OF ANY DEPTH UNDERGROUND PETROLEUM AND CHEMICAL STORAGE TANKS OR LIQUID TRANSMISSION PIPELINES SEWAGE TREATMENT PLANTS SEWAGE WET WELLS SEWAGE PUMPING STATIONS DRAINAGE DITCHES WHICH CONTAINS INDUSTRIAL WASTE DISCHARGES OR WASTES FROM SEWAGE TREATMENT SYSTEMS ANIMAL FEEDLOTS SOLID WASTE DISPOSAL SITES LANDFILL AND DUMP SITES LANDS ON WHICH SEWAGE PLANT OR SEPTIC TANK SLUDGE IS APPLIED LANDS IRRIGATED BY SEWAGE PLANT EFFLUENT MILITARY FACILITIES INDUSTRIAL FACILITIES WOOD-TREATMENT FACILITIES LIQUID PETROLEUM AND PETROCHEMICAL PRODUCTION STORAGE AND TRANSMISSION FACILITIES CLASS 1 2 3 AND 4 INJECTION WELLS PESTICIDE STORAGE AND MIXING FACILITIES AND ALL OTHER CONSTRUCTIONS OR OPERATIONS THAT COULD POLLUTE THE GROUNDWATER SOURCES OF THE WELL THAT IS THE SUBJECT OF THIS EASEMENT FOR THE PURPOSE OF THIS EASEMENT IMPROPERLY CONSTRUCTED WATER WELLS ARE THOSE WELLS WHICH DO NOT MEET THE SURFACE AND SUBSURFACE CONSTRUCTION STANDARDS FOR A PUBLIC WATER SUPPLY WELL
3 THE CONSTRUCTION EXISTENCE AND/OR OPERATION OF TILE OR CONCRETE SANITARY SEWERS SEWER APPURTENANCES SEPTIC TANKS STORM SEWERS CEMETERIES AND/OR THE EXISTENCE OF LIVESTOCK IN PASTURES IS SPECIFICALLY PROHIBITED WITHIN A 50-FOOT RADIUS OF THE WATER WELL DESCRIBED AND LOCATED BELOW
4 THIS EASEMENT PERMITS THE CONSTRUCTION OF HOMES OR BUILDINGS UPON THE GRANTOR'S PROPERTY AND FARMING AND RANCHING OPERATIONS AS LONG AS ALL ITEMS IN RESTRICTIONS NOS 2 AND 3 ARE RECOGNIZED AND FOLLOWED

PRELIMINARY PLAT OF VINEYARD RIDGE

BEING A 660 723 ACRE TRACT OF LAND LOCATED IN THE W PRICE SURVEY NO 210 ABSTRACT NO 540 THE J MACKEY SURVEY NO 743 ABSTRACT NO 481 THE H KAMMANN SURVEY NO 298 ABSTRACT NO 863 THE W LINDEMAN SURVEY NO 295 ABSTRACT NO 872 THE E KLANNER SURVEY NO 808 ABSTRACT NO 1067 THE A RODRIGUEZ SURVEY NO 8 ABSTRACT NO 570 AND THE R MEANS SURVEY NO 6 ABSTRACT NO 457 GILLESPIE COUNTY TEXAS BEING ALL OF A CALLED 660 00 ACRE TRACT OF LAND BASED ON A SURVEY CONDUCTED BY HAMBRIGHT LAND SURVEYING IN SEPTEMBER OF 2013 AND BEING ALL OF THAT CERTAIN 660 44 ACRE TRACT OF LAND RECORDED IN DOCUMENT NO 20080373 OFFICIAL PUBLIC RECORDS OF GILLESPIE COUNTY TEXAS

NEW RESIDENTIAL LOTS 160
L F OF NEW STREETS 19 975
ACERAGE OF NEW STREET 9 8



LOCATION MAP
NOT TO SCALE

THIS SUBDIVISION PLAT OF VINEYARD RIDGE HAS BEEN SUBMITTED TO AND CONSIDERED BY THE COMMISSIONERS COURT OF GILLESPIE COUNTY TEXAS AND WAS HEREBY APPROVED BY SUCH

DATED THIS DAY OF 2016

BY
COUNTY JUDGE

BY
SECRETARY

VINEYARD RIDGE LLC (OWNER) BY FILING THIS PLAT OF RECORD AND ALL FUTURE OWNERS OF PROPERTY WITHIN THIS SUBDIVISION BY PURCHASING SUCH PROPERTY ACKNOWLEDGE AND AGREE THAT GILLESPIE COUNTY SHALL HAVE NO OBLIGATION WHATSOEVER TO REPAIR OR ACCEPT MAINTENANCE OF THE ROADS IN THIS SUBDIVISION UNTIL AND UNLESS VINEYARD RIDGE, LLC OWNER) AND/OR THE PROPERTY OWNERS IN THE SUBDIVISION HAVE IMPROVED THE ROADWAYS TO THE THEN CURRENT STANDARDS REQUIRED BY GILLESPIE COUNTY AND THE ROADS HAVE BEEN ACCEPTED FOR MAINTENANCE BY FORMAL WRITTEN ACTION OF THE GILLESPIE COUNTY COMMISSIONERS COURT AND THE ROADWAY HAS BEEN DEDICATED BY THE OWNERS THEREOF AND BY THE COUNTY AS A PUBLIC ROAD VINEYARD RIDGE LLC (OWNER) AND ALL FUTURE OWNERS OF THE PROPERTY WITHIN THIS SUBDIVISION SHALL LOOK SOLELY TO THE OWNER THE PROPERTY OWNERS IN THE SUBDIVISION AND/OR HOMEOWNERS ASSOCIATION FOR FUTURE MAINTENANCE AND REPAIR OF THE ROADS SHOWN ON THIS SUBDIVISION PLAT

STATE OF TEXAS
COUNTY OF GILLESPIE

THE OWNERS OF THE LAND IDENTIFIED BY ABSTRACTS NUMBERS RECORDED IN THE VOLUME AND PAGE NUMBERS SHOWN ON THIS PLAT AND WHOSE NAMES ARE SUBSCRIBED HERETO AND IN PERSON OR THROUGH A DULY AUTHORIZED AGENT ACKNOWLEDGE THAT THIS PLAT WAS MADE FROM ACTUAL SURVEYS ON THE GROUND AND DEDICATES TO THE USE OF THE PUBLIC FOREVER ALL PUBLIC UTILITY EASEMENTS THEREON SHOWN FOR THE PURPOSE AND CONSIDERATION THEREIN EXPRESSED

VINEYARD RIDGE LLC

BEFORE ME THE UNDERSIGNED AUTHORITY ON THIS DAY PERSONALLY APPEARED Davy Roberts KNOWN TO ME TO BE THE PERSON WHOSE NAME IS SUBSCRIBED TO THE FOREGOING INSTRUMENT AND ACKNOWLEDGED TO ME THAT THEY EXECUTED THE SAME FOR THE PURPOSES AND CONSIDERATIONS THEREIN EXPRESSED AND IN THE CAPACITY THEREIN STATED
GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS 27th DAY OF December
A D 2016

SHARI WILLIAMS MARCELL
ID #
My Commission Expires
January 18 2020

Shari W Marcell
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS
Shari W. Marcell
PRINTED NAME

STATE OF TEXAS
COUNTY OF GILLESPIE

I COUNTY CLERK OF SAID COUNTY DO HEREBY CERTIFY THAT THE FOREGOING INSTRUMENT OF WRITING WITH ITS CERTIFICATE OF AUTHENTICATION WAS FILED FOR RECORD IN MY OFFICE ON THE DAY OF A D 2016 AT M IN THE RECORDS OF DEEDS AND PLATS OF SAID COUNTY IN BOOK VOLUME ON PAGE IN TESTIMONY WHEREOF WITNESS MY HAND AND OFFICIAL SEAL OF OFFICE THIS DAY OF A D 2016

COUNTY CLERK GILLESPIE COUNTY TEXAS

BY DEPUTY

ENGINEERS CERTIFICATE
STATE OF TEXAS
COUNTY OF GILLESPIE
I HEREBY CERTIFY THAT PROPER ENGINEERING CONSIDERATION HAS BEEN GIVEN THIS PLAT TO THE MATTERS OF STREETS LOTS AND DRAINAGE LAYOUT TO THE BEST OF MY KNOWLEDGE THIS PLAT CONFORMS TO ALL REQUIREMENTS OF THE SUBDIVISION REGULATIONS EXCEPT FOR THOSE VARIANCES GRANTED BY THE COMMISSIONERS COURT OF GILLESPIE COUNTY

LICENSED PROFESSIONAL ENGINEER

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 29th DAY OF December
A D 2016

SHARI WILLIAMS MARCELL
ID #
My Commission Expires
January 18 2020

Shari W Marcell
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS
Shari W Marcell
PRINTED NAME

SURVEYORS CERTIFICATE

STATE OF TEXAS
COUNTY OF GILLESPIE

I HEREBY CERTIFY THIS PLAT IS TRUE AND CORRECT AND WAS PREPARED FROM AN ACTUAL SURVEY OF THE PROPERTY MADE UNDER MY SUPERVISION ON THE GROUND

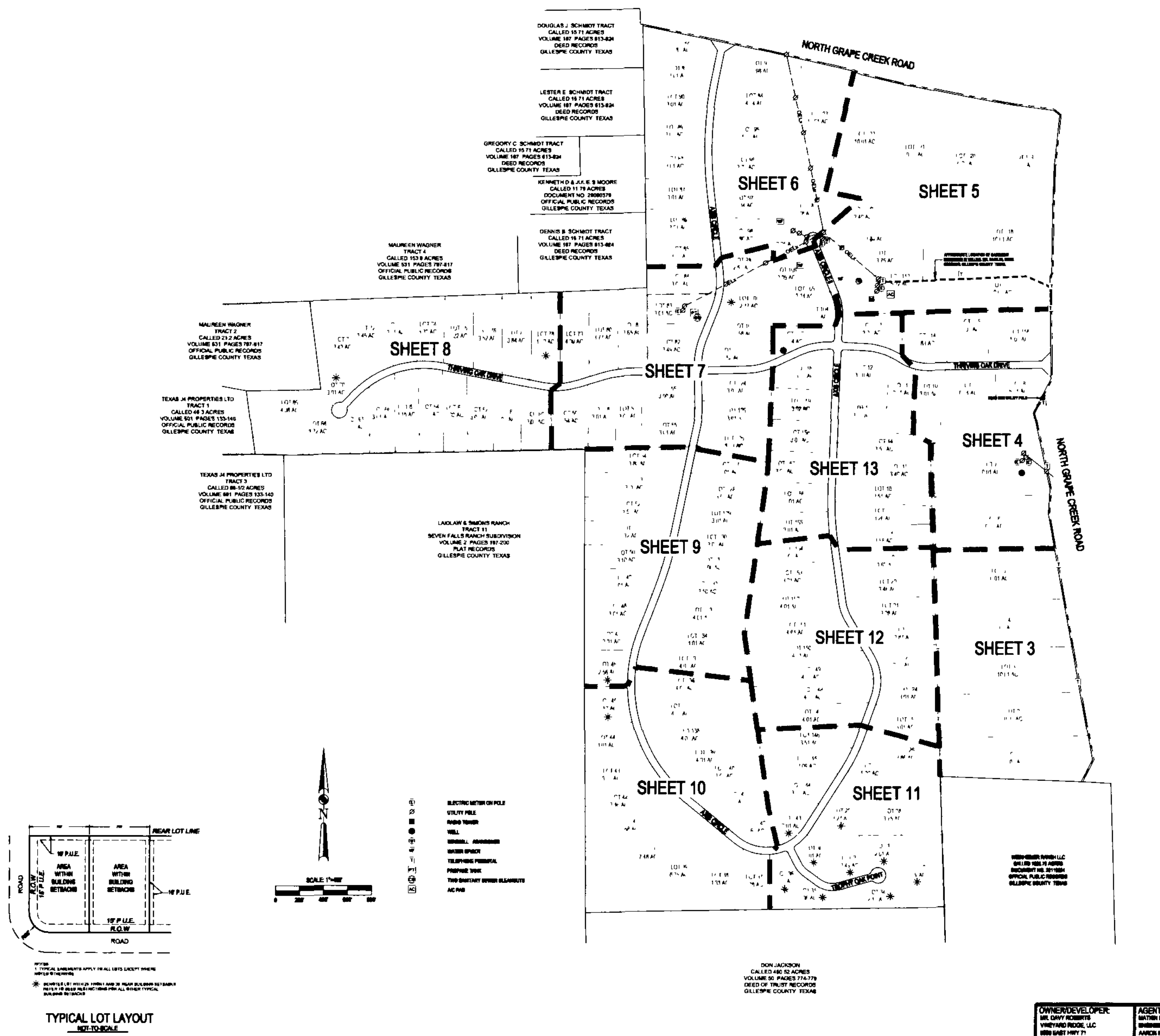
REGISTERED PROFESSIONAL LAND SURVEYOR

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 29th DAY OF December
A D 2016

SHARI WILLIAMS MARCELL
ID #
My Commission Expires
January 18 2020

Shari W Marcell
NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS
Shari W. Marcell
PRINTED NAME

OWNER/DEVELOPER	SURVEYOR	AGENT		
VINEYARD RIDGE LLC DAVY ROBERTS 9508 EAST HWY 71 SPICEWOOD TX 78669 800-511 2430	MATKIN HOOVER ENGINEERING & SURVEYING C/O JEFF BOERNER P E 8 SPENCER ROAD SUITE 100 BOERNE TEXAS 78006 (830) 249-0600	MATKIN HOOVER ENGINEERING & SURVEYING C/O AARON NEUMANN P E 8 SPENCER ROAD SUITE 100 BOERNE TEXAS 78006 (830) 249-0600 ANEUMANN@MATKINHOOVER.COM	MATKIN HOOVER ENGINEERING & SURVEYING	DATE NOVEMBER 2016 JOB NO 2790.00 SHEET 1 OF 13



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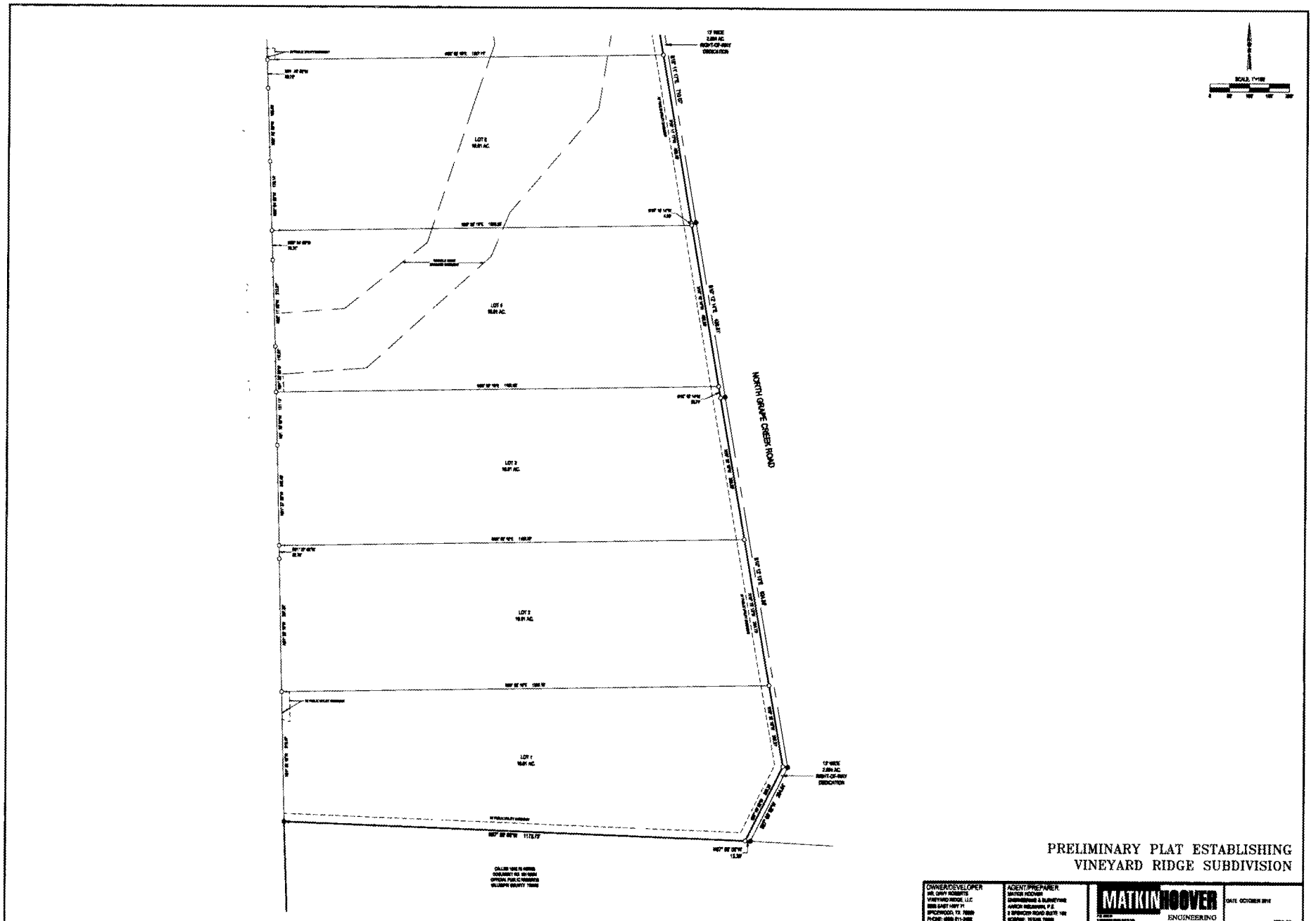
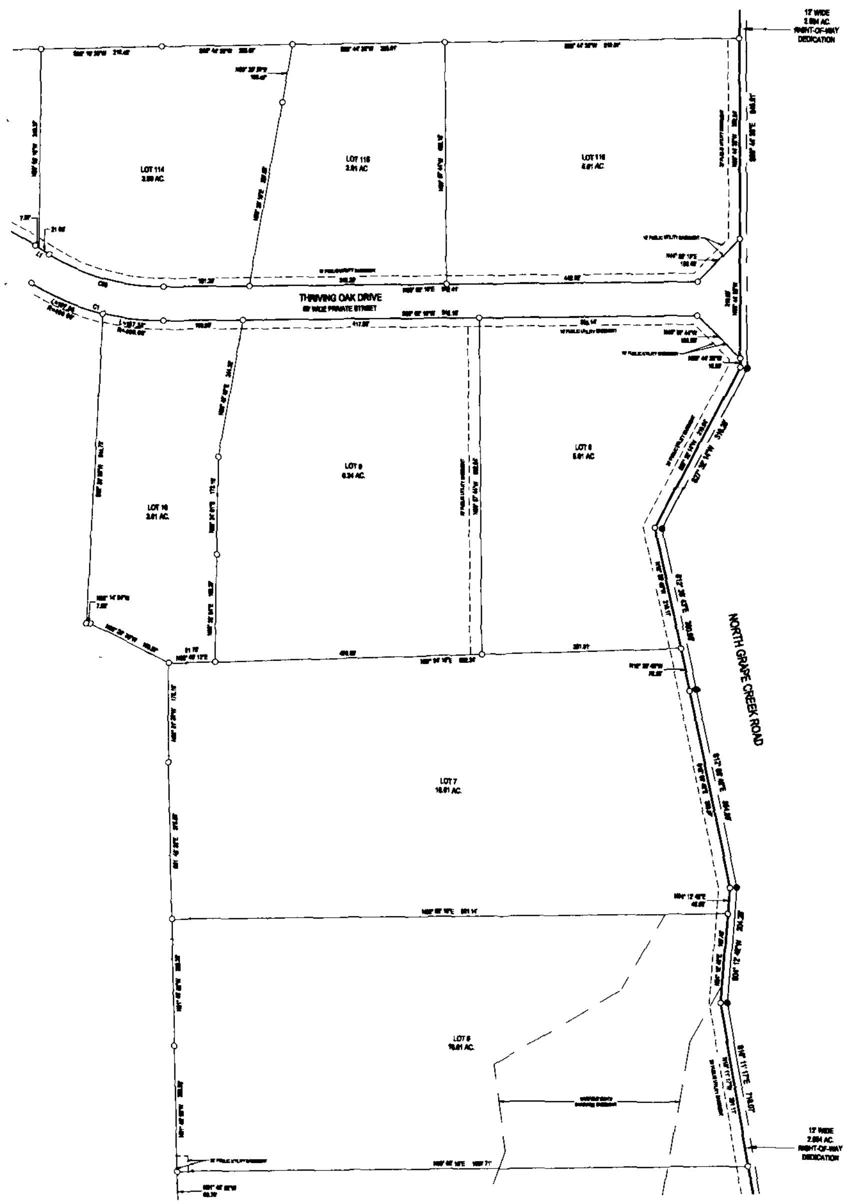
PRELIMINARY PLAT ESTABLISHING VINEYARD RIDGE SUBDIVISION

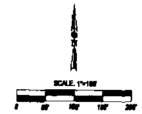
OWNER/DEVELOPER:	AGENT/PREPARER:	MATKIN HOOVER ENGINEERING & SURVEYING	
MR. DAVY ROBERTS VINEYARD RIDGE, LLC [illegible] EAST HWY 71 SPICEWOOD, TX [illegible] PHONE: [illegible]	MATKIN HOOVER ENGINEERING & SURVEYING AARON NEUMANN, P.E. [illegible] SPENCER ROAD SUITE 100 BOERNE, TEXAS [illegible] OFF: [illegible] FAX: [illegible] ANEUMANN@MATKINHOOVER.COM	TEXAS REGISTERED ENGINEERING FIRM F-004512 TEXAS REGISTERED SURVEYING FIRM F-10024000	DATE: OCTOBER 2016 JOB NO. 2790.00 SHEET 2 OF 13



PRELIMINARY PLAT ESTABLISHING
VINEYARD RIDGE SUBDIVISION

OWNER/DEVELOPER	AGENT/PREPARER		
MR. GARY ROBERTS VINEYARD RIDGE, LLC 8555 EAST HWY 71 SPICEWOOD, TX. 78669 PHONE: (830) 611-3482	MATKIN HOOVER ENGINEERING & SURVEYING AARON HEUERMAN, P.E. 2 SPENCER ROAD SUITE 105 BOERNE, TEXAS 78006 OFF: (830) 249-0600 FAX: (830) 249-0099	MATKIN HOOVER ENGINEERING & SURVEYING	DATE: OCTOBER 2016 JOB NO. 2750.00 SHEET 3 OF 13





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LINE	BEARING	DISTANCE
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CURVE TABLE					
CURVE	RADIUS	LENGTH	DELTA	CHORD BEARING	CHORD LENGTH
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PRELIMINARY PLAT ESTABLISHING VINEYARD RIDGE SUBDIVISION

OWNER/DEVELOPER.

AGENT/PREPARER

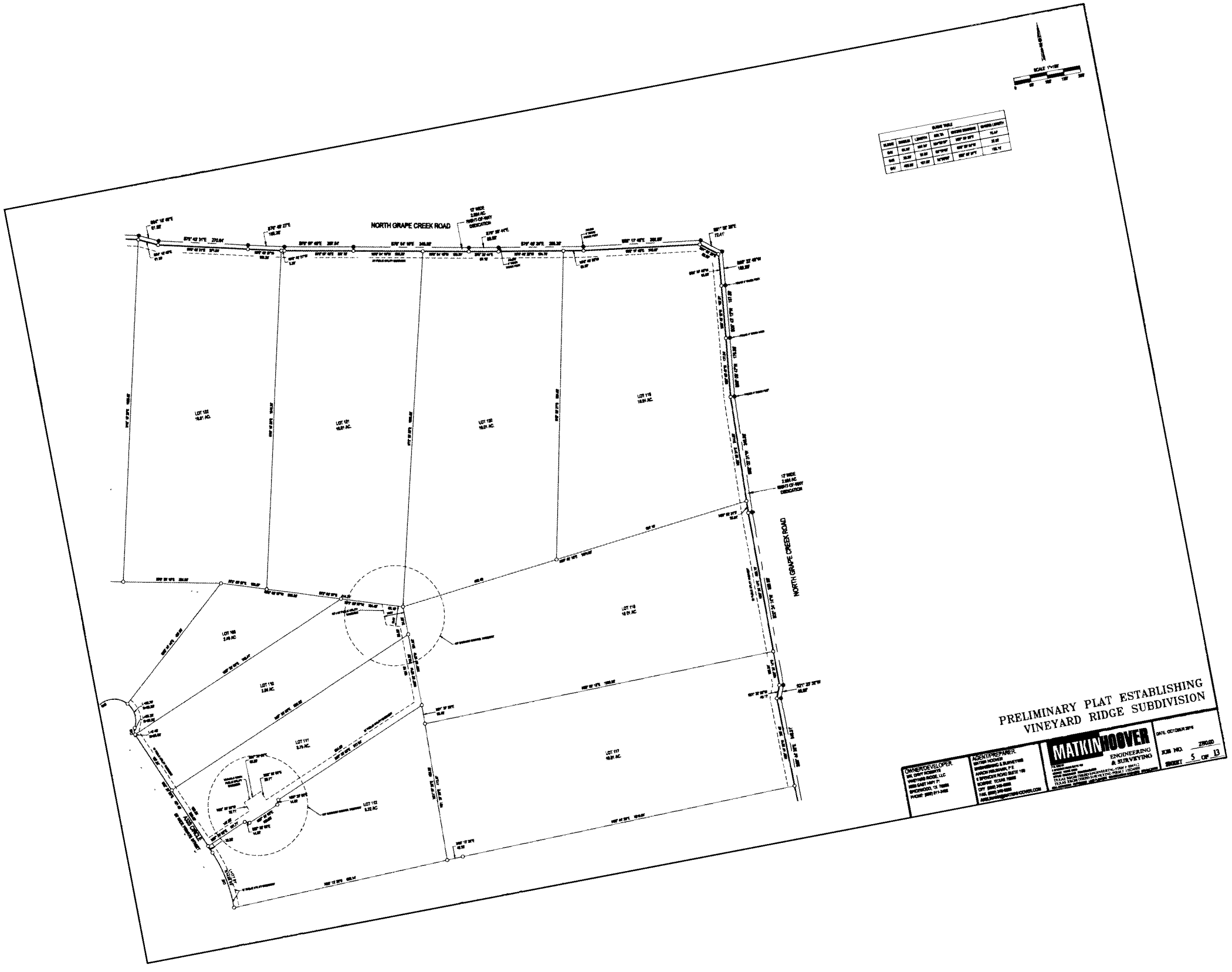
MATKIN HOOVER
ENGINEERING & SURVEYING

TEXAS REGISTERED ENGINEERING FIRM F-004512
TEXAS REGISTERED SURVEYING FIRM F-10024000

DATE: OCTOBER 2016

JOB NO. 2790.00

SHEET 4 OF 13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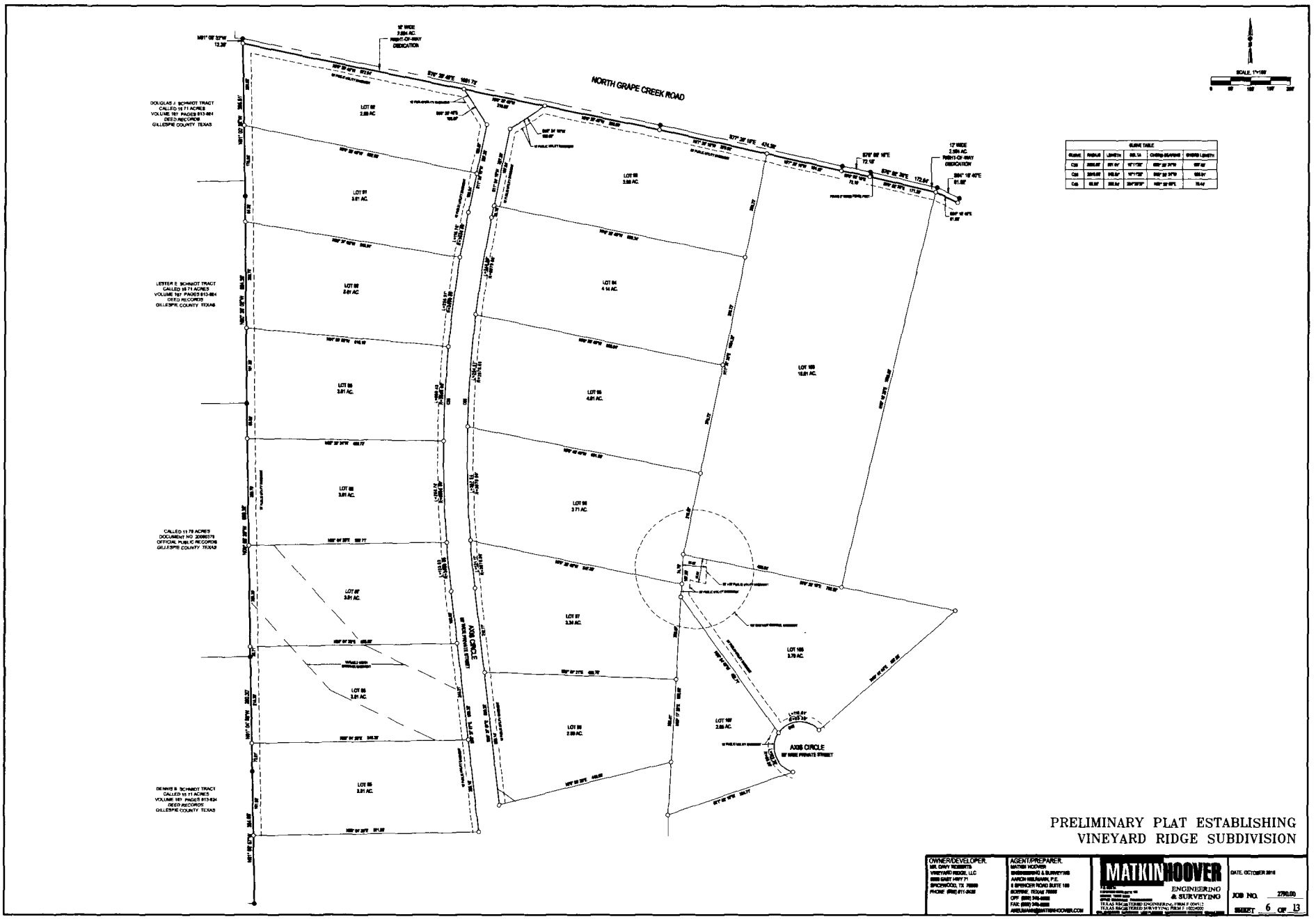
2.064 AC.
RIGHT-OF-WAY
DEDICATION
LOT 115
16.91 AC.
LOT 116
16.91 AC.
LOT 117
16.91 AC.
LOT 118
16.91 AC.
LOT 119
2.49 AC.
LOT 120
3.84 AC.
LOT 121
5.79 AC.
LOT 122
5.33 AC.
NORTH GRAPE CREEK ROAD
CURVE TABLE
SCALE 1"=100'
PRELIMINARY PLAT ESTABLISHING
VINEYARD RIDGE SUBDIVISION
OWNER/DEVELOPER
AGENT/PREPARER
MATKIN HOOVER
ENGINEERING & SURVEYING
DATE: OCTOBER 2019
JOB NO. 27900
SHEET 5 OF 13



PRELIMINARY PLAT ESTABLISHING VINEYARD RIDGE SUBDIVISION

OWNER/DEVELOPER:
MR. GARY ROBERTS
VINEYARD RIDGE, LLC
[illegible] EAST HWY 71
BRODWOOD, TX 78926
PHONE: (512) 811-9435

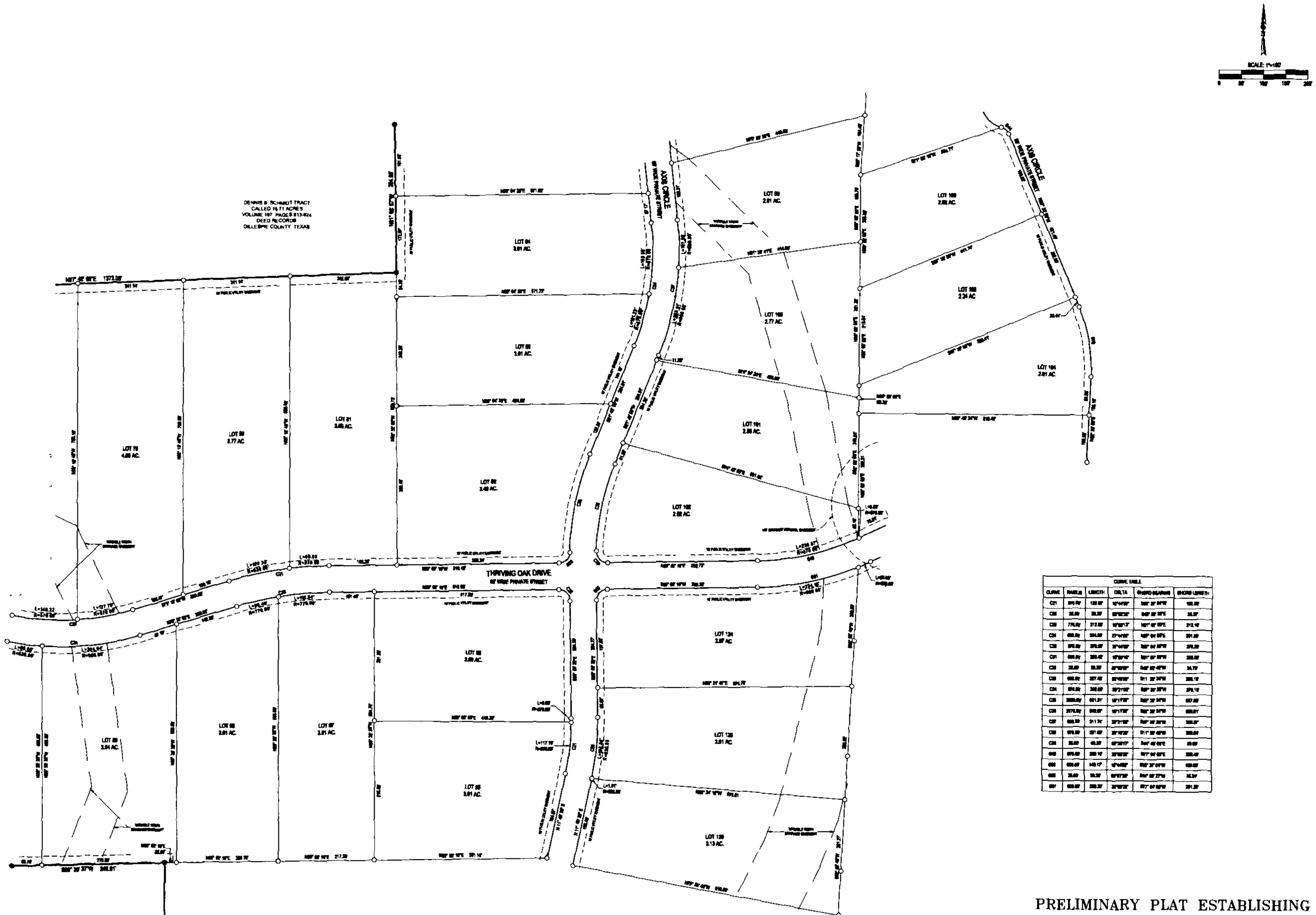
AGENT/PREPARER:
MATKIN HOOVER
ENGINEERING & SURVEYING
AARON HELMANN, P.E.
[illegible] SPENCER ROAD SUITE 105
BOERNE, TEXAS 78006
OFF: (830) 249-0600
FAX: (830) 249-0099
AHELMANN@MATKINHOOVER.COM

MATKINHOOVER
ENGINEERING & SURVEYING
TEXAS REGISTERED ENGINEERING FIRM F-00411
TEXAS REGISTERED SURVEYING FIRM F-10024200

DATE: OCTOBER 2018

JOB NO. 2790.00

SHEET 6 OF 13



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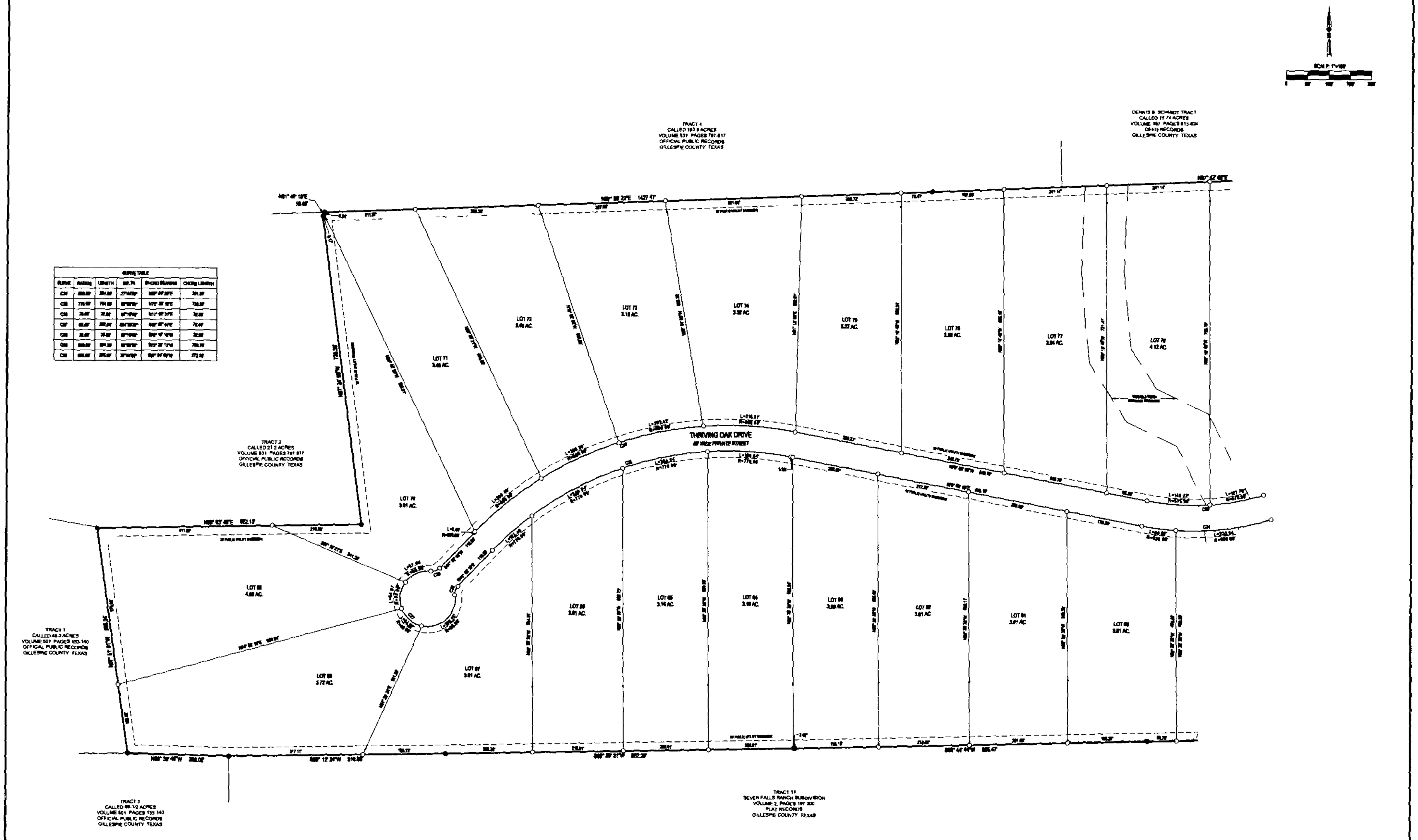
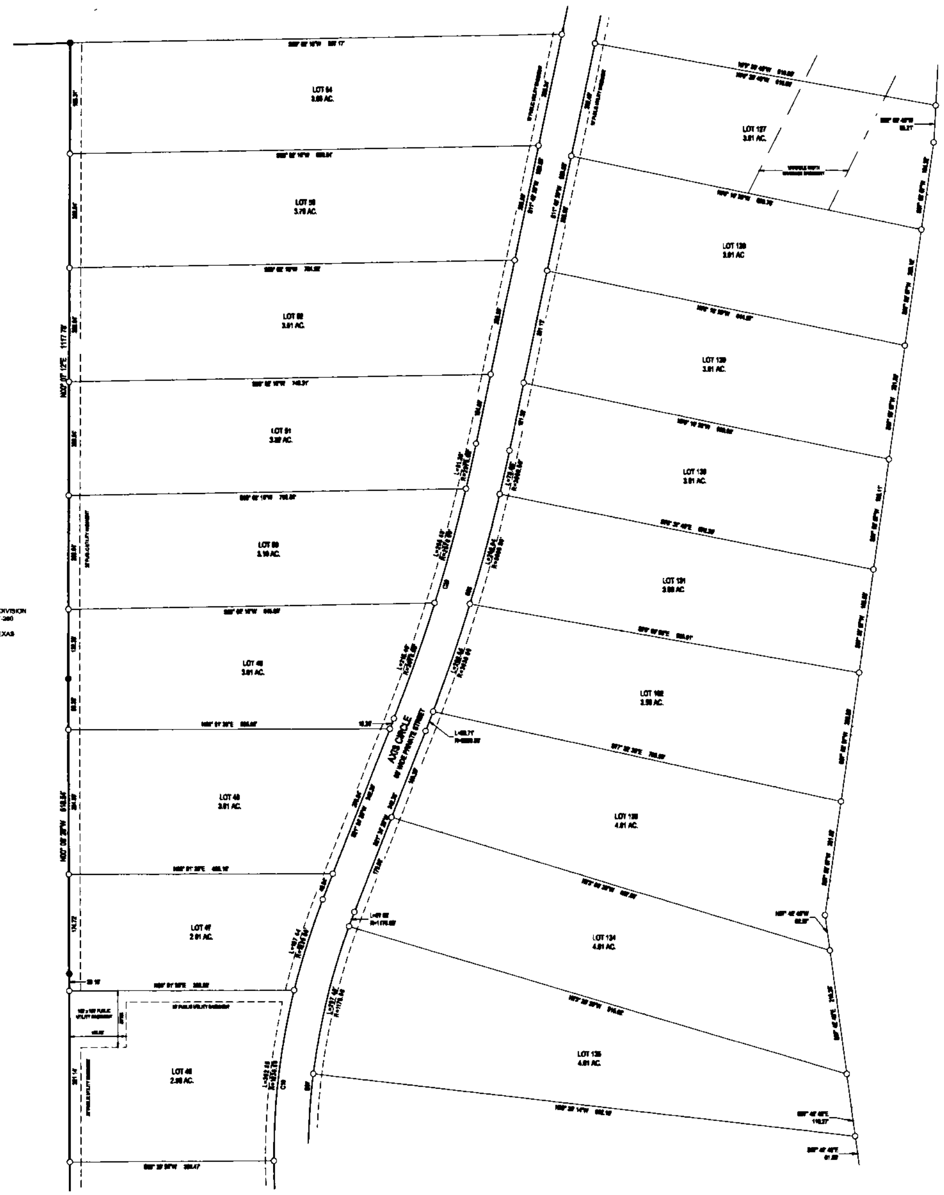
PRELIMINARY PLAT ESTABLISHING VINEYARD RIDGE SUBDIVISION

OWNER/DEVELOPER	AGENT/PREPARER	MATKIN HOOVER ENGINEERING & SURVEYING	
[illegible]	MATKIN HOOVER ENGINEERING & SURVEYING	TEXAS REGISTERED ENGINEERING FIRM F-004512	DATE: OCTOBER 2016
VINEYARD RIDGE, LLC	[illegible]	TEXAS REGISTERED SURVEYING FIRM F-10024000	JOB NO. 2790.00
SPICEWOOD, TX [illegible]	[illegible]		SHEET 7 OF 13



PRELIMINARY PLAT ESTABLISHING
VINEYARD RIDGE SUBDIVISION

OWNER/DEVELOPER	AGENT/PREPARER	MATKIN HOOVER ENGINEERING & SURVEYING	
VINEYARD RIDGE, LLC	MATKIN HOOVER	TEXAS REGISTERED ENGINEERING FIRM F 004512	JOB NO. 2790.00
SPICEWOOD, TX	AARON NEUMANN, P.E.	TEXAS REGISTERED SURVEYING FIRM F 10024000	SHEET 8 OF 13



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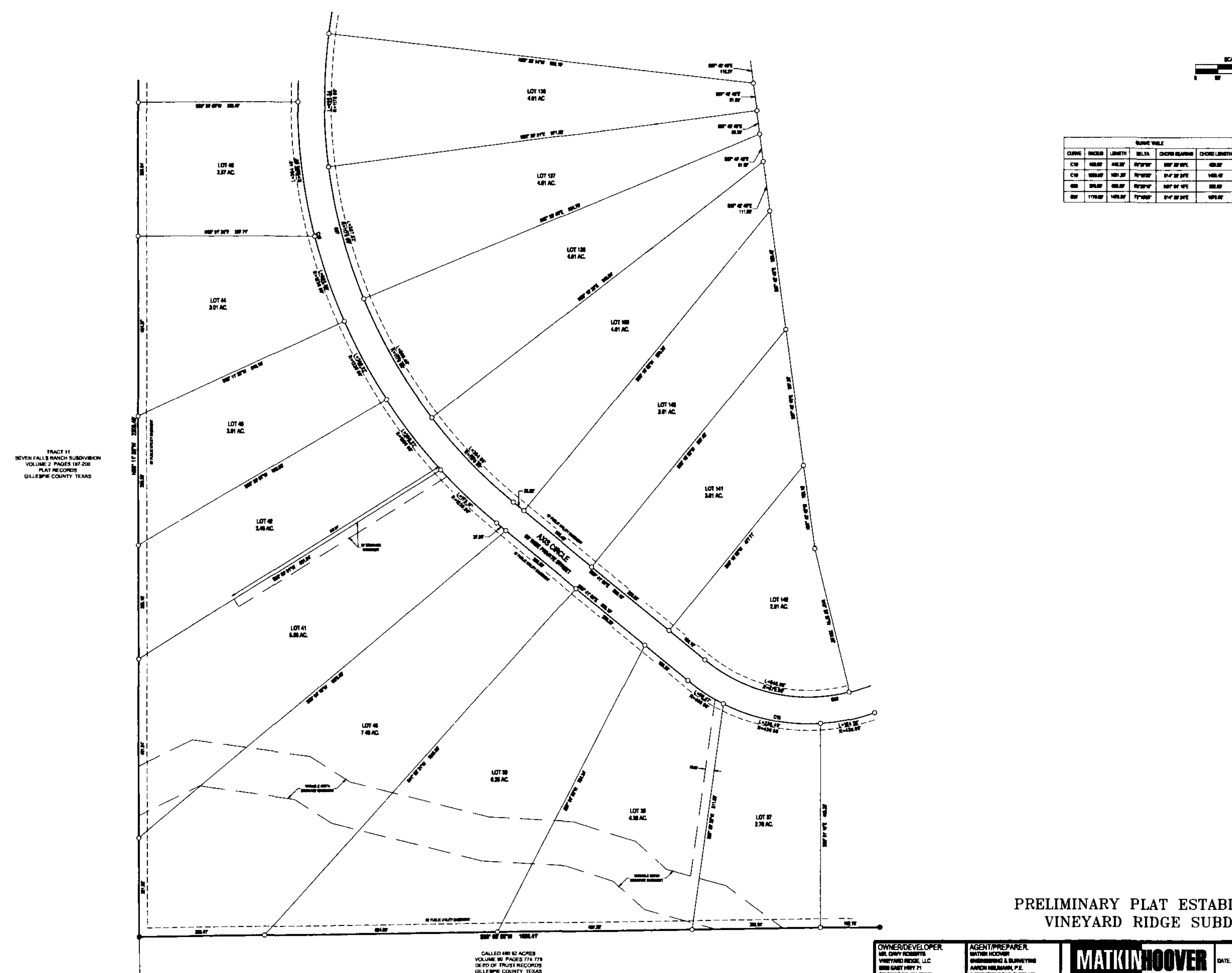
PRELIMINARY PLAT ESTABLISHING VINEYARD RIDGE SUBDIVISION

OWNER/DEVELOPER	AGENT/PREPARER		
MR. DAVY ROBERTS VINEYARD RIDGE, LLC [illegible] EAST HWY 71 SPICEWOOD, TX [illegible] PHONE: [illegible]	MATKIN HOOVER ENGINEERING & SURVEYING AARON NEUMANN, P.E. 8 SPENCER ROAD SUITE 100 BOERNE, TEXAS [illegible] OFF: [illegible] FAX: [illegible] ANEUMANN@MATKINHOOVER.COM	MATKINHOOVER ENGINEERING & SURVEYING TEXAS REGISTERED ENGINEERING FIRM F-004512 TEXAS REGISTERED SURVEYING FIRM F-10024000	DATE: OCTOBER 2016 JOB NO. 2750.00 SHEET 9 OF 13



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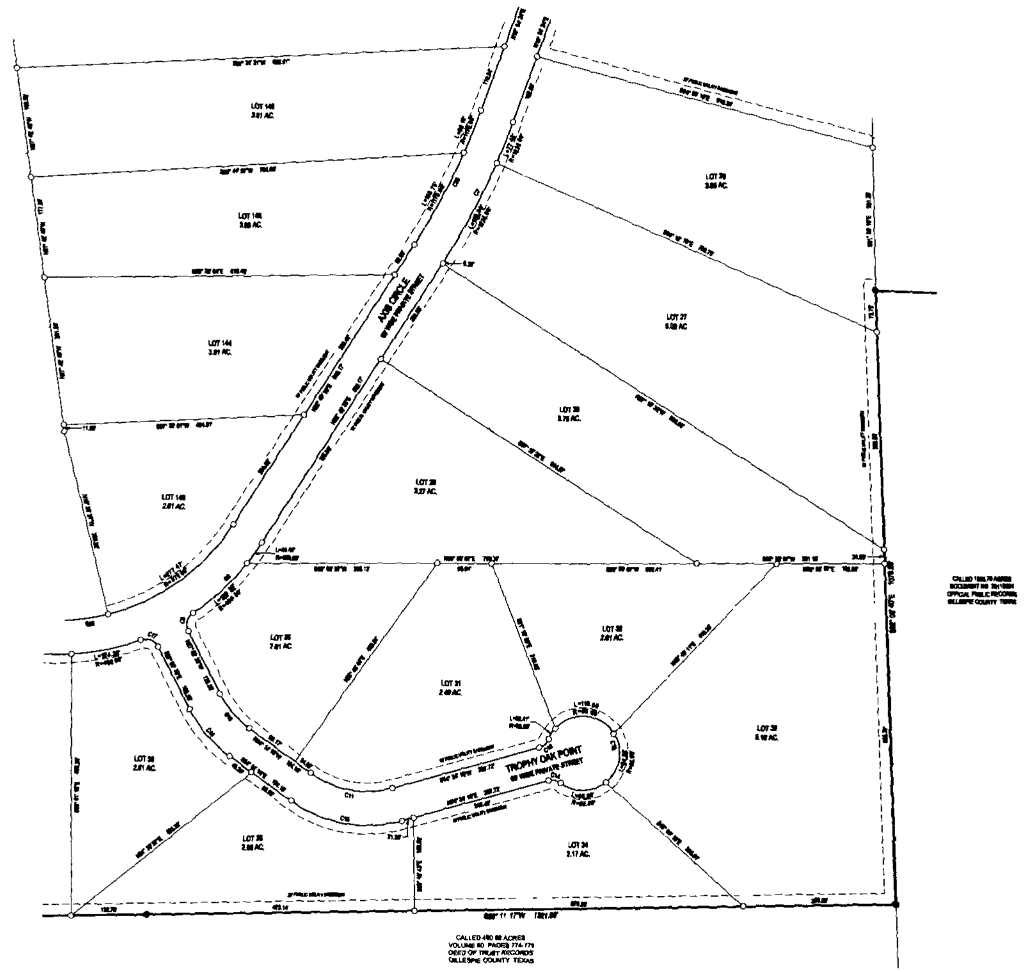
PRELIMINARY PLAT ESTABLISHING VINEYARD RIDGE SUBDIVISION

OWNER/DEVELOPER:	AGENT/PREPARER:		
[illegible]	MATKIN HOOVER ENGINEERING & SURVEYING	MATKIN HOOVER ENGINEERING & SURVEYING	DATE: OCTOBER 2016
VINEYARD RIDGE, LLC	AARON NEUMANN, P.E.	TEXAS REGISTERED ENGINEERING FIRM F-004512	JOB NO. 2790.00
[illegible]	[illegible]	TEXAS REGISTERED SURVEYING FIRM F-10024000	SHEET 10 OF 13



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PRELIMINARY PLAT ESTABLISHING VINEYARD RIDGE SUBDIVISION

OWNER/DEVELOPER
VINEYARD RIDGE, LLC
SPICEWOOD, TX

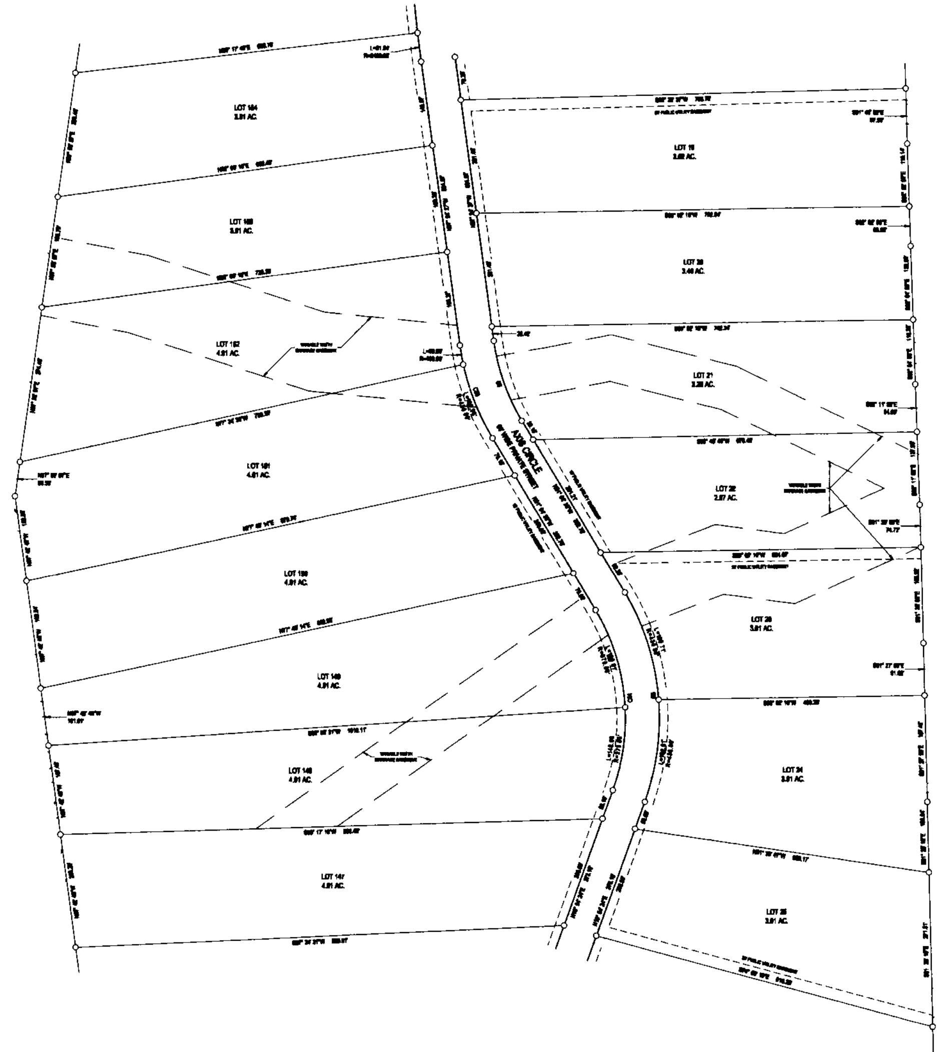
AGENT/PREPARER
MATKIN HOOVER
ENGINEERING & SURVEYING
BOERNE, TEXAS

MATKINHOOVER ENGINEERING & SURVEYING
TEXAS REGISTERED ENGINEERING FIRM
TEXAS REGISTERED SURVEYING FIRM

DATE: OCTOBER

JOB NO. 2790.00

SHEET 11 OF 13



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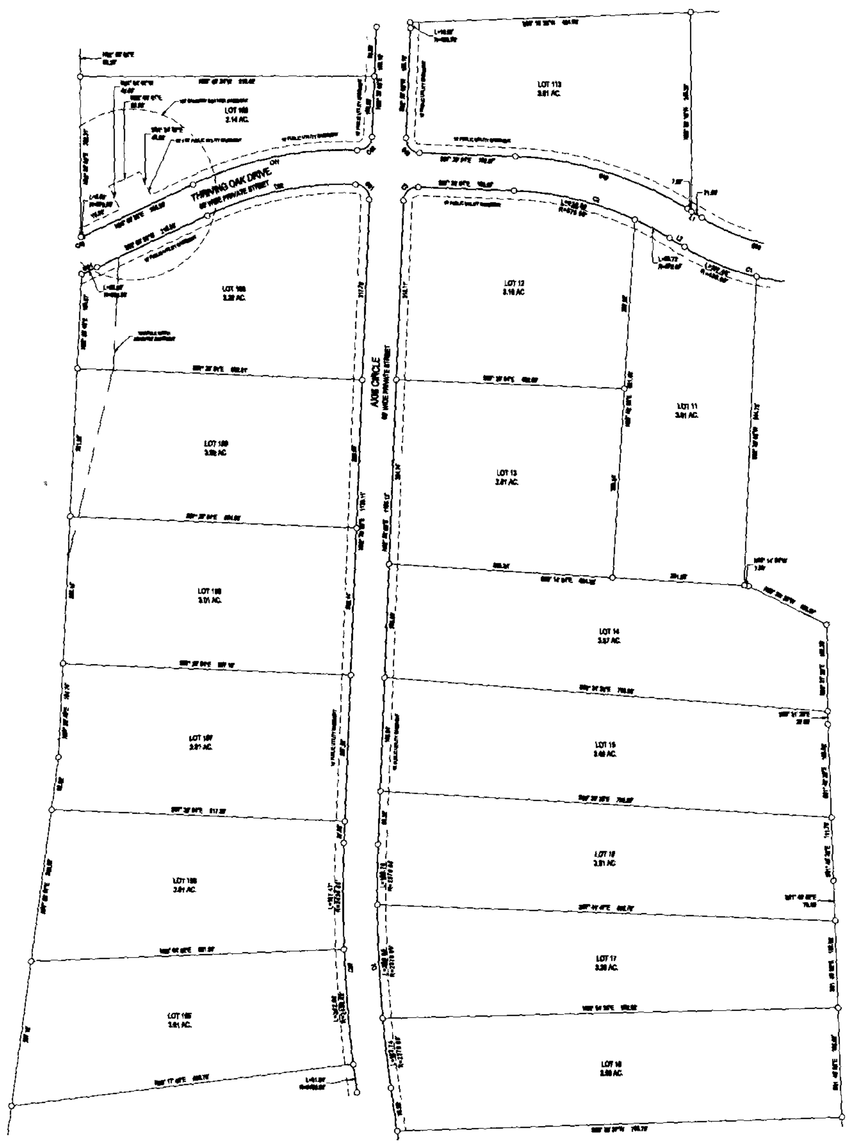
PRELIMINARY PLAT ESTABLISHING VINEYARD RIDGE SUBDIVISION

OWNER/DEVELOPER.	AGENT/PREPARER.	MATKIN HOOVER ENGINEERING & SURVEYING	
VINEYARD RIDGE, LLC	MATKIN HOOVER ENGINEERING & SURVEYING	TEXAS REGISTERED ENGINEERING FIRM F-004512	DATE: OCTOBER [illegible]
SPICEWOOD, TX [illegible]	AARON NEUMANN, P.E.	TEXAS REGISTERED SURVEYING FIRM F-10024000	JOB NO. 2790.00
PHONE [illegible]	8 SPENCER ROAD SUITE 100		SHEET 12 OF 13
	BOERNE, TEXAS [illegible]		
	OFF [illegible]		
	FAX [illegible]		
	ANEUMANN@MATKINHOOVER.COM		



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[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

PRELIMINARY PLAT ESTABLISHING VINEYARD RIDGE SUBDIVISION

OWNER/DEVELOPER	AGENT/PREPARER		
VINEYARD RIDGE, LLC	MATKIN HOOVER ENGINEERING & SURVEYING	MATKIN HOOVER ENGINEERING & SURVEYING	DATE: OCTOBER [illegible]
SPICEWOOD, TX [illegible]	[illegible]	TEXAS REGISTERED ENGINEERING FIRM F-[illegible]	JOB NO. [illegible]
PHONE: [illegible]	[illegible]@MATKINHOOVER.COM	TEXAS REGISTERED SURVEYING FIRM F-[illegible]	SHEET 13 OF 13

Exhibit “11”

DOCKET NO. 46948

APPLICATION OF VINEYARD RIDGE, LLC TO OBTAIN A WATER CERTIFICATE OF CONVENIENCE AND NECESSITY IN GILLESPIE COUNTY	§ § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

AFFIDAVIT OF DAVY ROBERTS

STATE OF TEXAS §
§
COUNTY OF GILLESPIE §

On this day, Davy Roberts, Project Manager of Vineyard Ridge, LLC, personally appeared before me, the undersigned notary public, and being by me fully sworn on his oath, deposed and stated as follows:

1. I, Davy Roberts, am over eighteen (18) years of age. I have never been convicted of a felony or crime involving moral turpitude, and I am fully competent to make this Affidavit. I have personal knowledge of the facts in this affidavit, and they are true and correct.

2. I am the Project Manager of Vineyard Ridge, LLC. I have held that position since July, 2016. My office address is 14246 East U.S. Hwy. 290, Stonewall, Gillespie County, Texas 78671.

3. By Deed dated September 27, 2016, Vineyard Ridge, LLC, acquired ownership of 659.723 acres of land, more or less, located in Gillespie County, Texas (the "Property"). A true and correct copy of the Deed, as recorded in the Official Public Records of Gillespie County, Texas, is attached hereto as Exhibit "1."

4. On January 3, 2017, Vineyard Ridge LLC sought Subdivision Platting approval of the Property from the County Commissioners Court of Gillespie County. On June 12, 2017, the Commissioners' Court approved subdivision of the Property, and on July 21, 2017, the final plat for the Vineyard Ridge Subdivision was signed by the County Judge. The Subdivision Plat is recorded in Volume 5, pages 122 through 134, of the Official Public Records of Gillespie County, Texas. A true and correct copy of the recorded final Subdivision Plat as approved by Gillespie County is attached hereto as Exhibit "2" and incorporated herein by reference for all purposes.

5. The Property described in the Deed and the final Subdivision Plat – 659.723 acres – is the same Property which is the subject of the Application of Vineyard Ridge, LLC, filed with the Public Utility Commission of Texas on March 15, 2017, and is the subject of this Docket No. 46948. Copies of Vineyard Ridge's CCN Application and supplemental information are on file and available in the records of the Public Utility Commission of Texas.

6. I am personally familiar with the ownership of the Property sought to be included within the CCN. Mr. McRae is not an owner of any of that acreage based upon my personal knowledge from my involvement in the acquisition of the Property, the platting of the subdivision, including efforts to secure approvals from the Hill Country Underground Water Conservation District to establish the availability of adequate groundwater to supply the subdivision and efforts to secure approval of a public water supply system by the Texas Commission on Environmental Quality ("TCEQ").

7. I have overseen the sales of the Lots in the Vineyard Ridge Subdivision, and am personally familiar with the persons to whom Lots have been sold. Attached hereto as Exhibit "5" is a Table identifying the Lots sales to date. As reflected in the Table, and based upon my personal knowledge of sales of Lots within the Subdivision, Mr. McRae has no ownership interest in the Property that is the subject of the Vineyard Ridge, LLC Application to the PUC for the CCN that is the subject of Docket No. 46948.

8. A true and correct copy of a letter from the Hill Country Underground Water Conservation District evidencing its conclusion that there is adequate groundwater available to support the subdivision and provide a municipal water supply to the Property to be included within the CCN, is attached hereto as Exhibit "3" and incorporated herein by reference for all purposes.

9. A true and correct copy of the correspondence from the Texas Commission on Environmental Quality evidencing approval of the proposed Public Water Supply System to serve the Property within the platted subdivision proposed to be included within the CCN is attached hereto as Exhibit "4" and incorporated herein by reference for all purposes.

10. I have been personally involved in the development of the Vineyard Ridge Subdivision, including its public water supply system, and securing studies supporting the availability of adequate water supplies to support Vineyard Ridge, LLC's application for a CCN. I have overseen the work of the hydrogeologists and engineers engaged on the project for these purposes.

11. The foregoing statements in paragraphs 1-10, inclusive, are true and correct, and made based upon my personal knowledge.

FURTHER AFFIANT SAYETH NOT

Davy Roberts, Project Manager
Vineyard Ridge, LLC

SWORN TO and SUBSCRIBED before me by DAVY ROBERTS on this 7th day of September, 2017.

Notary Public, State of Texas

MICHELLE FERGUSON
(Printed or Stamped Name of Notary)

MICHELLE ANN FERGUSON
Notary Public, State of Texas
Comm. Expires 01-14-2021
Notary ID 129265542

My Commission Expires: 1/14/2021
My Notary No. is: 12926542

LIST OF EXHIBITS

Exhibit	Description
"1"	Deed dated September 27, 2016, recorded as Document ID No. 20164806.
"2"	Final Subdivision Plat as approved by Gillespie County, recorded in Volume 5, Pages 122-134.
"3"	April 17, 2017, Letter from the Hill Country Underground Water Conservation District evidencing its conclusion that there is adequate groundwater available to support the subdivision.
"4"	May 30, 2017, Letter from the Texas Commission on Environmental Quality, evidencing approval of the Public Water Supply System to serve the Property within the platted subdivision proposed to be included within the CCN.

Appendix "A"

City of Waco v. Tex. Comm'n on Envtl. Quality

Court of Appeals of Texas, Third District, Austin

June 17, 2011, Filed

NO. 03-09-00005-CV

Reporter
346 S.W.3d 781 *; 2011 Tex. App. LEXIS 4644 **

City of Waco, Appellant v. Texas Commission on Environmental Quality, Appellee

Subsequent History: Petition for review denied by Tex. Comm'n on Envtl. Quality v. City of Waco, 2012 Tex. LEXIS 574 (Tex., June 29, 2012)

Petition for review granted by, Rehearing granted by, Petition withdrawn by Tex. Comm'n on Envtl. Quality v. City of Waco, 2013 Tex. LEXIS 83 (Tex., Feb. 1, 2013)

Reversed by, Judgment entered by Tex. Comm'n on Envtl. Quality v. City of Waco, 2013 Tex. LEXIS 604 (Tex , 2013)

Prior History: [**1] FROM THE DISTRICT COURT OF TRAVIS COUNTY, 201ST JUDICIAL DISTRICT NO. D-1-GV-08-000405, HONORABLE DARLENE BYRNE, JUDGE PRESIDING.

City of Waco v. Tex. Comm'n on Envtl. Quality, 2010 Tex. App. LEXIS 7692 (Tex. App. Austin, Sept. 17, 2010)

Disposition: Reversed and Remanded on Rehearing.

Core Terms

Dairy, contested-case, affected person, Lake, water code, City's, Commission's, justiciable, permit application, executive director, substantial-evidence, requirements, Copper, issues, odor, disputed, merits, proceedings, requestor, pet, judicial review, water-quality, factors, watershed, agency record, phosphorus, loading, pollutants, hearings, substantial evidence

Case Summary

Procedural Posture
Appellee, the Texas Commission on Environmental Quality, denied appellant city's request for a contested-case hearing regarding the proposed issuance of a water-quality permit for a dairy with concentrated animal feeding operations. The District Court of Travis County, 201st Judicial District, Texas, affirmed, and the city sought review.

Overview

The court of appeals held that the Commission acted arbitrarily and abused its discretion in concluding that the city was not an affected person with respect to the dairy's permit application and in denying its hearing request. For purposes of determining under Tex. Water Code Ann. § 5.115 whether the city was an "affected person" entitled to a contested-case hearing, the city had a legally protected interest, as a matter of law, in its property or economic stake in a lake's water quality. It was undisputed that the city owned all adjudicated and permitted rights to the water, used the water as the sole supply source for its municipal water utility, and had to treat the water to ensure it was safe. Substantial-evidence analysis did not govern the court's review of implied factual findings because the city never had an opportunity to develop an evidentiary record. Further, the finding that the city was not an affected person was arbitrary because the Commission failed to take the required hard look at whether the city had the requisite injury. The city could be affected or injured by a permit amendment, even if the proposed amendment was more protective than the current permit.

Outcome
The court reversed the district court's judgment affirming the Commission's order, reversed the Commission's order, and remanded to the Commission for further proceedings.

LexisNexis® Headnotes

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN1 **Enforcement, Discharge Permits**
For those categories of permit applications where an opportunity for contested-case hearing is required, the Texas Commission on Environmental Quality must grant a hearing request only if the request is made by its executive director or the permit applicant, Tex. Water Code Ann. § 55.211(c)(1) (West 2011), or, in certain circumstances, if made by a third party who is an "affected person," *Tex. Water Code Ann. § 5.556(a)-(e)*; *30 Tex. Admin. Code §§ 55.201*,.211(c)(2). Conversely, the Texas Commission on Environmental Quality is expressly prohibited from granting a contested-case hearing request unless it determines that the request was filed by an affected person as defined by Tex. Water Code Ann. *§ 5.115, Tex. Water Code Ann. § 5.556(c)*, subject to its discretion to grant a hearing if it determines that the public interest warrants doing so, *Tex. Water Code Ann. § 5.556(f)*; *30 Tex. Admin. Code § 55.211(d)(1)*.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN2 **Standing, Third Party Standing**
See *Tex. Water Code Ann. § 5.115*.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN3 **Standing, Third Party Standing**
The rules of the Texas Commission on Environmental Quality incorporate the same definition of "affected person" as found in *Tex. Water Code Ann. § 5.115*. *30 Tex. Admin. Code §§ 55.103 (2011)*. An "affected person" with respect to permit application has a personal justiciable interest related to a legal right, duty, privilege power, or economic interest affected by the permit application. An interest common to members of the general public does not qualify as a personal justiciable interest.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN4 **Standing, Third Party Standing**
See *Tex. Water Code Ann. § 5.115(a)*.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN5 **Standing, Third Party Standing**
See *30 Tex. Admin. Code § 55.203(c)*.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN6 **Standing, Third Party Standing**
Governmental entities, including local governments and public agencies, with authority under state law over issues raised by a permit application may be considered affected persons with regard to a water-quality permit. *30 Tex. Admin. Code § 55.203(b)*.

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN7 **Enforcement, Discharge Permits**
Although the evaluation by the Texas Commission on Environmental Quality of a hearing request may result in

the referral of the request to the State Office of Administrative Hearings for a limited contested-case hearing or the granting of a contested-case hearing on the merits of the permit application, the Commission's rules specify that its evaluation of the request is not itself a contested case subject to the Administrative Procedure Act. *30 Tex. Admin. Code § 55.211(a)*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN8 **Standards of Review, De Novo Review**
Statutory construction presents a question of law that the court review de novo.

Governments > Legislation > Interpretation

HN9 **Legislation, Interpretation**
The court's primary objective in statutory construction is to give effect to the Legislature's intent. The court seeks that intent first and foremost in the statutory text. Where text is clear, text is determinative of that intent. The court considers the words in context, not in isolation. The court relies on the plain meaning of the text, unless a different meaning is supplied by legislative definition or is apparent from context, or unless such a construction leads to absurd results. Under *Tex. Gov't Code Ann. § 311.011* (2005), words and phrases shall be read in context and construed according to the rules of grammar and common usage, but words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. The court also presumes that the Legislature was aware of the background law and acted with reference to it. The court further presumes that the Legislature selected statutory words, phrases, and expressions deliberately and purposefully.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Governments > Legislation > Interpretation

HN10 **Standards of Review, Deference to Agency Statutory Interpretation**
General principles of statutory construction have application even where the judgment or order on appeal is predicated on an administrative agency's construction of a statute that it is charged with administering. The rule of deference for an agency's construction of a statute it is charged with administering applies only when the statute in question is ambiguous—i.e., susceptible to more than one reasonable interpretation—and only to the extent that the agency's interpretation is one of those reasonable interpretations. Consequently, to determine whether this rule of deference applies, a reviewing court must first make a threshold determination that the statute is ambiguous and the agency's construction is reasonable—questions that turn on statutory construction and are reviewed de novo. The serious construction rule is further limited and qualified by, among other things, the principle that courts give less deference to an agency's construction of a statute that does not lie within its administrative expertise or pertains to a non-technical issue of law.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

HN11 **Standards of Review, Rule Interpretation**
Similarly to the serious consideration rule where it applies, the court defers to an agency's interpretation of its own rules unless that interpretation is plainly erroneous or inconsistent with the text of the rule or underlying statute. The court construes administrative rules in the same manner as statutes since they have the force and effect of statutes.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN12 **Standing, Third Party Standing**
A personal justiciable interest not common to members of the general public—the cornerstone of the "affected person" definition in *Tex. Water Code Ann. § 5.115*—denotes the constitutionally minimal requirements for litigants to have standing to challenge governmental actions in court.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Standing

HN13[] **Constitutionality of Legislation, Standing**
The general test for constitutional standing in Texas courts is whether there is a real (i.e., justiciable) controversy between the parties that will actually be determined by the judicial declaration sought. Constitutional standing is thus concerned not only with whether a justiciable controversy exists, but whether the particular plaintiff has a sufficient personal stake in the controversy to assure the presence of an actual controversy that the judicial declaration sought would resolve. The requirement thereby serves to safeguard the separation of powers by ensuring that the judiciary does not encroach upon the executive branch by rendering advisory opinions, decisions on abstract questions of law that do not bind the parties.

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > State & Territorial
Governments > Claims By & Against

HN14[] **Justiciability, Standing**
For a party to have standing to challenge a governmental action, as a general rule, it must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large. A plaintiff must allege some injury distinct from that sustained by the public at large. The sufficiency of a plaintiff's interest (to maintain a lawsuit) comes into question when he intervenes in public affairs. When the plaintiff, as a private citizen, asserts a public, as distinguished from a private, right, and his complaint fails to show that the matters in dispute affect him differently from other citizens, he does not establish a justiciable interest.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN15[] **Standing, Third Party Standing**
By crafting a definition in *Tex. Water Code Ann. § 5.115* of "affected person" that precisely mirrors constitutional standing principles and incorporating it into the statute governing contested-case hearing requests in water-quality permitting proceedings, the Legislature has unambiguously manifested its intent that those same principles govern standing to obtain a contested-case hearing in those proceedings.

Governments > Legislation > Interpretation

HN16[] **Legislation, Interpretation**
Where statutory terms have acquired a technical meaning, the court applies that meaning. The court presumes the Legislature was aware of background law.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN17[] **Standing, Third Party Standing**
To possess standing with regard to a water-quality permit application, a city has to establish: (1) an injury in fact from the issuance of the permit as proposed—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the issuance of the permit as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the permit; and (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision on its complaints regarding the proposed permit (i.e., refusing to grant the permit or imposing additional conditions). Together, these elements serve to limit court intervention to disputes that the judiciary is constitutionally empowered to decide by ensuring that the plaintiff has a sufficient personal stake in the controversy so that the lawsuit would not yield a mere advisory opinion or draw the judiciary into generalized policy disputes that are the province of the other branches. Consequently, the personal justiciable interest requirement is more restrictive than the standing concepts that ordinarily govern the public's right to participate in executive agency proceedings.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Standing

HN18 **Constitutionality of Legislation, Standing**
The existence of the injury-in-fact required for constitutional standing is conceptually distinct from the ultimate question of whether the plaintiff has incurred a legal injury—i.e., whether the plaintiff has a valid claim for relief on the merits.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Standing

HN19 **Standing, Third Party Standing**
The required potential harm to a city from the issuance of a water-quality permit must be more than speculative to give rise to affected-person status under *Tex. Water Code Ann. § 5.115*. There must be some allegation or evidence that would tend to show that the city's legally protected interests will be affected by the action.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN20 **Subject Matter Jurisdiction, Jurisdiction Over Actions**
While questions of subject-matter jurisdiction, including standing, are conceptually distinct from the merits, the two issues can nonetheless overlap or parallel each other in some instances.

Governments > Legislation > Interpretation

HN21 **Legislation, Interpretation**
The court determines the Legislature's intent first and foremost from the objective meaning of the words the Legislature has actually enacted.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN22 **Standing, Third Party Standing**
The rules of the Texas Commission on Environmental Quality incorporate *Tex. Water Code Ann. § 5.115*'s requirement of a personal justiciable interest, the constitutionally minimal requirement of standing to challenge governmental action in court. *§ 5.115*; *30 Tex. Admin. Code §§ 55.201*, *55.203*. Nothing in the major sole source impairment zone (MSSIZ) legislation purports to address, much less alter, these standing requirements.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN23 **Standing, Third Party Standing**
Access to contested-case hearings under subchapter M of water code chapter 5 are governed by the same requirement of a personal justiciable interest that controls standing to seek judicial relief against governmental action. *Tex. Water Code Ann. § 5.115(a)*. It is the substance of that requirement that controls whether it operates narrowly or broadly as to any particular hearing request.

Governments > Legislation > Interpretation

HN24 **Legislation, Interpretation**
In construing a statute, the court's purpose is to give effect to the Legislature's expressed intent.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN25 **Standing, Third Party Standing**
An "affected person" is ultimately defined as one having a personal justiciable interest in a water-quality permit application—and that definition necessarily constrains whatever discretion the Texas Commission on Environmental Quality possesses to consider factors in determining whether that definition is met in regard to a given hearing request. *Tex. Water Code Ann. § 5.115(a)* defines "affected person" in terms of personal justiciable interest and charges the Commission with adopting rules specifying factors which must be considered in determining whether a person is an affected person. *30 Tex. Admin. Code § 55.203(a)* defines "affected person" in regard to hearing request as one having a personal justiciable interest. Under *§ 55.203(c)*, determining whether a person is an affected person, all factors shall be considered, including, but not limited to those listed. The factors, in other words, are not made inquiries unto themselves, and do not purport to narrow or redefine the ultimate benchmark of personal justiciable interest that defines an affected person, but are mere factors the Commission considers in determining whether that benchmark is met.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN26 **Standing, Third Party Standing**
While each of the factors may potentially be relevant to determining whether the required personal justiciable interest in a water-quality permit application is present, the legal significance of a given factor in regard to a particular hearing request must turn on the extent to which the factor informs the ultimate inquiry under the specific circumstances of the case.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN27 **Standing, Third Party Standing**
See *30 Tex. Admin. Code § 55.203(c)(1), (3)*.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Governments > Local Governments > Claims By & Against

HN28 **Standing, Third Party Standing**
To have a personal justiciable interest in a water-quality permit application, a city must have injury to its legally protected interest that (1) is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) is fairly traceable to the issuance of the permit as proposed (as opposed to the independent actions of third parties or other alternative causes unrelated to the permit); and that (3) it would be likely, and not merely speculative, that the injury would be redressed by a favorable decision on its complaints regarding the proposed permit—i.e., refusing to grant the permit or imposing additional conditions.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN29 **Standards of Review, Arbitrary & Capricious Standard of Review**
An administrative agency's order made within its discretionary statutory and constitutional authority is ordinarily shielded by sovereign immunity from suit, such that there is no right to judicial review, unless and until the Legislature has waived that immunity by conferring a right of judicial review. However, even while the Legislature generally has the prerogative to waive sovereign immunity to permit judicial review, Texas courts have long held separation-of-powers principles bar the judiciary—even where the Legislature has purported to grant such broad review powers—from redetermining the fact findings of agencies exercising their administrative functions. Instead, the judicial inquiry in regard to such matters is restricted to the method employed by the administrative agency in arriving at its decision That is, whether the decision of the administrator is fraudulent, capricious or arbitrary. Conversely, an agency order failing to pass muster under this inquiry must be set aside as invalid, as

arbitrary action of an administrative agency cannot stand. This inquiry, in concept, presents a question of law rather than fact, going to the reasonableness of the agency's order rather than whether a preponderance of evidence supports the order.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN30[] **Standards of Review, Arbitrary & Capricious Standard of Review**
An arbitrary agency decision includes one that is made without regard to the facts. The substantial-evidence test evolved in Texas jurisprudence as an evidentiary mechanism through which a party could seek to establish the arbitrariness and invalidity of an agency order and thereby overcome the order's presumption of regularity. The so-called substantial evidence rule may be more accurately described as a test rather than a rule. When properly attacked, an arbitrary action cannot stand and the test generally applied by the courts in determining the issue of arbitrariness is whether or not the administrative order is reasonably supported by substantial evidence. In this respect, lack of substantial evidence and agency arbitrariness have been considered two sides of the same coin. However, establishing lack of substantial evidence is by no means the only method by which an agency's decision can be shown to be arbitrary and invalid.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN31[] **Standards of Review, Substantial Evidence**
Substantial-evidence review on an agency record is simply not possible absent the opportunity to develop that record through a contested-case or adjudicative hearing.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN32[] **Standards of Review, Arbitrary & Capricious Standard of Review**
An administrative agency is said to act arbitrarily or capriciously where, among other things, it fails to consider a factor the Legislature has directed it to consider, considers an irrelevant factor, or considered relevant factors but still reaches a completely unreasonable result. An agency also acts arbitrarily in making a decision without regard to the facts, relying on fact findings that are not supported by any evidence, or if otherwise there does not appear a rational connection between the facts and the decision. In short, the reviewing court must remand for arbitrariness if it concludes that the agency has not actually taken a hard look at the salient problems and has not genuinely engaged in reasoned decisionmaking.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN33[] **Standing, Third Party Standing**
It is the existence of some impact from a permitted activity, and not necessarily the extent or amount of impact, that is relevant to standing under *Tex. Water Code Ann. § 5.115*.

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

HN34[] **Preliminary Considerations, Jurisdiction**
Where disputed jurisdictional facts overlap with the merits of claims or defenses, the otherwise broad procedural discretion of trial courts in deciding evidence-based jurisdictional challenges is sharply limited. In such instances, trial courts lack discretion to dismiss a claim at a preliminary stage unless there is conclusive or undisputed evidence negating the challenged jurisdictional fact, similar to the standard governing a traditional summary-judgment motion. Whatever

discretion the Texas Commission on Environmental Quality does possess would be limited, in a manner similar to trial courts, in instances where it determines disputed facts that are relevant to both a hearing requestor's standing and the merits of a permit application.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN35[] **Standing, Third Party Standing**
The water code and rules of the Texas Commission on Environmental Quality create an entitlement to a contested-case hearing that is analogous to a civil claimant's right to have disputed material fact issues determined at trial—an affected person is entitled to a contested-case hearing on disputed questions of fact raised during the public-comment period that are relevant and material to the Commission's decision on a permit application. Tex. Water Code Ann. § 5.556; 30 Tex. Admin. Code §§ 55.201,211(b)(3), (c)(2). Where affected person status turns on the same disputed facts, the Commission is precluded from determining those facts without affording the hearing requestor the adjudicative processes that the Legislature and Commission rules have guaranteed them on the merits-a contested-case hearing.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > ... > Lay Witnesses > Opinion Testimony > General Overview

HN36[] **Testimony, Expert Witnesses**
Conclusory or speculative opinions are incompetent evidence that cannot support a judgment. The naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection. Bare conclusions do not amount to any evidence at all, and that the fact that they were admitted without objection adds nothing to their probative force. It is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand on the mere ipse dixit of a credentialed witness.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN37[] **Standards of Review, Arbitrary & Capricious Standard of Review**
An agency acts arbitrarily in relying on an irrelevant factor. An agency acts arbitrarily if there does not appear a rational connection between the facts and the decision of the agency.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN38[] **Standards of Review, Arbitrary & Capricious Standard of Review**
If a commission does not follow the clear, unambiguous language of its own regulation, the court reverses its action as arbitrary and capricious.

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For Appellee: Mr. Anthony C. Grigsby, Ms. Nancy Elizabeth Olinger, Assistant Attorney General Environmental Protection & Administrative Law Division, Austin, TX.

Judges: Before Justices Patterson, Puryear and Pemberton; Justice Patterson Not Participating.

Opinion by: Bob Pemberton

Opinion

[*787] ON REHEARING

We withdraw the panel opinion and judgment dated September 17, 2010, and **[*788]** substitute the following in its place. The motion for en banc reconsideration filed by appellant, the City of Waco (City), is dismissed as moot.

This administrative appeal presents several questions concerning third-party standing to obtain contested-case

hearings in Texas Commission on Environmental Quality (Commission[1] permitting proceedings that are governed by subchapter M of water code chapter 5. *See* Tex. Water Code Ann. §§ 5.551-.558 (West Supp. 2010).[2] The City challenges a Commission order denying its request for a contested-case hearing regarding **[**2]** the proposed issuance of a water-quality permit and a district court's judgment affirming the Commission's order. For the reasons explained herein, we conclude that the Commission's order must be reversed as arbitrary and an abuse of discretion.

BACKGROUND

In that way that seems unique to Texas jurisprudence,[3] this case presents significant and complex administrative law issues that arise from a dispute about cow manure—specifically, that generated by cattle at a dairy, located northwest and upriver from the City, known as the O-Kee Dairy. Because of the considerable volumes of manure and other animal waste generated by such facilities and the propensity of such waste to end up in surface or ground water, "concentrated animal feeding operations" (CAFOs)—which include dairies that confine and feed two-hundred or more cattle for extended periods in areas that do not sustain vegetation—are legally considered **[**3]** "point sources" of water pollution, and must obtain water-quality permits. *See* 30 Tex. Admin. Code §§ 321.31, .32(3), (13), (58), .33 (West 2011) (Texas Comm'n on Envtl. Quality, CAFOs). These "CAFO permits," generally speaking, require the dairies who hold them to maintain "retention control structures" (RCSs)—basically ponds to collect runoff of manure and wastewater from the areas where cows are confined—with capacities sufficient to prevent the waste from discharging except during certain large rainfall events. However, dairy CAFO operators are allowed, subject to certain restrictions, to discard their animal waste by applying it as fertilizer to grow crops on acreage termed "waste application fields" (WAFs), a method that is not considered a "discharge" of the waste. This proceeding arises from an application by the O-Kee Dairy's owner and operator to amend an existing CAFO permit to expand the dairy's maximum allowable number of cows from 690 to 999 and its total waste-application acreage from 261 to 285.4 acres. Because the procedures through which the Commission considers such amendments—in particular, public-participation requirements—are central to the issues on appeal, we **[**4]** first review the key statutes and rules that prescribe those procedures before turning to the Commission's application of them here.

Public-participation requirements

The procedures by which dairy CAFOs obtain new or amended permits with respect to water quality are governed in the **[*789]** first instance by chapter 26 of the water code, which governs water-quality permits generally. *See* Tex. Water Code Ann. §§ 26.001-.562 (West 2008). Under chapter 26, the Commission is required to give public notice of a permit application and, if requested by a commissioner, the Commission's executive director, or "any affected person," hold a "public hearing" on the application. *Id.* § 26.028(a), (c), (h). Exempt from the requirement of an opportunity for public hearing, however, are applications to amend or renew a water-quality permit that do not seek either to "increase significantly the quantity of waste authorized to be discharged" or "change materially the pattern or place of discharge," if "the activities to be **[**5]** authorized . . . will maintain or improve the quality of waste authorized to be discharged," and meet certain other requirements. *Id.* § 26.028(d).

To the extent that chapter 26 requires public notice or an opportunity for public comment or hearing in regard to a permit application, the Legislature has prescribed detailed procedures governing such notice or opportunity in chapter 5, subchapter M, of the water code. *See id.* §§ 5.551, 558. Enacted in 1999,[4] subchapter M—which also governs applications for injection-well and certain solid-waste disposal permits, *see id.* § 5.551(a)—requires public notice of an applicant's intent to obtain a permit once the Commission's executive director declares the application to be administratively complete. *See id.* §

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[1] For clarity, and because any distinctions are not material to our analysis, we will also use "Commission" to refer to the TCEQ's predecessor agencies.

[2] Except where there have been material intervening substantive changes, we cite to the current versions of statutes and rules for convenience.

[3] *See generally, e.g.*, Bennett v. Reynolds, 315 S.W.3d 867 (Tex. 2010) (addressing due-process limitations on punitive damages awards; award was predicated on jury findings of cattle rustling).

[4] *See* Act of May 30, 1999, 76th Leg., R.S., ch. 1350, § 2, 1999 Tex. Gen. Laws 4570 (codified at Tex. Water Code Ann. §§ 5.551-.558 (West Supp. 2010)).

5 552. The executive director then conducts a technical review of the permit application and issues a preliminary decision. *Id.* § 5.553(a). The preliminary decision triggers a second round of public-notice requirements and a public-comment period of a duration set by Commission rule. *See id.* § 5.553(b), (c). During the public-comment period, the executive director may also hold a public meeting on the permit application and must do so if, **[**6]** among other things, he "determines that there is substantial public interest in the proposed activity." *See id.* § 5.554. Following the conclusion of the public-comment period, the executive director must file a response "to each relevant and material public comment on the preliminary decision filed during the public comment period." *See id.* § 5.555.

After the executive director files his response to any public comments, subchapter M and the Commission's rules provide an opportunity for interested persons to request reconsideration of the executive director's preliminary decision and to request a contested-case hearing under the Administrative Procedure Act.[5] *See id.* § 5.556; 30 Tex. Admin. Code § 55.201 (West 2011) (Texas Comm'n on Envtl. Quality, Requests for Reconsideration or Contested Case Hearing). Exempt from this requirement, however, are several categories of permit applications that include "minor" permit amendments—those that improve or maintain the permitted quality of the waste discharge, *see id.* §§ 55.201(i), 305.62(c)(2) (West 2011) **[**7]** (Texas Comm'n on Envtl. Quality, Consolidated Permits); *see also* Tex. Water Code Ann. § 26.028(d) (statutory exemption from "public hearing" requirement)—as contrasted with "major" amendments, which the Commission has defined as those that change a "substantive term, provision, requirement or limiting parameter of a permit." *See* 30 Tex. Admin. Code § 305.62(c)(1). ***HN1***[↑] As for those categories of permit applications where an opportunity for contested-case hearing is **[*790]** required, the Commission must grant a hearing request only if the request is made by its executive director or the permit applicant, *see id.* § 55.211(c)(1) (West 2011), or, in certain circumstances, if made by a third party who is an "affected person," *see* Tex. Water Code Ann. § 5.556(a)-(e); 30 Tex. Admin. Code §§ 55.201, .211(c)(2); *see also* Tex. Water Code Ann. § 26.028(c) (Commission, "on the request of . . . any affected person, shall hold a public hearing on the application for a permit, permit amendment, or renewal of a permit."). Conversely, the Commission is expressly prohibited from granting a contested-case hearing request unless it "determines that the request was filed by an affected person as defined by [water code] Section 5.115," **[**8]** Tex. Water Code Ann. § 5.556(c), subject to its discretion to grant a hearing "if it determines that the public interest warrants doing so," *see id.* § 5.556(f); 30 Tex. Admin. Code § 55.211(d)(1). In instances where the Commission has granted a contested-case hearing request, the Legislature has authorized it to delegate the task of conducting the hearing itself to the State Office of Administrative Hearings (SOAH). *See* Tex. Water Code Ann. § 5.311 (West Supp. 2010).

Water code section 5.115 currently defines "affected person" as follows:

> ***HN2***[↑] For the purpose of an administrative hearing held by or for the commission involving a contested case, "affected person," or "person affected," or "person who may be affected" means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest.

Id. § 5.115(a) (West Supp. 2010). ***HN3***[↑] The **[**9]** Commission's pertinent rules incorporate the same definition. *See* 30 Tex. Admin. Code §§ 55.103 (West 2011) (Texas Comm'n on Envtl. Quality, Requests for Reconsideration and Contested Case Hearings; Public Comment) ("[A]ffected person" with respect to permit application "has a personal justiciable interest related to a legal right, duty, privilege power, or economic interest affected by the [permit] application. An interest common to members of the general public does not qualify as a personal justiciable interest."), .203(a) (West 2011) (Texas Comm'n Envtl. Quality, Determination of Affected Person) (same).

In water code section 5.115, the Legislature additionally mandated that the Commission ***HN4***[↑] "shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission's jurisdiction and whether an affected association is entitled to standing in contested case hearings." Tex. Water Code Ann. § 5.115(a). Pertinent to this appeal, the Commission has

[5] The Administrative Procedure Act (APA) is codified in title 10, subtitle A, chapter 2001 of the Texas Government Code. *See* Tex. Gov't Code Ann. §§ 2001.001-.902 (West 2008).

promulgated the following rule:

> ***HN5***[↑] In determining whether a person is an affected person, all factors shall be **[**10]** considered, including, but not limited to, the following:
> (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 and safety of the person, and on the use of property of the person;
>
> **[*791]** (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 Tex. Admin. Code § 55.203(c). Related to the final factor, the Commission has further provided that ***HN6***[↑] "[g]overnmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons." *Id. § 55.203(b)*.

We additionally note—as it later becomes relevant to our analysis—that the current versions of *section 5.115* and related Commission rules differ from those we construed in our prior precedents addressing **[**11]** contested-case hearing requests before the Commission. *See Collins v. Texas Natural Res. Conservation Comm'n, 94 S.W.3d 876, 881-82 (Tex. App.—Austin 2002, no pet.)*; *United Copper Indus. v. Grissom, 17 S.W.3d 797, 800-03 (Tex. App.—Austin 2000, pet. dism'd)*; *Heat Energy Advanced Tech., Inc. v. West Dallas Coal. for Envtl. Justice, 962 S.W.2d 288, 289, 294-95* (Tex. App.—Austin 1998, pet. denied) (*HEAT*). At the time pertinent to those decisions, *section 5.115* and Commission rules required hearing requestors to demonstrate not only that they possessed a "personal justiciable interest" in the permit application so as to be an "affected person," but also that their request was "reasonable" (considering such factors as whether the project would decrease emissions or discharges of pollutants and "the extent to which the person requesting a hearing is likely to be impacted by the emissions, discharge, or waste") and that it was supported by "competent evidence." *See* Act of May 28, 1995, 74th Leg., R.S., ch. 882, § 1, 1995 Tex. Gen. Laws 4380, 4381; *30 Tex. Admin. Code §§ 55.27(b)(2), .31*; *see Collins, 94 S.W.3d at 881-82*; *United Copper, 17 S.W.3d at 800-01*; *HEAT, 962 S.W.2d at 289, 294-95*. **[**12]** The Legislature deleted the "reasonableness" and "competent evidence" requirements in 1999—in the same legislation in which it added subchapter M to water code chapter 5. *See* Act of May 30, 1999, 76th Leg., R.S., ch. 1350, § 1, 1999 Tex. Gen. Laws 4570 (codified at *Tex. Water Code Ann. § 5.115*).

In addition to prohibiting the Commission from granting hearing requests of third parties who are not "affected persons," subchapter M restricts the Commission from referring an issue to SOAH for a contested-case hearing unless the Commission determines that the issue (1) involves a disputed question of fact (2) that was raised during the public-comment period and (3) that is "relevant and material" to its decision on the permit application. *See Tex. Water Code Ann. § 5.556(d)*. In the event it grants a hearing request, the Commission is additionally directed "to limit the number and scope of the issues" it refers to SOAH. *Id. § 5.556(e)*.

The water code does not prescribe a particular procedure through which the Commission is to decide requests for contested-case hearings and determine whether the requestor is an "affected person" entitled to one. *See id. §§ 5.115, .556*. The Commission's rules, **[**13]** however, specify that a person seeking a contested-case hearing must file a written hearing request within a specified period following the executive director's response to public comments, that the request "may not be based on an issue that was raised solely in a public comment withdrawn by the commenter" before the executive director filed his response to public comments, and that the request must "substantially comply" with rules specifying certain required contents. *30 Tex. Admin. Code § 55.201(a), (c), (d), (i)*. Among these required contents, the request must "list all relevant **[*792]** and material disputed issues of fact that were raised during the public comment period that are the basis for the hearing request," and "identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how or why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public." *See id.*

§ 55.201(d)(2), **[**14]** (4).

Once a contested-case hearing request is filed, a "response" may be filed by the executive director, the director of the Commission's Office of Public Assistance, or the applicant. *See id.* § 55.209(d) (West 2011). Any such response must specifically address "whether the requestor is an affected person[,] which issues raised in the hearing request are disputed[,] whether the dispute involves questions of fact or of law[,] whether the issues were raised during the public comment period[,] whether the hearing request is based on issues raised solely in a public comment [that was] withdrawn[, and] whether the issues are relevant and material to the [Commission's] decision on the application . . . ." *Id.* § 55.209(e)(1)-(6). The hearing requestor then has the right to file and serve a "written repl[y] to a response." *See id.* § 55.209(g).

The rules then direct the Commission to "evaluate" the hearing request and provide it four basic options. *See id.* § 55.211(b)-(d). First, the Commission "may . . . determine that a hearing request meets the requirements of this subchapter," and "shall" grant the request if made by an "affected person" and the request (1) is timely filed, (2) "is pursuant **[**15]** to a right to hearing authorized by law," (3) complies with the form and content requirements of *rule 55 201*, and (4) "raises disputed issues of fact that were raised during the [public] comment period, that were not withdrawn . . . and that are relevant and material to the [C]ommission's decision on the application." *See id.* § 55.211(b)(3), (c). In that instance, the Commission must refer the disputed relevant and material fact issues to SOAH for a contested-case hearing. *See id.* § 55.211(b)(3). The Commission's second option is to "determine that the hearing request does not meet the requirements of this subchapter," and proceed to act on the permit application without a hearing. *See id.* § 55.211(b)(2). Its third option is to refer the hearing request itself to SOAH for a contested-case hearing and recommendation "on the sole question of whether the requestor is an affected person." *See id.* § 55.211(b)(4). Finally, apart from these requirements, the Commission has discretion to grant a hearing request in the "public interest." *See id.* § 55.211(d).

HN7[↑] Although the Commission's "evaluation" of the hearing request may result in the referral of the request to SOAH for a limited contested-case **[**16]** hearing or the granting of a contested-case hearing on the merits of the permit application, the Commission's rules specify that its evaluation of the request "is not itself a contested case subject to the APA." *See id.* § 55.211(a).

The present proceeding

The Commission staff classified the O-Kee Dairy permit application as seeking a "major" amendment to the dairy's existing water-quality permit, as opposed to a "minor" one that would be exempt for that reason from the requirement of an opportunity for a contested-case hearing. *See id.* §§ 55.201(i); 305.62(c). The executive director declared the O-Kee Dairy permit application administratively complete, conducted technical review, prepared a draft **[*793]** permit, and issued a preliminary decision that the draft permit, if issued, met all statutory and regulatory requirements. As the applicants had requested, the draft permit proposed to increase the dairy's maximum herd size from 690 to 999 head and to expand its total waste application acreage from 261 to 285.4 acres. At the same time, however, the draft permit proposed to implement several new measures that Commission staff viewed as strengthening the overall water-quality protections at the **[**17]** facility, even considering the higher volumes of manure that would be produced by hundreds more cows. These included steps aimed at reducing the possibility of discharges from the dairy's RCSs by, among other things, more than doubling their total storage capacity to 21.9 acre-feet—a capacity estimated to accommodate rainfall and runoff from a ten-day rainfall volume that would be expected to occur once every 25 years—and improving monitoring of sludge and water levels. There were also new restrictions aimed at reducing the risk of waste from the WAFs entering the water supply, including limiting waste application in accordance with the phosphorus requirements of the crops and soil, rather than nitrogen requirements, which had an estimated effect of lowering by about 40 percent the amount of waste fertilizer that could be applied in the fields. The dairy was also required to expand the size of non-vegetative buffer zones around the WAFs and to transport any excess waste off-site. The new measures purported to conform to numerous regulatory changes that had been imposed on Texas dairy CAFOs—and particularly dairy CAFOs located, like the O-Kee Dairy, northwest of Waco—during the years **[**18]** since the dairy had obtained its previous water-quality permit, which dated back to 1999. Although located a few miles from the river itself, the O-Kee Dairy is situated within the watershed of the North Bosque River, which rises from headwaters in Erath County, flows southeastward through Hamilton and Bosque Counties, and into McLennan County and the Waco city limits, where it joins two other branches of the Bosque and a creek in forming Lake Waco. During

recent decades, the dairy industry within the North Bosque watershed has seen significant growth, bringing controversy among regulators, scientists, elected officials, and members of the public regarding the extent to which increasing volumes of animal waste being produced by the dairies are damaging water quality in the North Bosque and, ultimately, Lake Waco. The City—for whom Lake Waco serves as a source of both its municipal water supply and its broader economic health—has been prominent among those advocating stricter regulatory limits on the dairies' operations before the Legislature, the Commission, and in other fora. Among other complaints, the City has blamed upstream dairies for causing perceived unpalatable taste and odor **[**19]** in its drinking water, as well as contributing pathogens that can endanger human health.

Several of the intervening regulatory changes stemmed from a 1998 determination by the Commission made to comply with the federal Clean Water Act, which requires that Texas "identify those waters within its boundaries for which the effluent limitations required by [the Act] are not stringent enough to implement any water quality standard applicable to such waters," *33 U.S.C. § 1313(d)(1)(A) (2001)*. The Commission determined that two segments of the North Bosque River above Lake Waco were "impaired" under "narrative" water-quality standards—qualitative, somewhat subjective assessments of "too much," in contrast to quantitative or numeric measures—"related to nutrients and aquatic plant growth." These were Segment 1255, which extends from the North Bosque's headwaters to a point just downstream **[*794]** from Stephenville, and Segment 1226-the area in which the O-Kee Dairy is located—which extends from the southeast end of Segment 1225 to the point where the river flows into Lake Waco.[6] The Commission's identification of the two segments of the North Bosque as "impaired" triggered an obligation on its part **[**20]** to determine for each a "total maximum daily load" (TMDL)—essentially a plan or budget that defines the maximum amount of a pollutant that the water body can receive and attain the applicable water-quality standard. *See id. § 1313(d)(1)(C)*. Following study and public comment from persons that included the City, the Commission in 2001 determined that soluble phosphorus, which it attributed primarily to dairies' waste application fields and municipal water-treatment plants, was the key variable that could be controlled to limit algal plant growth in the North Bosque River, and approved TMDLs that proposed an overall fifty-percent reduction in soluble phosphorus loading over time. After further study and comment (including comments from the City), the Commission in 2002 proposed an implementation plan through which dairies and cities could reduce phosphorus loadings. In 2004, the Commission adopted rules making parts of the plan legally enforceable. *See* 29 Tex. Reg. 2550-2601 (Mar. 12, 2004).

Meanwhile, in 2001, the Legislature—at **[**21]** the City's urging—had imposed new environmental restrictions on dairy CAFOs located in a "major sole source impairment zone" (MSSIZ)—a term that, at the time of enactment, included only the North Bosque watershed above Lake Waco.[7] *See generally Tex. Water Code Ann. §§ 26.501-.504*. The restrictions and requirements of this MSSIZ legislation included mandating that new or expanded CAFOs located within a MSSIZ obtain an individual water-quality permit—i.e., one tailored to the particular circumstances of the dairy—and barred regulation through a general permit. *See id. § 26.503(a)*. Because general permits are among the types of permit that are exempt from the requirement of an opportunity for a contested-case hearing, *see 30 Tex. Admin. Code § 55.201(i)(7)*, the MSSIZ legislation's requirement of individual permits had the effect of removing that exemption for CAFOs covered by the statute, thus opening their permitting proceedings to the potential for contested-case hearings.

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[6] As the Commission emphasizes, however, Lake Waco itself has never been determined to be an "impaired" water body in regard to aquatic plants or any other criterion.

[7] "Major sole source impairment zone" was defined as:

> a watershed that contains a reservoir:
>
> (1) that is used by a municipality as a sole source of drinking water supply for a population, inside and outside of its municipal **[**22]** boundaries, of more than 140,000; and
>
> (2) at least half of the water flowing into which is from a source that, on the effective date of this subchapter, is on the list of impaired state waters adopted by the commission as required by *33 U.S.C. Section 1313(d)*, as amended:
>
> > (A) at least in part because of concerns regarding pathogens and phosphorus; and
> >
> > (B) for which the commission, at some time, has prepared and submitted a total maximum daily load standard.

Tex. Water Code Ann. § 26.502 (West 2008).

The Environmental Protection Agency also adopted new rules and guidelines governing CAFOs that imposed stricter waste-application and record-keeping requirements. *See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg 7176-7274 (Feb. 12, 2003). The Commission, in turn, promulgated rule amendments purporting to implement the MSSIZ legislation, the new stricter federal requirements, **[*795]** and other changes aimed at strengthening environmental protections at dairy CAFOs and particularly those located in the North Bosque watershed. *See* 27 Tex. Reg. 1511-33 (Mar. 1, 2002) (amending **[**23]** 30 Tex. Admin. Code §§ 321.31-.35, .39, .48., .49 (West 2011)); 29 Tex. Reg. 6652-6723 (July 9, 2004) (amending 30 Tex. Admin. Code §§ 321.31-.49) (West 2011)). The net effect was that the O-Kee Dairy's amended water-quality permit had to incorporate more stringent water-protection requirements than its previous one.

The City timely submitted numerous comments in opposition to the proposed permit[8] and requested a public meeting, which the executive director granted. Following the public meeting, the executive director filed his responses to public comment. With respect to the City's complaints, which he grouped into thirty-one specific comments or sets of comments, the executive director agreed to make five changes to permit provisions governing waste application in the dairy's WAFs or off-site, but otherwise rejected the City's legal and factual assertions.

The City then timely filed a written request for a contested-case hearing that incorporated its prior comments, replied to the executive director's responses, and delineated the legal and factual issues it considered to be in **[**24]** dispute. *See* 30 Tex. Admin. Code § 55.201(a), (c), (d). Purporting to act both in its own behalf and as *parens patriae* for its citizens, the City invoked the right of an "affected person" to obtain a contested-case hearing on a "major amendment" to the O-Kee Dairy's water-quality permit. *See id.* § 55 201(b)(4), (i); *id.* § 305.62(c)(1), (2). To comply with the requirement that it "identify [its] personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language [its] location and distance relative to the proposed facility or activity . . . and how and why [it] believes [it] will be adversely affected by the proposed facility or activity in a manner not common to members of the general public," *see id.* § 55.201(d)(2), the City presented four pages of argument that attached and incorporated two affidavits—one from a professional engineer, Bruce L. Wiland, whom the City presented as an expert in water-quality analysis, the other from the engineer who serves as the City's water-utility director, Richard L. Garrett. The Wiland affidavit attached and incorporated roughly two-hundred pages of research studies on which **[**25]** the expert relied as support for his opinions. The City's assertions concerning its personal justiciable interest in the O-Kee Dairy permit application, which essentially track the assertions and opinions of the two experts, can be summarized as follows:

- The City possesses a personal justiciable interest in the quality of the water in Lake Waco because it owns all adjudicated and permitted rights to the water impounded in the lake and uses the water as its sole source of supply for its municipal water utility, exclusive of emergency connections. The City must treat the water to ensure that it is safe for uses that include drinking and bathing and that it will be regarded as palatable by the customers to whom the City sells the water, including 113,000 City residents, approximately 45,000 residents of surrounding municipalities, and major industrial customers "that place a premium on the quality of the water they use." Otherwise, the City is placed at a competitive disadvantage in preserving and **[*796]** growing its water-utility customer base and, ultimately, its broader economic health.

- For many years, the City has received complaints about offensive taste and odor in its drinking water. **[**26]** The source of these problems has proven to be a geosmin (earthy odor) produced by decaying algae that grows in Lake Waco during warm weather. Beginning in the 1980s, Lake Waco began to experience more frequent and longer durations of algal blooms, with correspondingly more taste and odor problems in the City's drinking water. To counter these problems, the City has incurred escalating costs in attempting to treat the water. Despite these additional expenditures, current treatment methods (chiefly, the use of powdered activated carbon) have repeatedly fallen short of eliminating the geosmin, necessitating that the City deliver offensive smelling and tasting water to customers for the time being and that it plan and

[8] The sole other public comment came from a landowner near the dairy who was concerned about swarming flies.

budget to install different and more expensive water-treatment systems in the future.

• There is a causal linkage between the increasing algal growths in Lake Waco (and resultant taste and odor problems in the City's drinking water) and phosphorus loading from dairies upstream in the North Bosque watershed. The North Bosque contributes approximately 64 percent of the total flow into Lake Waco and over 72 percent of the total phosphorus loading to the lake. Between 30 to 40 **[**27]** percent of the lake's total phosphorus load is attributable to dairy operations in the North Bosque watershed, most of which stems from runoff and discharges that occur during heavy rainstorms. This phosphorus loading attributable to dairies in the North Bosque watershed, in turn, is the primary cause of the lake's heavy algal growth.

• In addition to contributing nutrients that lead to algal growth and, ultimately, to taste and odor problems in drinking water, CAFOs in the North Bosque watershed are also a source of bacteria and other pathogens entering Lake Waco. In addition to driving up water treatment costs, the presence of these pathogens in the lake endanger the health and enjoyment of the City's many citizens who swim, fish, sail, ski, and engage in other water recreation there.

• If the problems with the proposed O-Kee Dairy permit identified in the City's comments are not remedied to any greater extent than described in the executive director's response, the increases in the dairy's herd size from 690 to 999 will increase the amounts of phosphorus and bacteria transmitted from the dairy, its waste application fields, and third-party fields into the North Bosque and downstream **[**28]** to Lake Waco, where it will contribute to increased algal growth, more bacteria, and the problems that follow. Although Lake Waco is approximately eighty miles downstream from the O-Kee Dairy, the distance does not substantially reduce these adverse effects because the primary mechanism through which these pollutants are transported are heavy rains, which can deliver the pollutants downstream in as little as 3-5 days.

The executive director timely filed a response in opposition to the City's contested-case hearing request. *See id.* § 55.209(d), (e).[9] He did not dispute that **[*797]** the City, if an affected person, would have a legal right to a contested-case hearing and conceded that the City's request met the Commission's formal and procedural requirements governing hearing requests, *see id.* §§ 55.201, .211(c)(2)(B)-(D), including providing the requisite "brief, but specific, written statement" explaining the City's personal justiciable interest, *id.* § 55.201(d)(2). The executive director further concluded that the City had identified nine disputed and material fact issues or sets of issues that it had timely raised in its comments, not withdrawn, and that would be referable to SOAH. *See id.* **[**29]** §§ 55.201(d)(4), .211(c)(2)(A). The executive director disputed only whether the City met the requirement of an "affected person" with regard to the O-Kee Dairy permit.

The executive director analyzed the City's request under the non-exclusive "factors" that the Commission "considers" under its rules to identify "affected persons." *See id.* § 55.203(c). He first observed that the City has no legal authority to regulate dairies outside its territorial jurisdiction or to enforce CAFO regulations in particular. *See id.* § 55.203(b) ("[g]overnmental entities . . . with authority under state law over issues raised by the application may be considered affected persons"), (c)(6) ("for governmental entities, their statutory authority over or interest in the issues relevant to the application"). On the other hand, observing **[**30]** that the City had water rights in Lake Waco, the executive director acknowledged that the City's "interest in maintaining water quality in Lake Waco is protected by the rules and regulations covering this permit application and there is also a reasonable relationship between the interest claimed and the activity regulated." *See id.* § 55.203(c)(1) ("whether the interest claimed is one protected by the law under which the application will be considered"), (3) ("whether a reasonable relationship exists between the interest claimed and the activity regulated"). "However," the executive director reasoned, "the distance from the dairy to the City of Waco and Lake Waco weigh heavily against Waco's claim that they are an affected person for purposes of this particular permit application." *See id.* §§ 55.203(c)(4) ("likely impact of the regulated activity . . . on the use of property of the person"), (5) ("likely impact of the regulated activity on use of the impacted natural resource by the person"). In support of that conclusion,

[9] Responses were also filed by the applicants, who opposed the hearing request, and the Commission's public interest counsel, who maintained that the City was an affected person and entitled to a contested-case hearing. Amicus letters in opposition to the hearing request were also submitted by the Texas Association of Dairymen and a state legislator who represented Hamilton County.

the executive director relied on two sets of basic propositions:

> • The extent of any discharge from the dairy's RCSs that would be allowed by the permit, he suggested, **[**31]** would be rare or insignificant, occurring only "in the event of a rainfall event that exceeds the 25-year, 10-day storm event for this area." As for runoff from the dairy's waste-application fields and third-party fields, the executive director reasoned it is considered non-point source runoff and exempt agricultural runoff that was not regulated so long as waste was applied in compliance with the permit and applicable rules. Further elaborating on these issues, the executive director attached the draft permit, his responses to public comment, and a "fact sheet" detailing his position that the amended permit, despite authorizing hundreds more cows, would nonetheless be "more stringent" in terms of water-quality protections than the existing one.
>
> • "Assuming the dairy had a discharge," the executive director added, it would be unlikely to impact Lake Waco because the dairy is approximately 7.2 downstream miles from reaching the North Bosque, then another 75 miles before the North Bosque reaches the point where it empties into the lake. "At 82 miles upstream," he reasoned, "the distance is such that . . . assimilation and dilution **[*798]** would occur long before the water reaches Lake Waco." "However, **[**32]** even if the discharge could somehow survive the 82 mile trip downstream," the executive director further reasoned, "it would then have to survive further dilution to travel an additional 6.8 miles across Lake Waco" to reach the City's municipal water intake point. The executive director did not cite to any support for these conclusions other than to attach a map illustrating the distances described.

The executive director also urged several broader policy or administrative justifications for denying the City's hearing request. He argued that the City's claim to affected-person status implied that "any city in Texas can challenge any permit upstream of their drinking water supply, without regard to distance, through the [contested-case hearing] process." He further suggested that the City's real issue "is not the potential contamination that could be caused by this particular dairy, but the cumulative effects of all dairy CAFO operations in the North Bosque watershed," going as far as to assert that "[n]one of the documentation submitted by [the City] identifies the Applicant by name as a source of nutrients." Similarly, urging that "many" of the City's complaints were in reality challenges **[**33]** to the underlying CAFO rules, the executive director criticized the City for an "entirely inappropriate" use of a contested-case hearing on a single permit to vent concerns that are properly addressed through rule-making or statutory change.

The City filed a reply in support of its hearing request. *See id.* § 55.209(g). It specifically disputed, among other things, whether the proposed permit would ensure compliance with Commission rules, the TMDLs, or the federal Clean Water Act; the factual accuracy of the executive director's assertions regarding "assimilation" and "dilution" of pollutants; the director's policy views regarding cumulative impacts; and his attempt to characterize the City's arguments as implicating only the upstream dairy industry as a whole and not the O-Kee Dairy permit in particular. The City presented a supplemental affidavit from Wiland in which he elaborated on the bases for his opinions, citing a study of nutrient loading in Lake Waco by Dr. Kenneth Wagner, and further detailing his opinions regarding a causal linkage between specific claimed deficiencies in the proposed permit and water-quality problems in Lake Waco. In part, Wiland opined that the proposed **[**34]** permit allowed excessive application of waste to WAFs and did not address application to third-party fields at all, that the nutrients and pollutants would be washed off the fields in the watershed and into the North Bosque during wet weather, that the permit aggravated the problem by permitting waste application to saturated fields, and that the same wet conditions would speed transmission (and reduce any natural attenuation) of pollutants to Lake Waco.

The Commission subsequently considered the City's hearing request and the O-Kee Dairy permit application in a public meeting. *See id.* § 55.209(g). It is undisputed that no further evidence was presented on the hearing request. The Commission denied the City's hearing request without referring it to SOAH. *See id.* § 55.211(b). Its order elaborated only that it had evaluated the request "under the requirements of the applicable statutes and Commission rules, including 30 Texas Administrative Code (TAC) Chapter 55," and considered the "responses to the hearing request filed by the Executive Director, the Office of Public Interest Counsel, the Applicant; the City of Waco's reply; and all timely public comment." In the same order, the Commission **[**35]** also proceeded to adopt the executive director's response to public comment, approved **[*799]** the permit amendment, and issued the permit as the

executive director had proposed.

The City sought judicial review of the Commission's order. *See Tex. Water Code Ann. §§ 5.351, .354* (West Supp. 2010).[10] During the pendency of the suit, the Commission supplemented the administrative record to include not only the filings in the O-Kee Dairy permitting proceeding, but additional agency documents, created prior to its order, reflecting its study and actions concerning broader water-quality issues in the North Bosque watershed and Lake Waco. These documents included the 2001 TMDLs for the North Bosque watershed, the 2002 implementation plan for the TMDLs, the Commission's responses to public comment concerning the TMDLs and implementation plan (including comments from the City), 2004 and 2008 status reports concerning implementation of the TMDLs, and 2002 water-quality assessments pertaining to Lake Waco and the North Bosque watershed.

The district court affirmed the Commission's order in full. This appeal ensued. *See id. § 5.355* (West Supp. 2010).

ANALYSIS

In a single issue, the City asserts that the Commission "erred" in denying its request for a contested-case hearing and that the district court similarly erred in affirming the Commission's order.

Although the Commission did not elaborate in its order on its specific grounds for denying the City's hearing request, nor did it enter findings of fact and conclusions of law, the parties agree that the order is founded on an ultimate legal conclusion that the City had failed to demonstrate that it is an "affected person" with respect to the O-Kee Dairy permit application under the meaning of the water code provisions and Commission rules that govern its right to a contested-case hearing. The Commission thus concedes that, as its executive director determined, the City's hearing request raised disputed, relevant, and material fact issues regarding the O-Kee Dairy permit application and otherwise complied with the procedural and substantive requirements that would entitle the **[**37]** City, if an "affected person," to a contested-case hearing on the application. *See id. § 5.556(c), (d); 30 Tex. Admin. Code §§ 55.201, .211(b)(3), (c).*

The City challenges this ultimate legal conclusion with essentially two sets of arguments. In the first, the City contends that the Commission's conclusion is predicated on an erroneous construction of "affected person" as defined under the water code and Commission rules. The City's second set of arguments concerns the factual bases on which the Commission would have impliedly relied in reaching that conclusion. We consider each in turn.

"Affected person"

Our resolution of the City's first set of arguments turns on ***HN8***[↑] statutory construction, which presents a question of law that we review de novo. *See State v. Shumake, 199 S.W.3d 279, 284 (Tex. 2006).* ***HN9***[↑] Our primary objective in statutory construction is to give effect to the Legislature's intent. *See id.* We seek that intent "first and foremost" in the statutory text. *Lexington Ins. Co. v. Strayhorn, 209 S.W.3d 83, 85 (Tex. 2006).* "Where text is clear, text is determinative of that intent." *Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433, 437 (Tex. 2009)* (op. on reh'g) (citing *Shumake, 199 S.W.3d at 284*). **[**38]** We consider the words in context, not in isolation. *See State v. Gonzalez, 82 S.W.3d 322, 327 [*800] (Tex. 2002).* We rely on the plain meaning of the text, unless a different meaning is supplied by legislative definition or is apparent from context, or unless such a construction leads to absurd results. *See Entergy Gulf States, Inc., 282 S.W.3d at 437; City of Rockwall v. Hughes, 246 S.W.3d 621, 625-26 (Tex 2008); see also Tex. Gov't Code Ann. § 311.011* (West 2005) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage," but "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."). We also presume that the Legislature was aware of the background law and acted with reference to it. *See Acker v. Texas Water Comm'n, 790 S.W.2d 299, 301 (Tex. 1990).* We further presume that the Legislature selected statutory words, phrases, and expressions deliberately and purposefully. *See Texas Lottery Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628, 635 (Tex. 2010); Shook v. Walden, 304 S.W.3d 910, 917 (Tex. App.—Austin 2010, no pet.).*

HN10[↑] These principles **[**39]** have application even where, as here, the judgment or order on appeal is predicated on an administrative agency's construction of

[10] It appears that the City filed both a motion for rehearing before the Commission and a suit for judicial review, then filed a second suit for judicial review after its **[**36]** rehearing motion was overruled. The district court subsequently consolidated the two proceedings.

a statute that it is charged with administering. *See* Railroad Comm'n of Tex. v. Texas Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 624-25 (Tex. 2011). The Commission emphasizes that there are circumstances in which courts must give deference—"serious consideration"—to an agency's construction of a statute it is charged with administering. *See id.*; Fiess v. State Farm Lloyds, 202 S.W.3d 744, 747-48 (Tex. 2006). However, as the Texas Supreme Court has recently made clear, this rule of deference applies only when the statute in question is ambiguous—i.e., susceptible to more than one reasonable interpretation—and only to the extent that the agency's interpretation is one of those reasonable interpretations. *See* Texas Citizens for a Safe Future & Clean Water, 336 S.W.3d at 624-25. Consequently, to determine whether this rule of deference applies, a reviewing court must first make a threshold determination that the statute is ambiguous and the agency's construction is reasonable—questions that turn on statutory construction and are reviewed de novo. **[**40]** *See* id. at 625. The "serious construction" rule is further limited and qualified by, among other things, the principle that courts give less deference to an agency's construction of a statute that does not lie within its administrative expertise or pertains to a non-technical issue of law. *See* id. at 630 (citing Rylander v. Fisher Controls Int'l, Inc., 45 S.W.3d 291, 302 (Tex. App.—Austin 2001, no pet.)).

HN11[↑] Similarly to the "serious consideration" rule where it applies, we defer to an agency's interpretation of its own rules unless that interpretation is plainly erroneous or inconsistent with the text of the rule or underlying statute. *See* Public Util. Comm'n v. Gulf States Util. Co., 809 S.W.2d 201, 207 (Tex. 1991); Tennessee Gas Pipeline Co. v. Rylander, 80 S.W.3d 200, 203 (Tex. App.—Austin 2002, pet. denied). We construe administrative rules in the same manner as statutes since they have the force and effect of statutes. Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d 248, 254 (Tex. 1999).

As previously noted, the Commission rules that control the City's right to a contested-case hearing all incorporate a definition of "affected person" found in water code section 5.115. *See* 30 Tex. Admin. Code §§ 55.103, **[**41]** .203. Section 5.115, in turn, defines an "affected person" as one "who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest" in the matter at issue, and not merely "[a]n interest **[*801]** common to members of the general public." Tex. Water Code Ann. § 5.115(a). The City argues that "affected person" as defined in water code section 5.115 must be construed in accordance with case decisions espousing an expansive view of standing to participate in administrative hearings. *See, e.g.*, Fort Bend County v. Texas Parks & Wildlife Comm'n, 818 S.W.2d 898, 899 (Tex. App.—Austin 1991, no writ) (observing that "[a]s a matter of policy, the right to participate in agency proceedings is liberally construed in order to allow the agency the benefit of diverse viewpoints"); Texas Indus. Traffic League v. Railroad Comm'n of Tex., 628 S.W.2d 187, 197 (Tex. App.—Austin 1982) (reasoning that "[s]ince administrative proceedings are different from judicial proceedings in purpose, nature, procedural rules, evidence rules, relief available and the availability of review, . . . one's right to appear in an agency proceeding should be liberally recognized," and that **[**42]** "[a]ny stricture upon standing in an administrative agency would . . . be inconsistent with the proposition that the agency ought to entertain the advocacy of various interests and viewpoints in determining where the public interest lies and how it may be furthered"), *rev'd on other grounds*, 633 S.W.2d 821 (Tex. 1982).

The Commission responds that the Legislature intended section 5.115's "affected person" definition to do precisely the opposite. It observes that the definition of an "affected person" or "person affected" as one having a "justiciable interest" not common with the "general public" tracks the jurisprudence addressing constitutional standing requirements in court, *see* Hooks v. Texas Dep't of Water Res., 611 S.W.2d 417, 419 (Tex. 1981), which are more restrictive than the standing concepts generally applicable at the agency level, *see* Texas Rivers Prot. Ass'n v. Texas Natural Res. Conservation Comm'n, 910 S.W.2d 147, 151 (Tex. App.—Austin 1995, writ denied). Further, citing anecdotal legislative history, the Commission maintains that the Legislature intended section 5.115 to combat perceived overuse or misuse of contested-case hearings in Commission permitting proceedings. **[**43]** *See* Senate Comm. on Natural Resources, Bill Analysis, Tex. S.B. 1546, 74th Leg., R.S. (1995). Consequently, the Commission reasons, the judicial standing requirements that the Legislature incorporated into section 5.115 must be applied "narrowly" or "restrictively" in light of the legislative intent to limit access to contested-case hearings.

We agree with the Commission, but only in part.

As this Court has previously observed, ***HN12***[↑] a "personal justiciable interest" not common to members

of the "general public"—the cornerstone of section 5.115's "affected person" definition—denotes the constitutionally minimal requirements for litigants to have standing to challenge governmental actions in court. *See* HEAT, 962 S.W.2d at 295 (observing that Commission's associational standing rules that incorporated section 5.115's "affected person" requirement were "clearly derived" from constitutional standing requirements articulated in Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 446-47 (Tex. 1993)); *accord* United Copper, 17 S.W.3d at 803. As we recently summarized these constitutional standing requirements and their purposes:

> HN13[↑] The general test for constitutional standing in Texas courts **[**44]** is whether there is a "real" (i.e., justiciable) controversy between the parties that will actually be determined by the judicial declaration sought. *See* [Texas Ass'n of Bus., 852 S.W.2d] at 446. Constitutional standing is thus concerned not only with whether a justiciable controversy exists, but whether the particular plaintiff has a sufficient personal stake in the controversy **[*802]** to assure the presence of an actual controversy that the judicial declaration sought would resolve. *See* Patterson v. Planned Parenthood, 971 S.W.2d 439, 442 (Tex. 1998); Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 662 (Tex. 1996). The requirement thereby serves to safeguard the separation of powers by ensuring that the judiciary does not encroach upon the executive branch by rendering advisory opinions, decisions on abstract questions of law that do not bind the parties. *See* Texas Ass'n of Bus., 852 S.W.2d at 444.
>
> HN14[↑] For a party to have standing to challenge a governmental action, as a general rule, it "must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large." South Tex. Water Auth. v. Lomas, 223 S.W.3d 304, 307 (Tex. 2007); *see* Brown v. Todd, 53 S.W.3d 297, 302 (Tex. 2001) **[**45]** ("Our decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large."); Tri County Citizens Rights Org. v. Johnson, 498 S.W.2d 227, 228-29 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) ("It is an established rule . . . that '. . . sufficiency of a plaintiff's interest (to maintain a lawsuit) comes into question when he intervenes in public affairs. When the plaintiff, as a private citizen, asserts a public, as distinguished from a private, right, and his complaint fails to show that the matters in dispute affect him differently from other citizens, he does not establish a justiciable interest.'") (quoting 1 Roy W. McDonald, *Texas Civil Practice* § 3.03, at 229 (rev. vol. 1965)).

Stop the Ordinances Please v. City of New Braunfels, 306 S.W.3d 919, 925-26 (Tex. App.—Austin 2010, no pet.) (footnote omitted) (*STOP*). HN15[↑] By crafting a definition of "affected person" that precisely mirrors these standing principles and incorporating it into the statute governing contested-case hearing requests in water-quality permitting proceedings, the Legislature unambiguously manifested its intent that those same principles govern standing to obtain **[**46]** a contested-case hearing in those proceedings. *See* Entergy Gulf States, Inc., 282 S.W.3d at 437 (HN16[↑] where statutory terms have acquired a technical meaning, we apply that meaning); Acker, 790 S.W.2d at 301 (we presume the Legislature was aware of background law); State v. Young, 265 S.W.3d 697, 705-07 (Tex. App.—Austin 2008, pet. denied) (applying similar analysis to determine that Legislature's use of the phrase "has been granted relief based on actual innocence" in wrongful-conviction statute denoted relief obtained through habeas corpus and not direct appeal).

HN17[↑] To possess standing under these principles with regard to the O-Kee Dairy permit application, the City had to establish:

> (1) an "injury in fact" from the issuance of the permit as proposed—an invasion of a "legally protected interest" that is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical";
>
> (2) the injury must be "fairly traceable" to the issuance of the permit as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the permit; and
>
> (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable **[**47]** decision on its complaints regarding the proposed permit (i.e., refusing to grant the permit or imposing additional conditions).

See Brown v. Todd, 53 S.W.3d 297, 305 (Tex. 2001) (quoting Raines v. Byrd, 521 U.S. 811, 818-19, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997), Lujan v. Defenders of **[*803]** Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)); STOP, 306 S.W.3d at 926-27; Save Our Springs Alliance, Inc. v. City of Dripping Springs, 304 S.W.3d 871, 878 (Tex. App.—

Austin 2010, pet. denied). Together, these elements serve to limit court intervention to disputes that the judiciary is constitutionally empowered to decide by "ensur[ing] that the plaintiff has a sufficient personal stake in the controversy so that the lawsuit would not yield a mere advisory opinion or draw the judiciary into generalized policy disputes that are the province of the other branches." STOP, 306 S.W.3d at 927 (citing Lujan, 504 U.S. at 569, 576-78; Save Our Springs Alliance, Inc., 304 S.W.3d at 894). Consequently, as the Commission observes, the "personal justiciable interest" requirement is more restrictive than the standing concepts that ordinarily govern the public's right to participate in executive agency proceedings. *See, e.g.*, Texas Rivers Prot. Ass'n, 910 S.W.2d at 151; **[**48]** Fort Bend County, 818 S.W.2d at 899.

The City also insists that to establish its "personal justiciable interest" in the O-Kee Dairy permit application, it need not prove the "merits" of its objections to the proposed permit, but only show that some "potential harm" would result if the permit was issued as proposed. The City is correct to the extent that ***HN18***[↑] the existence of the injury-in-fact required for constitutional standing is conceptually distinct from the ultimate question of whether the plaintiff has incurred a *legal* injury—i.e., whether the plaintiff has a valid claim for relief on the merits. *See* STOP, 306 S.W.3d at 926-27 (citing Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984)). This distinction is reflected in our precedents addressing contested-case hearing requests before the Commission. *See* United Copper, 17 S.W.3d at 802-04; HEAT, 962 S.W.2d at 295.

United Copper involved a 1997 application for an air-quality permit by United Copper Industries, Inc., to operate two copper-melting furnaces, facilities that would emit copper and lead particulate matter into the air. 17 S.W.3d at 799-800. After United Copper submitted its application with research data predicting levels of ground-level **[**49]** emission concentration that would result from the operation, the Commission determined that the proposed facility would not have any negative impact on the health or property interests of the public in the surrounding area—a finding required before the Commission could issue the permit under the then-applicable version of the health and safety code. Id. at 800 (citing Tex. Health & Safety Code Ann. § 382.0518(b) (West Supp. 2000)). Following public notice of the permit application, Grissom, who lived within two miles of the proposed facilities, sent a letter to the Commission requesting a contested-case hearing on the application. Id. at 800. In his letter, Grissom expressed concern that the facilities would have adverse health effects on himself and his two sons, all of whom suffered from serious asthmatic conditions. *Id.*

United Copper filed a response urging that, with reference to the then-applicable, pre-1999 version of water code section 5.115 and Commission rules, the hearing request should be denied because (1) Grissom was not an "affected person," (2) the hearing request was "unreasonable," and (3) Grissom had failed to present "competent evidence" (or, for that matter, any **[**50]** evidence) in support of his request. *Id.* The Commission's executive director, on the other hand, filed a response conceding that Grissom was an "affected person" but urging that his hearing request should be denied as "unreasonable" in the view that United Copper's uncontroverted evidence "established that the emissions would probably not negatively affect Grissom, his family, nor any other members of the public." **[*804]** *Id.* Grissom did not file a reply in support of his hearing request, nor did he ever submit evidence. *See id.* At a subsequent public meeting, the Commission, concluding that Grissom had failed to meet the requirements for obtaining a contested-case hearing, denied his request and proceeded to grant United Copper's permit application. Id. at 800-01.

Grissom sued for judicial review, contending that, at a minimum, he was entitled to a "preliminary hearing" at which he would have an opportunity to present evidence in support of his request. Id. at 801. The district court agreed, deciding that the Commission erred in determining that the hearing request was unreasonable and not supported by competent evidence without first providing Grissom a preliminary hearing at which he could **[**51]** offer evidence, and remanding the proceeding to the Commission for that purpose. Id. at 801-02. Both United Copper and the Commission appealed.

Of immediate relevance, United Copper argued that the district court should have upheld the Commission's order because the research data it submitted with its permit application, which Grissom never controverted, conclusively established that Grissom's health, safety, and property would not be affected by its operations and, consequently, that he was not an "affected person." *See* id. at 802-03. This Court disagreed that United Copper's evidence negated any effect of the proposed operation on Grissom or his family, observing that the data actually "indicates that the operations will result in increased levels of lead and copper at the site of Grissom's home and the elementary school one of his

sons attends." Id. at 803-04. Consequently, we reasoned, the data "does not prove that Grissom and his family will not be affected" so as to have a personal justiciable interest in the permit, but only "merely suggests that Grissom may not be affected to a *sufficient degree* to entitle him to prevail in a contested-case hearing on the merits of his case **[**52]** against United Copper's application." Id. at 803 (emphasis in original). In this regard, "United Copper," this Court explained, "confuses the preliminary question of whether an individual has standing as an affected person to *request* a contested-case hearing with the ultimate question of whether that person will *prevail* in a contested-case hearing on the merits." *Id.* (emphasis in original) (citing HEAT, 962 S.W.2d at 295). Relying on United Copper's own proof regarding the effect of its proposed operations and the factual allegations in Grissom's hearing request regarding his close proximity to the facility and "unique health concerns," the Court held that Grissom and his family had a personal justiciable interest in United Copper's permit application because they faced "potential harm" from the permitted activity. Id. at 803-04.

HEAT, on which *United Copper* relied in part, involved the application by an operator of a hazardous waste storage and processing company to renew the Commission permit under which it conducted its business. *See* HEAT, 962 S.W.2d at 289. Invoking a statutory right of "persons affected"—as defined by the pre-1999 version of water code section 5.115—to a contested-case **[**53]** hearing on the application, a coalition of residents who lived near HEAT's facility requested a hearing based on the affected-person status of individual members. *Id.* The Commission exercised its discretion to refer the issue of the coalition's standing (including the "affected person" status of individual members) to SOAH. *See id.* SOAH conducted an evidentiary hearing and heard testimony that included the account of a coalition member who claimed that he lived one-and-a-half blocks from the HEAT facility, that he had detected odor coming from the facility that was especially strong in the afternoons, and that it had affected his breathing and **[*805]** caused throat problems that prompted him to seek medical attention. Id. at 289-90, 295. HEAT attempted to challenge this testimony by identifying inconsistences between the location of the member's house and the direction from which he claimed the odors came, and also suggested that the odors might have come from other area businesses who used chemicals. *See* id. at 295. However, HEAT apparently acknowledged during the hearing that it was planning to reduce its odor emissions in connection with a separate Commission proceeding. *See id.*

With reference **[**54]** to the pre-1999 version of water code section 5.115, the administrative law judge (ALJ) found that the testifying coalition member had "presented competent evidence, in the form of his personal testimony, that odors from the HEAT facility are negatively affecting him and his use of his property." Id. at 294. The ALJ concluded that the member was a "person affected" by the permit and that, in turn, the coalition had associational standing to obtain a contested-case hearing. *Id.* The Commission, however, deleted the ALJ's findings and substituted its own findings negating the testifying member's individual standing and, thus, the coalition's associational standing. *Id.* The Commission found that the member had not established that HEAT had caused the odors he had experienced, that the facility would likely impact the health, safety, or use of his property, or that there was a reasonable relationship between his interest and the regulated activity. *Id.* Reviewing the Commission's substituted findings under a substantial-evidence analysis, this Court held that "the Commission could not reasonably have determined the Coalition did not have standing." Id. at 295.

While acknowledging inconsistencies **[**55]** in the member's testimony regarding the directions from which the odors came and evidence regarding other odor-emitting businesses in the area, the Court emphasized HEAT's admissions that it was planning to reduce odor emissions at its facility. *Id.* "This evidence," the Court urged, "suggests the HEAT facility had the *potential* to emit odors, and it lends credence to [the member's] assertion that he smelled odors coming from the HEAT facility." *Id.* (emphasis in original). This Court further reasoned that the constitutional standing requirements incorporated into water code section 5.115 "do[] not require parties to show they will ultimately prevail in their lawsuits; it requires them only to show that they will potentially suffer harm or have a 'justiciable interest' related to the proceedings." *Id.* The Commission's substituted findings, the Court added, "suggest that the Coalition would have had to prove the merits of its case against HEAT just to have *standing* to prove them again in a hearing on the merits." *Id.* (emphasis in original).

The City places great emphasis on *United Copper* and *HEAT*'s use of the phrase "potential harm" to describe the nature of the actual or anticipated injury **[**56]** necessary to give rise to a personal justiciable interest. The City reasons that allegations or proof of

some or *any* "potential" for harm, however remote, are sufficient. To the contrary, ***HN19***[↑] the required "potential harm" to the City from the permit's issuance "must be more than speculative. There must be some allegation or evidence that would tend to show that the [City's legally protected interests] will be affected by the action." *See* Save Our Springs Alliance, Inc, 304 S.W.3d at 883.[11] Both **[*806]** *United Copper* and *HEAT* are ultimately consistent with this requirement. In *United Copper*, the "potential harm" that conferred standing was established by United Copper's own data indicating that its operations would increase levels of lead and copper particulate at Grissom's home and his child's school, together with proof that Grissom and his child suffered from "serious asthma." *See* 17 S.W.3d at 803-04. In *HEAT*, the "potential harm" was established where the association member's house was located one-and-a-half blocks from the facility, the permit applicant had acknowledged in another Commission proceeding that the facility indeed emitted odors, and the association member claimed to detect strong **[**57]** odors coming from it. *See* 962 S.W.2d at 295; *accord* Texas Rivers Prot. Ass'n, 910 S.W.2d at 151 ("potential harm" to riparian property owners and canoe guides from lowering river levels was sufficient to confer standing).

Finally, we note that ***HN20***[↑] while questions of subject-matter jurisdiction, including standing, are conceptually distinct from the merits, as the City suggests, more recent decisions of the Texas Supreme Court and this Court have made clear that the two issues can nonetheless overlap or parallel each other in some instances. *See* Texas Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226-29 (Tex. 2004); Hendee v. Dewhurst, 228 S.W.3d 354, 366-69, 373-79 (Tex. App.—Austin 2007, pet. denied).[12]

The City also suggests that, as a matter of statutory construction, its personal justiciable interest in the O-Kee Dairy permit application was established through the Legislature's 2001 enactment of the MSSIZ legislation. Through this enactment, as previously noted, the Legislature, at the City's urging, imposed new environmental restrictions on dairy CAFOs located in a MSSIZ, a term that was defined so as to include at the time only the North Bosque watershed above Lake Waco. The City further observes that the legislation's new environmental restrictions included mandating individual rather than general permits for new or expanded CAFOs located in a MSSIZ, *see* Tex. Water Code Ann. § 26.503(a), which had the effect of removing an exemption from the requirement of an opportunity for a contested-case hearing. *See* 30 Tex. Admin. Code § 55.201(i)(7). The City urges that the Commission and this Court are bound to defer to this "legislative intent" to protect water quality in Lake Waco from the CAFOs' possible pollution, including allowing it to obtain a contested-case hearing on its objections to the proposed O-Kee Dairy permit. To hold that the City is not an "affected person" **[**59]** here, the City further reasons, would "effectively dismiss the [MSSIZ] legislation and language and intent and render it a nullity."

We disagree that anything in the MSSIZ legislation establishes the City's "personal justiciable interest" in the O-Kee Dairy permit application or that it is otherwise entitled to a contested-case hearing. As previously explained, ***HN21***[↑] we determine the Legislature's intent "first and foremost" from the objective meaning of the words the Legislature has actually enacted. *See* Lexington Ins. Co, 209 S.W.3d at 85; Shumake, 199 S.W.3d at 284. Under the MSSIZ legislation, it is true, as the City observes, that the Legislature required individual permitting of dairy CAFOs within MSSIZs, that this measure has the effect of generally expanding access to **[*807]** contested-case hearings concerning those facilities' permit applications, and that the O-Kee Dairy is within the legislation's coverage. However, nothing in the MSSIZ legislation addresses contested-case hearings in particular permitting proceedings, much less creates a right to one. *See generally* Tex. Water Code Ann. §§ 26.501-.504. The Legislature instead left those issues to be governed by subchapter M and ***HN22***[↑] the Commission's **[**60]** related rules—which, again, incorporate water code section 5.115's requirement of a "personal justiciable interest," the constitutionally minimal requirement of standing to challenge governmental action in court. *See id.* § 5.115; 30 Tex. Admin. Code §§ 55.201, .203. Nor does anything in the MSSIZ legislation purport to address, much less alter, these standing requirements. *See*

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[11] *See also* Texas Disposal Sys. Landfill, Inc. v Texas Comm'n on Envtl. Quality, 259 S.W.3d 361, 363-64 (Tex. App.—Amarillo 2008, no pet.) (holding that party lacked standing to complain of Commission's decision to modify permit because alleged potential injury was "mere speculation"; likening alleged chance of injury to that of "pig growing wings").

[12] However, as we observe below, such overlap has important implications for the procedures through which the jurisdictional issue may **[**58]** be decided.

generally Tex. Water Code Ann. §§ 26 501-.504.

At most, the City's observations concerning the MSSIZ legislation indicate that the Legislature made policy determinations that Lake Waco (and, by extension, the City) warranted various forms of additional protections against perceived pollution threats from upstream dairies. But if so, this would prove no more than that the City possessed a stake in the ongoing *policy* debate regarding dairy CAFOs in the North Bosque watershed. A "personal justiciable interest," as the Legislature has required before the City can obtain a contested-case hearing, entails more. The purpose of the "personal justiciable interest" requirement, again, is to distinguish the types of controversies that the *judiciary* is constitutionally empowered to decide from the broader policy disputes **[**61]** that are the domain of the Legislature or executive agencies. *See* STOP, 306 S.W.3d at 927 (citing Lujan, 504 U.S. at 560, 576-78). Lacking any indication in the statutory text that the Legislature intended to confer such an interest on the City with respect to particular permitting proceedings, we conclude that the MSSIZ legislation does not impact our analysis of whether the City possesses a personal justiciable interest with regard to the O-Kee Dairy permit.

On the other hand, we must also reject, as similarly lacking textual support in the statute, the Commission's view that the Legislature intended the personal justiciable interest requirement under subchapter M to be applied particularly "narrowly" or "restrictively," with an eye to limiting access to contested-case hearings. To support that proposition, the Commission relies primarily on anecdotal legislative history preceding the original enactment of water code section 5.115, which occurred in 1995. *See* Senate Comm. on Natural Resources, Bill Analysis, Tex. S.B. 1546, 74th Leg., R.S. (1995). The Commission emphasizes that proponents advocated the addition of section 5.115 as one of several measures—along with authorizing general **[**62]** permits and exempting "minor" permit amendments from hearing requirements—aimed at limiting the use of contested-case hearings in Commission permitting matters and their attendant cost and delay. *See id.* Leaving aside that intervening amendments suggest a more complicated and nuanced legislative disposition toward access to contested-case hearings in Commission permitting proceedings,[13] it is the intent that the Legislature **[*808]** has objectively expressed in the words it actually enacted that governs our construction of the personal justiciable interest requirement. *See* Entergy Gulf States, Inc., 282 S.W.3d at 437. Here, the Legislature has manifested its intent that ***HN23***[⬆] access to contested-case hearings under subchapter M be governed by the same requirement of a personal justiciable interest that controls standing to seek judicial relief against governmental action. *See* Tex. Water Code Ann. § 5.115(a). It is the substance of that requirement, not the Commission's perceptions about subjectively preferred outcomes, that controls whether it operates "narrowly" or "broadly" as to any particular hearing request. *See* Iliff v. Iliff, No. 09-0753, 339 S.W.3d 74, 2011 Tex. LEXIS 292, 2011 WL 1446725, at *3 (Tex. Apr. 15, 2011) (***HN24***[⬆] "In construing **[**63]** a statute, the court's purpose is to give effect to the Legislature's *expressed* intent.") (emphasis added).

The Commission also claims broad discretion to "weigh" or "balance" the "factors" identified in its rule, *see* 30 Tex. Admin. Code § 55.203(c), as well as broader concerns of policy and administration—such as its general charge to consider "the economic development of the state" when regulating water quality, *see* Tex. Water Code Ann. § 26.003, or any preference it might have for addressing a **[**64]** particular complaint (e.g., cumulative impacts of dairy CAFOs) via rule-making rather than adjudication—in determining whether a hearing requestor is (or should be) considered an "affected person" entitled to a contested-case hearing. In support, the Commission cites the rule-making delegation in water code section 5.115, where the Legislature charged the Commission with "adopt[ing] rules specifying factors which must be considered in determining whether a person is an affected person," *id.* § 5.115(a), as well as the "factors" rule itself, *see* 30 Tex. Admin. Code § 55.203(c). However, under the explicit text of both provisions, it remains that ***HN25***[⬆] an "affected person" is ultimately defined as one having a "personal justiciable interest" in a permit application—

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[13] *E.g.*, the 1999 amendments deleting the "reasonableness" and "competent evidence" requirements from section 5.115 and the 2001 enactment of the MSSIZ legislation, which, while not directly creating a right to a contested-case hearing for particular permit proceedings, did expand the range of proceedings in which such hearings potentially may be available. *See* Act of May 30, 1999, 76th Leg., R.S., ch. 1350, § 1, 1999 Tex. Gen. Laws 4570 (codified at Tex. Water Code Ann. § 5.115) (West Supp. 2010); Act of May 28, 2001, 77th Leg., R.S., ch. 965, § 12, 2001 Tex. Gen. Laws 4570 (amending Tex. Water Code Ann. § 26.001(10), (13) (West 2008), adding Tex. Water Code Ann. §§ 26.501-.504) (West 2008).

and that definition necessarily constrains whatever discretion the Commission possesses to "consider" "factors" in "determining" whether that definition is met in regard to a given hearing request. *See* Tex. Water Code Ann. § 5.115(a) (defining "affected person" in terms of "personal justiciable interest" and then charging Commission with "adopt[ing] rules specifying *factors* which must be *considered in determining whether* a person **[**65]** is an affected person"); 30 Tex. Admin. Code § 55.203(a) (defining "affected person" in regard to hearing request as one having a "personal justiciable interest"), (c) ("*[i]n determining whether* a person is an affected person, all *factors* shall be *considered*, including, but not limited to, the following . . .") (emphases added). The "factors," in other words, are not made inquiries unto themselves, and do not purport to narrow or redefine the ultimate benchmark of personal justiciable interest that defines an affected person, but are mere "factors" the Commission "considers" in "determining" whether that benchmark is met. *See* Tex. Water Code Ann. § 5.115(a); 30 Tex. Admin. Code § 55.203(a), (c). Consequently, **HN26**[↑] while each of the factors may potentially be relevant to determining whether the required personal justiciable interest is present, the legal significance of a given factor in regard to a particular hearing request must turn on the extent to which the factor informs that ultimate inquiry under the specific circumstances of the case. *See City of El Paso v. Public Util. Comm'n, 883 S.W.2d 179, 184 (Tex. 1994)* (agency action is arbitrary and capricious if, among other things, agency **[**66]** failed to **[*809]** consider factor Legislature directs it to consider or considered irrelevant factor).

Having thus construed "affected person" and "personal justiciable interest," we turn to the City's arguments regarding the factual bases underlying the Commission's conclusion that the City failed to meet these requirements.

Underlying facts

The City argues that "undisputed" facts it presented in its written hearing request and incorporated evidence establish its affected-person status as a matter of law. At least with respect to the threshold requirement of a legally protected interest, we agree with the City.

Legally protected interest

The City claims a legally protected interest predicated on, among other things, its property or economic stake in Lake Waco's water quality. The City alleged and presented evidence—and it remains undisputed—that it owns all adjudicated and permitted rights to the water impounded in Lake Waco, uses the water as the sole supply source for its municipal water utility, and must treat the water to ensure that it is safe for uses that include drinking and bathing and that it will be regarded as palatable by the customers to whom the City sells the water, including major **[**67]** industrial customers "that place a premium on the quality of the water they use." The City further asserted and presented evidence—again, without dispute—that it is incurring escalating costs to combat unpleasant taste and odor in the water that it sells to its customers.

These undisputed facts establish, as a matter of law, the type of interest, rooted in property rights, that constitute legally protected interests, distinct from those of the general public. *See* STOP, 306 S.W.3d at 928 (businesses that rented coolers had standing to challenge ordinance that banned coolers inasmuch as ordinance restricted their use of property and caused them to incur additional expenses to purchase replacement coolers that complied with ordinance); Lake Medina Conservation Soc'y v. Texas Natural Res. Conservation Comm'n, 980 S.W.2d 511, 516 (Tex. App.—Austin 1998, pet. denied) (association comprised of lakeside property owners and waterfront businesses had standing to challenge administrative action that would cause lake levels to drop); Texas Rivers Prot. Ass'n, 910 S.W.2d at 151-52 (riparian property owners and canoe guides had standing to challenge agency action that would lower river levels). Indeed, **[**68]** in his response to the City's hearing request, the Commission's own executive director conceded that the City's "interest in maintaining water quality in Lake Waco is protected by the rules and regulations covering this permit application and there is also a reasonable relationship between the interest claimed and the activity regulated." *See* **HN27**[↑] 30 Tex. Admin. Code § 55.203(c)(1) (factors to determine "affected person" include "whether the interest claimed is one protected by the law under which the application will be considered"), (3) ("whether a reasonable relationship exists between the interest claimed and the activity regulated").

On appeal, the Commission urges that the City has no legal authority to regulate the O-Kee Dairy and therefore could not be an "affected person" by virtue of having "authority under state law over issues raised by the application," one of the considerations identified in its "factors" rule. *See id.* § 55.203(b) ("[g]overnmental entities . . . with authority under state law over issues

raised by the application may be considered affected persons"), (c)(6) (factors include, "for governmental entities, their statutory authority over or interest in the issues **[**69]** relevant to the application"); *see* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 673, 680 (Tex. 1979). However, the City does not **[*810]** rely on a claim to such authority as the basis for its asserted legally protected interest. As for any other claim the City makes to a legally protected interest, the Commission accuses the City of merely asserting the individual interests of its citizens, customers, or other members of the public in ensuring Lake Waco's water quality. It is true that, in its hearing request, the City purported to act not only in its own behalf, but also as *parens patriae* for its citizens. To the extent that the City seeks merely to stand in its citizens' shoes in asserting their common interests in ensuring Lake Waco's water quality, we agree that those interests would, by definition, be common to members of the general public. *See* Save Our Springs Alliance, Inc., 304 S.W.3d at 878-80 (concluding that plaintiffs who claimed "environmental," "scientific," and "recreational" interests in public water body, but no property interests affected by alleged pollution of it, had not established injury distinct from that of general public). But again, the City also **[**70]** asserts its own property or economic interests that sufficiently distinguish it from the general public.

Regarding the City's property or economic interest in Lake Waco's water quality, the Commission suggests that because the City may externalize its increased water treatment costs to some extent through higher taxes on its citizens or higher water rates for its customers, its interest in Lake Waco is ultimately no different from that of the general public. The sole authority the Commission cites in support of that proposition is a case addressing the individual standing of a Fort Worth resident to challenge that city's expansion of its zoo into public parkland. Persons v. City of Fort Worth, 790 S.W.2d 865 (Tex. App.—Fort Worth 1990, no writ). In *Persons*, the court of appeals held that the resident lacked standing because, while he claimed to have used and enjoyed the parkland in various ways, he failed to identify a personal justiciable interest in using the parkland that distinguished him from any other citizen of the city. Id. at 869-71. *Persons* does not speak to a municipality's claim of standing and, if it has any relevance here, it is only to highlight the distinctions between **[**71]** interests common to the "general public" and the type of legally protected interest the City possesses in Lake Waco water. Furthermore, the Commission's view would imply that a municipality that supplies water could never have a justiciable interest distinct from its customers, as virtually any water-quality or supply problem could, in theory, be resolved through higher expenditures passed on through higher taxes and rates. We reject that notion. *See* City of San Antonio v. Texas Water Comm'n, 407 S.W.2d 752, 764-65 (Tex. 1966) (municipality had justiciable interest in permit proceeding impacting reservoir that served as source for municipal water utility).

In sum, based on the undisputed facts relating to the City's property or economic interest in Lake Waco's water quality, we conclude that, as a matter of law, the City possesses the requisite legally protected interest that may give rise to a personal justiciable interest in the O-Kee Dairy permit application.

Concrete and imminent injury, causation, and redressibility

HN28[↑] To have a personal justiciable interest in the O-Kee Dairy permit application, the City must also have injury to its legally protected interest in Lake Waco's water quality **[**72]** that (1) is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical"; (2) is "fairly traceable" to the issuance of the permit as proposed (as opposed to the independent actions of third parties or other alternative causes unrelated to the permit); and that (3) it would be likely, and not merely speculative, that the injury would be redressed **[*811]** by a favorable decision on its complaints regarding the proposed permit—i.e., refusing to grant the permit or imposing additional conditions. *See* Brown, 53 S.W.3d at 305 (quoting Raines, 521 U.S. at 818-19 (1997); Lujan, 504 U.S. at 560-61); STOP, 306 S.W.3d at 926-27; Save Our Springs Alliance, Inc., 304 S.W.3d at 878. In contrast to its arguments regarding the City's legally protected interest, the Commission has not asserted that the factual allegations in the City's hearing request or its evidence, *if taken as true*, would be legally insufficient to establish these remaining elements of a personal justiciable interest. Instead, the Commission has purported to rely on contrary factual determinations, based on its weighing of "evidence," to the effect that:

- the amended O-Kee Dairy permit would not increase **[**73]** but reduce the risk and amount of phosphorus or pathogens being contributed by the dairy to the North Bosque River;
- any phosphorus or pollutants the dairy did

contribute would be "assimilated" or "diluted" as they washed downstream so as to have no ultimate impact on Lake Waco;

• assuming any phosphorus from the dairy actually reached Lake Waco, whether it would contribute to algal growth would be, at best, speculative because (a) myriad other sources also contribute phosphorus to Lake Waco (e.g., other dairies, municipal water treatment plants), (b) other nutrients also contribute to algal growth (e.g., nitrogen from row-crop farms along the other rivers that flow into Lake Waco), and (c) many factors other than nutrients, such as sunlight and climate, influence algal growth;

• in any event, there is no connection between algal growth and episodes of taste and odor problems in Lake Waco drinking water, which predate the growth of the dairy industry in the North Bosque watershed; and

• bacteria is not an issue in Lake Waco, which meets regulatory standards for contact recreation, and is not among the water bodies deemed "impaired" by bacteria. Nor has North Bosque segment 1226—the segment **[**74]** immediately north of Lake Waco that includes the O-Kee Dairy—been deemed impaired by bacteria since 2002.[14]

The Commission reasons that these findings, alone or in combination, would negate the existence of the requisite "concrete and particularized," imminent injury "fairly traceable" to the issuance of the O-Kee Dairy permit and likely redressed by denying the permit or imposing additional conditions. *See* Brown, 53 S.W.3d at 305 (quoting Raines, 521 U.S. at 818-19; Lujan, 504 U.S. at 560-61).

Evidence

The Commission's focus on "evidence," not to mention the City's own reliance on affidavits, beg threshold questions regarding whether the Commission has any discretion under the current water code and Commission rules to look beyond **[**75]** the written hearing request, response, and reply, and consider evidence relevant to the requestor's personal justiciable interest. As previously noted, while prior versions of the water code and rules required hearing **[*812]** requestors to supply "competent evidence" in support of their applications, that requirement was eliminated from the water code in 1999, *see* Act of May 30, 1999, 76th Leg., R.S., ch. 1350, § 1, 1999 Tex. Gen. Laws 4570, and the current versions of the water code and rules contain no express reference to evidence, nor to any procedure contemplating evidence, other than with respect to hearing requests that the Commission opts to refer to SOAH. *See* Tex. Water Code Ann. §§ 5.115, .556; Tex. Admin. Code §§ 55.201, .209, .211. On the other hand, the current water code does not expressly prohibit consideration of evidence, either. The Legislature simply directs the Commission to "determine[]," as a threshold matter, whether a "request was filed by an affected person as defined by Section 5.115"—i.e., one having a personal justiciable interest in the permit application, *see* Tex. Water Code Ann. § 5.115(a)—and does not elaborate as to how the Commission is to make this determination. **[**76]** *See id.* § 5.556(c).

The Commission's rules are more specific as to the procedures, however, and they impose what are in the nature of pleading requirements—the hearing requestor must file a written hearing request that "identif[ies] the person's personal justiciable interest affected by the application," including "a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public," followed by opportunities to file a "response" and "reply." *See* 30 Tex. Admin. Code §§ 55.201(c)-(d), .209(c)-(e). But then again, nothing in the rules explicitly limits the Commission's inquiry solely to the factual allegations in the hearing request or otherwise prohibits presentation or consideration of evidence. *See id.*

In asserting that it may weigh evidence and reject the City's factual allegations or evidence, the Commission analogizes itself to a trial court deciding a plea to the jurisdiction. It is now well-established **[**77]** that trial courts, when determining jurisdictional issues, including standing, are not bound by pleading allegations but may—and, indeed, must—consider evidence to the extent necessary to decide the issue. *See, e.g.,*

[14] The Commission couches its analysis of these facts and "evidence" in terms of its rule "factors" in its rule relating to a "reasonable relationship . . . between the interest claimed and the activity regulated," the "likely impact of the regulated activity on the . . . use of property of the person," and the "likely impact of the regulated activity on use of the impacted natural resource by the person." *See* 30 Tex. Admin. Code § 55.203(c)(3)-(5) (West 2011).

Miranda, 133 S.W.3d at 226-29; *Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554-55 (Tex. 2000)*. This is so despite the fact that the Texas Rules of Civil Procedure do not mention such a procedure. We also note that in at least one other procedural context analogous to the present one—the education commissioner's determination of his own jurisdiction over appeals under *section 7.057 of the education code*, which also does not mention evidence[15] —we have previously approved the agency's adoption of the basic analytical framework applied by trial courts when deciding pleas to the jurisdiction, including consideration of jurisdictional evidence in addition to the pleadings. *See Tijerina v. Alanis, 80 S.W.3d 292, 295 (Tex. App.—Austin 2002, pet. denied)*; *Smith v. Nelson, 53 S.W.3d 792, 794 (Tex. App.—Austin 2001, pet. denied)* (citing *Bland, 34 S.W.3d at 555*). Finally, we observe that, within statutory and constitutional constraints, administrative agencies possess "considerable **[**78]** procedural flexibility" in the manner in which they discharge their delegated functions. *See City of Corpus Christi v. Public Util. Comm'n of Tex., 51 S.W.3d 231, 262 (Tex. 2001)*.

[*813] Informed by these precedents, and barring any express prohibition to that effect in the water code or rules, we cannot conclude that the Commission would categorically lack discretion to consider evidence—through some sort of procedure—when it "determines" whether a "request was filed by an affected person as defined by *Section 5.115*." *See Tex. Water Code Ann. § 5.556(c)*. But this conclusion leads us to tougher questions concerning the specific procedures through which the Commission may consider evidence and how we review its factual determinations.

Substantial evidence

The parties vigorously join issue as to the validity of the implied fact findings on which the Commission relies and, as a preliminary matter, the standard (or standards) that govern our review of any such findings.[16] The gravamen of the Commission's position is that we must affirm its order because substantial evidence in the existing agency record supports the implied findings. As the Commission **[**79]** emphasizes, the substantial-evidence test or standard of review is essentially a rational-basis test whereby courts determine, as a matter of law, whether an agency's order finds reasonable factual support in the record. *See Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452-53 (Tex. 1984)*. Under this test, we consider whether the evidence as a whole is such that reasonable minds could have reached the same conclusion as the agency in the disputed action. *Collins, 94 S.W.3d at 881* (citing *Stratton v. Austin Indep. Sch. Dist., 8 S.W.3d 26, 30 (Tex. App.—Austin 1999, no pet.)*). The issue is not whether the agency reached the correct conclusion, but rather whether there is some reasonable basis in the record for its action. *City of El Paso, 883 S.W.2d at 185*. We may not substitute our judgment for that of the agency on matters committed to its discretion. *Stratton, 8 S.W.3d at 30*. Importantly, the agency's findings, inferences, conclusions, and decisions are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise. *Collins, 94 S.W.3d at 881*.

The City disputes that the substantial-evidence test or standard of review is relevant or applicable to our disposition of this appeal. In essence, it urges that there can be no substantial-*evidence* review where, as here, there was no evidentiary hearing at the agency level. The City observes that "substantial-evidence" review, at least as it is known under the APA, applies only to contested-case proceedings, thus presupposing **[**81]** an agency record that has been developed through trial-like adjudicative procedures, including the opportunities to test evidence through cross-examination and contrary evidence. *See Tex. Gov't Code Ann. §§ 2001.171-.1775* (West 2008) (prescribing procedures for judicial review of "a final decision in a contested case," including review of the agency record to determine whether decision is "not reasonably supported by substantial evidence considering the reliable and probative evidence **[*814]** in the record as a whole"); *see generally id. §§ 2001.051-.103*

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[15] *See Tex. Educ. Code Ann. § 7.057* (West 2006).

[16] In addition to the parties' briefing on original submission and the **[**80]** City's motion for reconsideration en banc, we have considered briefing submitted on these important issues by three amici on motion for reconsideration en banc: (1) the Texas Chapter of the Coastal Conservation Association (CCA), which describes itself as "a non-profit marine conservation organization" that "regularly comments upon and requests contested case hearings on applications filed at the [Commission] that seek authority to discharge wastewater into or adjacent to the Texas Coast"; (2) Mont Belvieu Caverns, L.L.C., which complains of what it perceives as the Commission's overly broad application of substantial-evidence review in a current proceeding regarding the entity's eligibility for a tax exemption; and (3) Professor Ron Beal of the Baylor Law School.

(prescribing agency-level procedures for hearing a "contested case"). No such adjudicative procedure was afforded it here, as the City observes, because the Commission's rules explicitly provide that the agency's "consideration" of its hearing request "is not itself a contested case subject to the APA." *See* 30 Tex. Admin. Code § 55.211(a)(4). The City further asserts that it was arbitrary and capricious, if not a denial of "due process," for the Commission to resolve factual and evidentiary issues without affording it the opportunity to test and rebut any evidence on which the Commission relies through an adjudicative hearing. It relies primarily **[**82]** on *United Copper*, in which this Court, in addition to holding that the evidence did not conclusively establish that the hearing requestor was not an affected person, affirmed the district court judgment ordering a limited contested-case hearing on whether the requestor was an affected person entitled to a contested-case hearing on the merits of the proposed permit. *See* 17 S.W.3d at 804-06. Citing what it regarded as the confusing nature of Commission rules and notices and other circumstances, this Court reasoned that "fundamental ideals of fairness," and "[b]asic due process" required that the requestor be given a "meaningful opportunity" to develop evidence to demonstrate his entitlement to a hearing and that the Commission had acted "unreasonably" in denying him a contested-case hearing for that purpose. *See id.* Although *United Copper* involved the application of the pre-1999 version of water code section 5.115—which, unlike the current version, required the requestor to present "competent evidence" and establish the "reasonableness" of the request—the City suggests that *United Copper* is nonetheless controlling to the extent that the Commission is purporting to rely on evidence.

We **[**83]** begin by considering whether the substantial-evidence analysis governs our review of the Commission's implied factual determinations. The parties agree that the APA's provisions governing judicial review of contested cases—including the "substantial-evidence" review on the agency record provided under that statute—are not directly applicable here because there was no "contested case" before the Commission.[17] *See* Tex. Gov't Code Ann. §§ 2001.171-.1775. That factor distinguishes this case from *HEAT*, in which the Commission had exercised its discretion to refer the hearing request to SOAH for a limited contested-case hearing, such that judicial review was governed by the APA. *See* 962 S.W.2d at 289, 294-95. The parties also seem to recognize that the statute authorizing judicial review of the Commission's order, *section 5.351 of the water code*, does not specify a standard or scope of review. In relevant part, *section 5.351* provides only that a person who is "affected by a ruling, order, decision, or other act of the commission may file a petition to review, set aside, modify, or suspend the act of the commission." *Tex. Water Code Ann. § 5.351(a)*. These features of *section 5.351* **[*815]** serve to **[**84]** distinguish this case from *United Copper*, in which we held that textual similarities between the APA and the statute authorizing judicial review there reflected legislative intent to adopt the APA's provisions governing the standard and scope of review of contested cases. *See* United Copper, 17 S.W.3d at 801. We relied on statutory language directing the reviewing court to consider only "whether the [Commission's] action is invalid, arbitrary, or unreasonable," a phrase that this Court had previously held "was intended to incorporate the entire scope of review" under the APA. *Id.* (citing Smith v. Houston Chem. Servs., Inc., 872 S.W.2d 252, 257 n.2 (Tex. App.—Austin 1994, writ denied)).

In the absence of statutory guidance, the Commission invokes jurisprudence predating both the APA and its statutory predecessor, the 1975 Administrative Procedure and Texas Register Act (APTRA),[18] that applied a common-law version of the "substantial evidence rule" in suits for judicial review under *section 5.351*'s predecessors. *See* City of San Antonio, 407 S.W.2d at 756, 758-62; Southern Canal Co. v. State Bd. of Water Eng'rs, 159 Tex. 227, 318 S.W.2d 619, 622-24 (Tex. 1958). From these pre-APTRA decisions, the

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[17] Amicus curiae CCA maintains that we should resolve this case by holding that the Commission's proceeding falls within the APA's definition of a "contested case" (notwithstanding the Commission's rule to the contrary) and that, for this reason, the APA independently requires "contested-case" hearing procedures. The CCA urges us to revisit this Court's precedents holding that the APA does not independently create a right to such a hearing in a "contested case." *See, e.g.*, Texas Dep't of Ins. v. State Farm Lloyds, 260 S.W.3d 233, 244 (Tex. App.—Austin 2008, no pet.) **[**85]** (observing that "[t]his Court has long held that, absent express statutory authority, the APA does not independently provide a right to a contested case hearing," and citing several of our precedents). Especially where neither party is making such an argument here, we decline the invitation.

[18] *See* Act of April 8, 1975, 64th Leg., R.S., ch. 61, §§ 1-24, 1975 Tex. **[**86]** Gen. Laws 136, 136-48, *repealed and replaced by* Act of May 4, 1993, 73rd Leg., R.S., ch. 268, §§ 1-50, 1993 Tex. Gen. Laws 583, 583-987.

Commission deduces a categorical rule that we must review all of its decisions for substantial evidence on the agency record and affirm if we find substantial evidence. The Commission's view is founded upon misperceptions about the origins, nature, and purposes of the "substantial-evidence rule" that is reflected in these decisions.

To explain why, we begin with the principle that ***HN29***[↑] an administrative agency's order made within its discretionary statutory and constitutional authority is ordinarily shielded by sovereign immunity from suit, such that there is no right to judicial review, unless and until the Legislature has waived that immunity by conferring a right of judicial review. *See* Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W.3d 170, 198 (Tex. 2004); Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality, 307 S.W.3d 505, 514 (Tex. App.—Austin 2010, no pet.); *cf.* Creedmoor-Maha, 307 S.W.3d at 526 (contrasting "inherent" judicial power to restrain agency actions violative of statutory or constitutional provisions, which is not barred by sovereign immunity). However, even while the Legislature generally has the prerogative to waive sovereign immunity to permit judicial review, Texas courts have long held separation-of-powers principles bar the judiciary—even where the Legislature has purported to grant such broad review powers—from **[**87]** redetermining the fact findings of agencies exercising their administrative functions. *See* Gerst v. Nixon, 411 S.W.2d 350, 353-54 (Tex. 1966); Southern Canal Co., 318 S.W.2d at 622-24. Instead, "[t]he judicial inquiry in regard to such matters is restricted to the *method* employed by the administrative agency in arriving at its decision . . . . [That is,] whether the decision of the administrator is fraudulent, capricious or arbitrary." Gerst, 411 S.W.2d at 354 (emphasis added) (footnote omitted) (citing Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699, 714-15 (Tex. 1959); Chemical Bank & Trust Co. v. Falkner, 369 S.W.2d 427, 431-33 (Tex. 1963)). Conversely, it is also long established that an agency order failing to pass muster under this inquiry must be set aside as invalid, as "arbitrary action of an administrative agency cannot stand." Lewis v. Metropolitan Sav. & Loan Assoc., 550 S.W.2d 11, 16 (Tex. 1977) (citing Gerst, 411 S.W.2d at 354). This inquiry, in concept, **[*816]** presents a question of law rather than fact, going to the reasonableness of the agency's order rather than whether a preponderance of evidence supports the order. *See* City of San Antonio, 407 S.W.2d at 756.

HN30[↑] An "arbitrary" agency **[**88]** decision includes one that is made "without regard to the facts." *See* Gerst, 411 S.W.2d at 354 (quoting Railroad Comm'n of Tex. v. Shell Oil Co., 139 Tex. 66, 161 S.W.2d 1022, 1029 (Tex. 1942)). The substantial-evidence test evolved in Texas jurisprudence as an evidentiary mechanism through which a party could seek to establish the arbitrariness and invalidity of an agency order and thereby overcome the order's presumption of regularity. *See id.* ("The so-called substantial evidence rule may be more accurately described as a test rather than a rule. When properly attacked, an arbitrary action cannot stand and the test generally applied by the courts in determining the issue of arbitrariness is whether or not the administrative order is reasonably supported by substantial evidence."). In this respect, lack of substantial evidence and agency arbitrariness have been considered "two sides of the same coin." *See* Charter Med., 665 S.W.2d at 454. However, establishing lack of substantial evidence is by no means the *only* method by which an agency's decision can be shown to be arbitrary and invalid. *See id.*; Lewis, 550 S.W.2d at 15-16.

In its original, common-law form, Texas's "substantial-evidence review" **[**89]** entailed a bench trial at which the contestant was provided the opportunity to establish—through the presentation and rebuttal of evidence, cross-examination, and other normal evidentiary and procedural features of civil actions generally—that no reasonable factual basis for the order had existed at the time the order was made. *See* Gerst, 411 S.W.2d at 354; Shell Oil Co., 161 S.W.2d at 1030; *see also* Thomas M. Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 Sw. L.J. 239, 241 (1969). Whether or not the *agency* had actually heard or relied on any such facts as the basis for its order was not considered material given that the parties would have "full opportunity in their appearance before a judicial body 'to show that at the time the order was entered there did, or did not, then exist sufficient facts to justify entry of the same.'" Gerst, 411 S.W.2d at 354 (quoting Cook Drilling Co. v. Gulf Oil Corp., 139 Tex. 80, 161 S.W.2d 1035, 1036 (Tex. 1942)). In fact, the agency record was not generally admissible. *See* Shell Oil Co., 161 S.W.2d at 1030; Reavley, 23 Sw. L.J. at 241 n.14. This procedural regime was said to be justified in light of the "informal" nature of agency proceedings **[**90]** and as a preferable alternative to placing the burden on agencies "to make an 'appeal-proof' record in every instance." Cook Drilling Co., 161 S.W.2d at 1036.

This method of substantial-evidence review—what we now commonly term "substantial-evidence-de-novo"

review, to distinguish it from the APA's "pure" substantial-evidence review on the agency record—was the dominant or "default" method of judicial review in Texas state courts prior to the 1975 enactment of APTRA. *See* Gerst, 411 S.W.2d at 354-55 ("This rule of procedure has application to judicial review when the statute allowing such review expressly so provides; or the statute, while allowing judicial review, is silent as to the method or when in the absence of express statutory provision, a judicial review is allowed because of constitutional considerations."); *see also* Gilder v. Meno, 926 S.W.2d 357, 366 (Tex. App.—Austin 1996, writ denied) (Jones, J., dissenting) ("Whatever its flaws, substantial evidence de novo was the prevailing method of judicial review **[*817]** in this state from the 1930s until the enactment of the [APTRA] in 1975."). And this was the form of substantial-evidence review that the Texas Supreme Court was applying **[**91]** in the pre-APTRA precedents on which the Commission relies. *See* City of San Antonio, 407 S.W.2d at 756, 758; Southern Canal Co., 318 S.W.2d at 623-24.

In agency proceedings within their scope, the APTRA and APA have supplanted the substantial-evidence-de-novo method in favor of a substantial-evidence analysis generally confined to the record made before the agency. *See* Tex. Gov't Code Ann. §§ 2001.174(2)(E), .175(e). But just as with the substantial-evidence-de-novo procedure, APA "pure," on-the-agency-record substantial-evidence review contemplates that the contestant is afforded an opportunity to elucidate the factual bases of the agency's order through presentation and rebuttal of evidence, cross-examination, and other trial-type procedures—a contested-case hearing. *See id.* §§ 2001.171, .174. Indeed, with substantial-evidence review confined to the agency record, the full and fair opportunity to develop an evidentiary record in this manner "becomes of paramount importance." Lewis, 550 S.W.2d at 13. And, absent this opportunity to develop the agency record, as this Court has recently observed, "no substantial evidence review is required or even possible." Texas Dep't of Ins. v. State Farm Lloyds, 260 S.W.3d 233, 245 (Tex. App.—Austin 2008, no pet.). **[**92]** This Court has similarly reasoned that where the Legislature has specified substantial-evidence review of an agency decision under the APA, it necessarily intended that the contestant be afforded an adjudicative hearing before the agency to develop the evidentiary record. *See* Ramirez v. Texas State Bd. of Med. Exam'rs, 927 S.W.2d 770, 773 (Tex. App.—Austin 1996, no writ) (rejecting argument that Legislature created right of judicial review of agency proceedings under APA substantial-evidence rule while depriving parties of opportunity for contested-case hearing; "[i]f the Board's interpretation were correct, it could deny applications . . . without creating any significant agency record at all, certainly not a record that would permit meaningful judicial review . . . [and] then the [L]egislature would have done a useless, futile thing in . . . provid[ing] for such review").

We recognize that this Court has not always spoken with complete clarity regarding whether substantial-evidence analysis can properly be applied to an agency record that has not been developed through contested-case or other trial-like processes. The Commission emphasizes *Collins*, which was a suit for judicial review **[**93]** under *water code section 5.351* from a Commission order denying a hearing request under the pre-1999 version of *water code section 5.115*. This Court applied a substantial-evidence analysis confined to an agency record that consisted of both (1) the record from a limited contested-case hearing adjudicating a hearing requestor's proximity to the permitted activity (specifically, the accuracy of a scaled map that the permit applicant had presented), *and* (2) written submissions of evidence that the parties had filed with the Commission, including affidavits and reports from experts. *See* Collins, 94 S.W.3d at 881-83. Although judicial review of the contested-case hearing record would clearly be governed by the APA (as was the case in HEAT, 962 S.W.2d 288), the other evidence had not been subjected to contested-case processes. The Commission views *Collins* as supporting the application of substantial-evidence review to this sort of informal agency record. However, the *Collins* opinion indicates that the contestant conceded or assumed that review of both components of the agency record was governed by the substantial-evidence standard. **[*818]** *See* id at 879. In the least, there is no indication that **[**94]** the applicable standard of review was disputed.

The Commission emphasizes other cases in which this Court has used language referring to "substantial-evidence" review where the agency record was compiled without a contested-case or adjudicative hearing. *See* County of Reeves v. Texas Comm'n on Envtl. Quality, 266 S.W.3d 516, 527-28 (Tex. App.—Austin 2008, no pet.); H.G. Sledge, Inc. v. Prospective Invest. Trading Co., Ltd., 36 S.W.3d 597, 602-03 (Tex. App.—Austin 2000, pet. denied); Stratton, 8 S.W.3d at 30; Gilder, 926 S.W.2d at 360-61.[19] In some of these

[19] The Commission also cites *United Copper*, but that decision

cases, the applicability of substantial-evidence review appears to be conceded by the contestant, as in *Collins*. *See* Stratton, 8 S.W.3d at 29. In others, "substantial-evidence" review is used as a shorthand reference to the entire scope of **[*819]** review under the APA—which, while titled "Review Under Substantial Evidence Rule or Undefined Scope of Review," authorizes reversal of agency decisions not only where "not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole," but also if the decisions were "in violation of a constitutional or statutory provision," "in excess of the **[**95]** agency's statutory authority," "made through unlawful procedure," "affected by other error of law," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion," *see* Tex. Gov't Code Ann. § 2001.174[20] — and is arguably dicta, as the cases were ultimately decided on substantive grounds other than the absence of substantial evidence. *See* County of Reeves, 266 S.W.3d at 526-31 (citing APA's entire scope of review; analysis turned on construction of rule); H.G. Sledge, Inc., 36 S.W.3d at 602-07 (same).[21] In the final case, *Gilder*, which involved an administrative appeal of a school board's order to the education commissioner, the sole issue was whether a legislative requirement of "substantial-evidence" review contemplated review on a hearing record developed at the local level or a substantial-evidence-de-novo type proceeding before the Commissioner. *See* 926 S.W.2d at 359-64.

Regardless, even assuming that any of these cases were not fully distinguishable such that a conflict exists in our precedents, we would conclude that the correct rule—the one consistent with the origins and purposes of substantial-evidence review as it has evolved in Texas—is the one we recognized in *State Farm Lloyds*: ***HN31***[↑] substantial-evidence review on an agency record is simply "not possible" absent the opportunity to develop that record through a contested-case or adjudicative hearing. *See* State Farm Lloyds, 260 S.W.3d at 245; *see also* Ramirez, 927 S.W.2d at 773. The United States Supreme Court has reached a similar conclusion **[**97]** with respect to substantial-evidence review under federal law. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-15, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) (substantial-evidence review applied to agency actions "based on a public adjudicatory hearing," not a "nonadjudicatory, quasi-legislative" agency proceeding that "is not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial-evidence review").

In this case, the Commission, though recognizing that the underlying agency proceeding was not an APA-contested case, advocated that the district court confine its review to the agency record, and the district court complied. Consequently, because the City never had the opportunity to develop an evidentiary record before the Commission through contested-case or adjudicative processes, we agree with the City that substantial-evidence review is inapplicable and unavailable. *See* State Farm Lloyds, 260 S.W.3d at 245; Ramirez, 927 S.W.2d at 773; *see also* Volpe, 401 U.S. at 414-15.

As the City further suggests, such a deprivation of the opportunity to develop a record that could overcome the substantial-evidence standard may, in some circumstances, rise to **[**98]** the level of being a violation of procedural due process and, for that reason, arbitrary. *See* United Copper, 17 S.W.3d at 804-06; *see also* Lewis, 550 S.W.2d at 13-16. We need not decide if that is so here because the agency record, even in its current state, reveals that the Commission, as a matter of law, acted arbitrarily with respect to its asserted implied fact findings—independently and apart from whether substantial evidence could be said to support those findings. *See* Charter Med., 665 S.W.2d at 454; Lewis, 550 S.W.2d at 13-16; State Farm Lloyds, 260 S.W.3d at 245-46.[22]

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actually applied concepts of agency arbitrariness or unreasonableness that were independent from the question of whether substantial evidence supported the agency order. *See* 17 S.W.3d 797, 800-03 (Tex. App.—Austin 2000, pet. dism'd).

[20] As **[**96]** amicus Professor Beal suggests, such use of "substantial-evidence review" in both a broad and narrow sense, though confusing and perhaps incorrect, is not uncommon. *See, e.g.*, State Farm Lloyds, 260 S.W 3d at 241-42, 245-46 (using the term in both senses). As should be apparent from context, our use of "substantial-evidence" review above is intended in the narrower sense.

[21] *Collins* may also fall into this category, inasmuch as the decisive facts that negated the hearing applicant's affected-person status appear to have been uncontroverted. *See infra* at p. 60-64, 68-69.

[22] Similarly, we express no opinion as to whether the reasoning under this Court's precedents extending APA-style review on the agency record to agency proceedings other than contested cases is applicable to this case. *See* Gilder v. Meno, 926 S.W 2d 357, 359-64 (Tex. App.—Austin 1996, writ denied) (reasoning that education code provision requiring reversal of

Arbitrariness

HN32[↑] An administrative agency is said to act arbitrarily or capriciously where, among other things, it fails to consider a factor the Legislature has directed it to consider, considers an irrelevant factor, or considered relevant factors but still reaches a completely unreasonable result. *See City of El Paso, 883 S.W.2d at 184.* An agency also acts arbitrarily in making a decision "without regard to the facts," *see* Gerst, 411 S.W.2d at 354 (quoting Shell Oil Co., 161 S.W.2d at 1029), relying on fact findings that are not supported by any evidence, *see* Flores v. Employees Ret. Sys. of Tex., 74 S.W.3d 532, 542 (Tex. App.—Austin 2002, pet. denied), or if otherwise there does not "appear a rational connection between the facts and the decision." Starr County v. Starr Indus. Servs., Inc., 584 S.W.2d 352, 356 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974)). **[**100]** In short, "the reviewing court must remand [for arbitrariness] 'if it concludes that the agency has not actually taken a hard look at the **[*820]** salient problems and has not genuinely engaged in reasoned decision-making.'" *Id.* (quoting Texas Med. Ass'n v. Matthews, 408 F. Supp. 303, 305 (W.D. Tex. 1976)). The record demonstrates the absence of the required "hard look" and "reasoned decision-making" by the Commission as to whether the City possesses the requisite "concrete and particularized," imminent injury fairly traceable to the issuance of the O-Kee Dairy permit that would likely be redressed by denying the permit or imposing additional conditions.

Relative "protectiveness" of the amended permit

Citing the proposed O-Kee Dairy permit's terms and its executive director's unsworn argument and analysis in response to the City's hearing request, the Commission asserts that this "evidence" establishes that the amended permit would reduce the amount and frequency of the O-Kee Dairy's contributions of pollutants to the North Bosque, even considering the addition of hundreds more cows to the facility. Because the new permit would thus be "more protective" of the North Bosque's water quality than **[**101]** the current one, the Commission reasons, the City cannot show any concrete or imminent adverse effect or injury to it if the permit were approved. In support of this reasoning, the Commission relies heavily on *Collins*.

In *Collins*, the operator of a poultry CAFO, B&N, applied for a permit amendment allowing it to change from a "dry" waste-management system to a "wet" waste-management system that utilized clay-lined waste-collection lagoons that were designed not to discharge waste. 94 S.W 3d at 879 n.3. The operator of an organic farm, Collins, filed a written request for a contested-case hearing, "claiming that his land was adjacent to B&N's property and that his groundwater resources and air quality, already adversely affected by B&N's operations, would further deteriorate if the permit were granted." Id. at 879. At the time, as we previously noted, hearing requests were governed by the pre-1999 version of water code section 5.115 and Commission rules that required a requestor not only to establish his personal justiciable interest, but also that his request was "reasonable" and supported by "competent evidence." *See* id. at 881-82. B&N filed a response challenging Collins's assertions **[**102]** that he would be affected by the proposed operations and specifically disputing Collins's claim that his property was adjacent to B&N's property. Id. at 880. In support, B&N submitted a map indicating that its property, in fact, was not adjacent to Collins's but was located on the opposite side of an intervening property. *Id.*

B&N later filed a reply to responses filed by the Commission's executive director and the Office of Public Interest Counsel (who had initially sided with Collins) alleging that (1) Collins's home was at least 1.3 miles away from the nearest permanent odor source at the proposed operation, (2) neither Collins nor anyone else had previously complained about the existing operations, (3) the wind blew toward Collins's property only about four percent of the time, (4) area groundwater would be protected by the clay-lined lagoons, and (5) general groundwater flow was not in the direction of Collins's property. *See id.* B&N also challenged the reasonableness of Collins's request on the basis that the proposed "wet" waste-management system was environmentally superior to the current "dry" one. *Id.* In support, B&N attached a map with scales indicating that Collins's property **[**103]** was 590 feet away from B&N's farm and that his residence was approximately 1.3 miles away from Collins's residence;

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decision if "arbitrary, capricious, unlawful, or not supported by substantial evidence" contemplated substantial-evidence review confined to agency record because, in Court's view, language was modeled on previously enacted APTRA judicial-review provisions); **[**99]** *see also* id. at 367 (Jones, J., dissenting) ("Regarding judicial review of administrative decisions to which the APA does not apply, Texas courts have consistently held that the proper approach is to revert to the pre-APA substantial-evidence-de-novo review.").

a wind data chart; and an affidavit of a professional engineer opining that, based on studies and data regarding **[*821]** groundwater in the area, the proposed waste lagoons would "likely not result in degradation of [Collins's] groundwater resources." *See id. at 880, 881 n.5*.

Subsequently, B&N filed aerial photos showing the distance between B&N's operations and Collins's property, as well as the affidavit of another professional engineer stating that the proposed "wet" waste-management system would be superior to the current one. *Id. at 880*. Collins countered with "photographs allegedly taken from [his] land of the existing poultry operations and some new construction; affidavits of other nearby landowners stating that they have experienced odors and insects coming from B&N's operation; and a letter from an engineer that questioned the wisdom of using compacted clay liners because such liners are difficult to install correctly and are not as 'state of the art' as geomembrane liners" and "opin[ing] that insects and odors would be better controlled if the lagoons were covered." **[**104]** *Id. at 880-81*.

Collins's hearing request was considered by the Commission during a subsequent public meeting. *Id. at 881*. After Collins disputed the accuracy of the second map that B&N had submitted, the Commission referred the issue of the map's accuracy to SOAH for a limited contested-case hearing. *Id.* Following the hearing, the ALJ issued proposed findings of fact and conclusions of law indicating that the B&N map was accurate. *Id.* The Commission adopted the ALJ's proposed findings and conclusions and denied Collins's hearing request, clearing the way for the permit's approval. *Id.*

After the district court affirmed the Commission's denial of his hearing request, Collins appealed to this Court. *See id.* Applying a substantial-evidence standard of review that, again, no party appeared to dispute, this Court held that "the Commission was well within its discretion to determine that Collins is not an affected person," and did not reach whether the Commission could have denied the request for lack of reasonableness or "competent evidence." *See id. at 881-83*. It reasoned as follows:

> The map that the ALJ found to be accurate indicates that Collins's property is not adjacent to B&N's property **[**105]** and that his home is approximately 1.3 miles away from the proposed lagoons. Collins predicts that the lagoons will produce "noxious odors." But a concentrated animal feeding operation, such as B&N's farm, qualifies for a standard air permit—issued without the opportunity for a contested case hearing—if its permanent odor sources are at least half a mile from occupied residences and business structures.
>
> Collins also predicts that his groundwater will be polluted and submitted an affidavit of an engineer stating that clay liner systems are difficult to install and might fail. But the permit only authorizes a correctly installed lagoon system. The type of failure that Collins fears would actually be a permit violation. Moreover, the Commissioners had before them competent evidence that the environment—including Collins's land, health, and safety—would be positively impacted by changing from the existing dry waste management to the clay lined lagoon system. By the time the Commission issued its order denying Collins's hearing request, it had considered the detailed affidavits of two engineers, indicating that the proposed clay lined lagoon system is environmentally superior to a dry waste **[**106]** system and that, in any event, Collins's groundwater resources were very unlikely to be affected even by the failure of the lagoon system.

Id. at 883 (citation omitted).

Citing this Court's language regarding the relative benefits of the proposed "wet" **[*822]** versus "dry" waste systems, the Commission portrays *Collins* to mean that if a proposed permit amendment can be said to improve environmental protections compared to the current permit, a hearing requestor cannot be affected or injured by its issuance so as to have a personal justiciable interest in opposing it. The City responds that the Commission misreads *Collins*, confuses the determination of its standing with the merits of its objections to the proposed permit, and improperly decided the merits. We agree with the City.

The salient holdings of *Collins* with respect to affected-person status are that (1) B&N's proposed operations were a sufficient distance from residential and business structures to exempt its air-protection aspects altogether from contested-case hearing requirements; and (2) with respect to groundwater, Collins could not be injured or affected by the permit as proposed because "substantial evidence" (again, conceded to **[**107]** be the applicable standard of review in the case) reasonably supported findings that (a) if B&N complied with the waste permit, the clay-lined ponds would prevent discharges into groundwater; and (b) even if the ponds failed, Collins

was effectively "upstream" from B&N and still would not be affected by any discharge. *See id.* In fact, while this Court couched its analysis in terms of "substantial evidence," it does not appear from the opinion that Collins presented *any* evidence to controvert B&N's evidence of these facts. *See id. at 879-81*. In other words, (1) even if Collins could be deemed an affected person with respect to air protections, he would have no legal right to a contested-case hearing; and (2) regarding groundwater, assuming B&N complied with the permit, there was undisputed evidence that *no* waste could emit from the ponds and get into Collins's groundwater, such that Collins would be affected by the permit's issuance. The facts are starkly different in the present case.

Here, in contrast to the air-quality issues in *Collins*, it is undisputed that the O-Kee Dairy CAFO permit application is subject to subchapter M's requirement of an opportunity for contested-case hearing. **[**108]** And, unlike the water-quality protections imposed in *Collins*, the proposed O-Kee Dairy permit, as the City emphasizes, explicitly contemplates that waste will discharge from the dairy's RCSs during periods of significant rainfall and, perhaps more critically, that waste will run-off from its WAFs and load nutrients into the North Bosque. Assuming the discharge, run-off, or loading contemplated by the permit would harm Lake Waco's water quality and the City's legally protected interest in it, the City would have a personal justiciable interest in ensuring that the permitted activities comply with current legal requirements. *See United Copper, 17 S.W.3d at 802-04*; *HEAT, 962 S.W.2d at 295*. That the current legal requirements incorporated into the new permit are "more protective" than in years past is, standing alone, irrelevant. What matters is that discharge, run-off, or loading is an acknowledged certainty under the amended permit, and if this injures the City's legally protected interest, the City would possess a personal justiciable interest in the enforcement of the current laws regardless of how the harm compares to that occurring under the previous permit. In this respect, this **[**109]** case is controlled by *HEAT* and *United Copper*, in which we held that ***HN33***[↑] it is the existence of *some* impact from a permitted activity, and not necessarily the *extent* or *amount* of impact, that is relevant to standing. *See United Copper, 17 S.W.3d at 802-04*; *HEAT, 962 S.W.2d at 295*; *see also STOP, 306 S.W.3d at 926-27* (distinguishing between legal injury and the injury in fact required for standing). Consequently, to the extent **[*823]** that the Commission denied the City's hearing request based on the premise that the amended O-Kee Dairy permit would be "more protective" of the environment than the current one, it acted arbitrarily by relying on a factor that is irrelevant to the City's standing to obtain a hearing. *See City of El Paso, 883 S.W.2d at 184* (agency action is arbitrary and capricious if agency considered an irrelevant factor); *State Farm Lloyds, 260 S.W.3d at 246* (reversing agency order as arbitrary and capricious where "order was based in part on at least one legally irrelevant factor").

In the alternative, assuming that the extent or amount of the dairy's contributions of waste, nutrients, or pathogens to the North Bosque under the amended permit could be considered relevant to whether **[**110]** such contributions ultimately have *an* impact on Lake Waco and the City (as opposed to the *extent* or *amount* of such impact), we conclude there is an additional reason that the Commission would have abused its discretion in denying the City's hearing request based on an implied determination of those issues. This reason stems from the fact that the Commission could determine the extent or amount of the dairy's waste discharge, run-off, or loadings as they impact the City only by deciding some of the same fact disputes on which the City, if an affected person, would be entitled to a contested-case hearing on the merits of the proposed permit.

The Commission, as previously explained, has conceded that the City's hearing request raised disputed, relevant, and material fact issues regarding the O-Kee Dairy permit application on which the City, if an affected person, would be entitled to a contested-case hearing. *See Tex. Water Code Ann. § 5.556(c)-(d)*; *30 Tex. Admin. Code §§ 55.201*, *.211(b)(3)*, *(c)*. Among the nine sets of disputed material fact issues identified by the executive director as appropriate for SOAH referral were those concerning the factual accuracy of calculations and underlying **[**111]** assumptions regarding the propensity of the dairy's RCSs to overflow and the amount of phosphorus loading that the WAFs would cause, questions relevant to whether the proposed permit complied with current regulatory requirements. In short, if the Commission is correct that the extent or amount of waste emissions or nutrient loading under the amended permit would properly be relevant to the City's standing to obtain a contested-case hearing, those issues would overlap with disputed fact issues on the merits of the permit application.

The City urges that the Commission cannot decide facts going to the merits of its objections to the O-Kee Dairy

permit application in the course of determining its standing to obtain a contested-case hearing on the merits. In response, the Commission analogizes itself to a trial court deciding a plea to the jurisdiction, emphasizing that trial courts must consider evidence and determine facts relevant to subject-matter jurisdiction, *see, e.g.,* Miranda, 133 S.W.3d at 226-29; Bland, 34 S.W.3d at 554-55, and that, as a general rule, trial courts can decide evidence-based jurisdictional challenges on affidavits and written submissions rather than live evidence **[**112]** at a hearing. *See* Miranda, 133 S.W.3d at 227-29 (observing that trial courts possess broad discretion in first instance with respect to form in which evidence is presented and whether evidence-based jurisdictional challenges should be decided at a preliminary stage or await further development). It is also true that, contrary to what the City seems to suggest, disputed facts relevant to jurisdiction may overlap with the merits. *See* id. at 226-29; Hendee, 228 S.W.3d at 366-69. However, the Texas Supreme Court concluded in *Miranda* that ***HN34***[↑] where disputed **[*824]** jurisdictional facts overlap with the merits of claims or defenses, the otherwise broad procedural discretion of trial courts in deciding evidence-based jurisdictional challenges is sharply limited. In such instances, trial courts lack discretion to dismiss a claim at a preliminary stage unless there is conclusive or undisputed evidence negating the challenged jurisdictional fact, similar to the standard governing a traditional summary-judgment motion. *See* Miranda, 133 S.W.3d at 227-28; *cf.* University of Tex. v. Poindexter, 306 S.W.3d 798, 806-07 (Tex. App.—Austin 2009, no pet.) (contrasting permissible procedures where there is overlap **[**113]** between jurisdictional issues and merits versus where there is not).

As previously suggested, we need not decide in this case whether, as a general matter, the Commission's procedural discretion in considering evidence relevant to hearing requests is as broad as that of trial courts deciding evidence-based jurisdictional challenges. However, guided by *Miranda*, we conclude that whatever discretion the Commission does possess would be limited, in a manner similar to trial courts, in instances where it determines disputed facts that are relevant to both a hearing requestor's standing and the merits of a permit application.

Underlying the analysis in *Miranda* is a claimant's right to have disputed facts material to the merits of claims and defenses determined at trial. *See* Miranda, 133 S.W.3d at 228 ("By reserving for the fact finder the resolution of disputed jurisdictional facts that implicate the merits of the claim or defense, we preserve the parties' right to present the merits of their case at trial."). That right exists unless there is no genuine issue of material fact and the merits can be determined as a matter of law. *See id.*; *see also* Halsell v. Dehoyos, 810 S.W.2d 371, 372 (Tex. 1991) **[**114]** (holding that refusal to grant jury trial is harmless error if record shows that no material issues of fact exist). A claimant's right to a determination of material, disputed facts at trial presumes, of course, that the claimant has properly invoked the trial court's subject-matter jurisdiction. In *Miranda*, the supreme court chose between two procedural alternatives for resolving genuine issues of material fact that are relevant to both jurisdiction and the merits: (1) resolve them as part of a jurisdictional determination at a preliminary stage, with the potential effect of pretermitting an issue on the merits that otherwise would have required resolution through trial; or (2) defer the jurisdictional determination until trial and resolve the disputed fact at that time. Miranda, 133 S.W.3d at 227-28. The supreme court required the latter, and held that the former was an abuse of the trial court's discretion. *Id.*

HN35[↑] The water code and Commission rules create an entitlement to a contested-case hearing that is analogous to a civil claimant's right to have disputed material fact issues determined at trial—an affected person is entitled to a contested-case hearing on disputed questions of **[**115]** fact raised during the public-comment period that are relevant and material to the Commission's decision on a permit application. *See* Tex. Water Code Ann. § 5.556; 30 Tex. Admin. Code §§ 55.201, .211(b)(3), (c)(2); *see also id.* § 26.028(c) (Commission must hold "public hearing" on request of affected person). Where "affected person" status turns on the same disputed facts, we conclude that Miranda's reasoning would preclude the Commission from determining those facts without affording the hearing requestor the adjudicative processes that the Legislature and Commission rules have guaranteed them on the merits-a contested-case hearing.

The City, as previously noted, presented evidence that discharge or run-off of waste under the amended permit would have adverse **[*825]** effects on Lake Waco's water quality and the City's legally protected interest in it. Consequently, whatever "evidence" the Commission presented regarding the accuracy of the calculations and assumptions underlying its view of the amended permit's effects would not be uncontroverted or conclusive, as required under *Miranda*. The Commission, therefore, would have abused its

discretion in deciding those issues without affording the **[**116]** City a contested-case hearing on those issues. *See Miranda, 133 S.W.3d at 227-28*. And, although the Commission heavily relies on *Collins* in claiming broader discretion, that decision is ultimately consistent with the *Miranda* analysis—B&N presented uncontroverted evidence that negated any effect of the permit on Collins's groundwater. *See 94 S.W.3d at 879-81*.

In a final argument concerning the relative "protectiveness" of the amended permit, the Commission emphasizes that the Legislature has excluded from public-hearing requirements water-quality permit applications that do not seek either to "increase significantly the quantity of waste authorized to be discharged" or "change materially the pattern or place of discharge," if "the activities to be authorized . . . will maintain or improve the quality of waste authorized to be discharged." *See Tex. Water Code Ann. § 26.028(d)*. Because the Legislature has thus impliedly authorized it to determine whether proposed permits would "increase . . .waste" or "change . . . the pattern or place of discharge" in order to ascertain whether contested-case hearing requirements apply at all, the Commission reasons that it may similarly consider a permit's **[**117]** likely effects in determining whether a hearing requestor is an affected person. However, the two sets of issues are distinct—one goes to whether a permit application is a type for which the Commission must afford an *opportunity* for a contested-case hearing if any affected persons want one, the other goes to whether a particular person has standing to *request* a contested-case hearing where the law requires an opportunity for such a hearing. In this case, the Commission has conceded that the O-Kee Dairy permit application seeks a "major amendment" and is therefore not excluded from the requirement that the Commission afford an opportunity for a contested-case hearing if any affected person requests one. Consequently, whatever discretion the Commission possesses in making this sort of determination[23] has no bearing on its discretion in determining whether a hearing requestor is an affected person.

Effects downstream

Because the Commission would have acted arbitrarily or abused its discretion in denying the City's hearing request based on implied findings **[**118]** regarding the anticipated relative protectiveness of the amended O-Kee Dairy permit, the Commission's order must ultimately rest upon its implied findings that any contributions of waste or nutrients by the O-Kee Dairy to the North Bosque watershed will ultimately have no effect on the City's legally protected interest in Lake Waco's water quality. The Commission first points to "evidence" that any waste or nutrients entering the watershed from the dairy would "assimilate" or "dilute" before they could harm Lake Waco or the City. As "evidence" of these facts, the Commission relies chiefly upon arguments in its executive director's response to the City's hearing request. As previously summarized, the executive director emphasized that the dairy was located approximately eighty miles upstream from Lake Waco and another six miles distant from the municipal **[*826]** water intake. He urged the Commission that "assimilation" and "dilution" of any pollutants from the dairy "would occur long before the water reache[d] Lake Waco," or at least before it reached the intake.

The executive director did not elaborate on the factual basis for these assertions other than to reference an attached map that illustrated **[**119]** the distance between the dairy, Lake Waco, and the intake. No further explanation is provided as to why or how the Commission should infer from the bare fact of distance that any pollutants would "assimilate" or "dilute" during transport. Even if the unsworn assertions of the Commission's executive director could otherwise be considered "evidence," these sorts of unsupported factual conclusions cannot support a reasonable inference that those facts exist. *See, e.g., Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 233 (Tex. 2004)* (observing that ***HN36***[↑] "conclusory or speculative" opinions are "'incompetent evidence' . . . [that] cannot support a judgment"); *Dallas Ry. & Terminal Co. v. Gossett, 156 Tex. 252, 294 S.W.2d 377, 380 (Tex. 1956)* ("It is well settled that the naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection."); *Casualty Underwriters v. Rhone, 134 Tex. 50, 132 S.W.2d 97, 99 (Tex. 1939)* (holding that "bare conclusions" did not "amount to any evidence at all," and that "the fact that they were admitted without objection add[ed] **[**120]** nothing to their probative force"); *see also Burrow v. Arce, 997 S.W.2d 229, 235 (Tex. 1999)* ("[I]t is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand on the mere *ipse dixit* of a credentialed witness.").

[23] And we intend no comment regarding the scope of the Commission's discretion in making such determinations or the procedures it may apply.

Beyond its executive director's unsworn and unsupported conclusions regarding "assimilation" and "dilution," the Commission points to tacit acknowledgments by the City's expert Wiland that natural assimilation or dilution may have *some* impact on pollutants while being transported in a waterway. But this fact, without more, cannot support a reasonable inference that waste, nutrients, or pathogens from the dairy would assimilate or dilute to an extent that they would have *no* effect in Lake Waco or when they reached the City's municipal water intake. *See Flores, 74 S.W.3d at 542* (agency acts arbitrarily in making fact findings unsupported by any evidence).

Next, the Commission cites the undisputed fact that algal growth in Lake Waco may be influenced by factors other than phosphorus loading from dairies upstream in the North Bosque watershed, such as climate, light, loadings **[**121]** of nutrients other than phosphorus, and loadings of phosphorus from sources other than dairies. However, the bare fact that there may be multiple factors contributing to algal growth in Lake Waco does not, in itself, support a reasonable inference that phosphorus loading from dairies, such as that which would occur under the amended O-Kee Dairy permit, would be excluded as one of those contributing factors. Nor would this "evidence" controvert the City's evidence that the amended permit, unless modified, would exacerbate the problem. Consequently, the Commission would have acted arbitrarily in relying on such an inference. *See City of El Paso, 883 S.W.2d at 184* (***HN37***[↑] agency acts arbitrarily in relying on irrelevant factor); *Starr County, 584 S.W.2d at 356* (agency acts arbitrarily if there does not "appear a rational connection between the facts and the decision of the agency").

[*827] Finally, the Commission purports to rely on "evidence" that there is no causal relationship between algal proliferation in Lake Waco and the taste and odor problems of which the City complains. The Commission points to acknowledgments by the City that the taste and odor problems existed to some extent even prior to **[**122]** the modern growth of the dairy industry in the North Bosque. This fact, however, does not in itself support a reasonable inference that there is no causal connection between such problems and algal growth, much less controvert the City's evidence of that causal connection and that the problems have worsened with the modern growth of the dairy industry.

The Commission also relies on a statement in its responses to public comment on the proposed TMDLs. The City had complained that the proposed TMDLs were focused too narrowly on water quality in the two "impaired" segments of the North Bosque and should have also taken into account conditions in Lake Waco. In response, the Commission asserted, in part, that "[w]hile nutrient conditions in the lake may have some indirect influence on taste and odor episodes, there is no demonstrated linkage to assure that reducing nutrient concentrations will reduce or eliminate taste and odor episodes. Other Texas reservoirs with similar and higher nutrient and algae levels do not experience taste and odor problems." As with its executive director's argument, the Commission provides no evidentiary support for these conclusions. Consequently, they are no **[**123]** evidence of the asserted facts. *See, e.g., Coastal Transp., 136 S.W.3d at 233*; *Burrow, 997 S.W.2d at 235*; *Gossett, 294 S W.2d at 380*; *Rhone, 132 S.W.2d at 99*.

CONCLUSION

In sum, the Commission acted arbitrarily and abused its discretion in concluding that the City was not an affected person with respect to the O-Kee Dairy permit application and denying its hearing request. *See City of El Paso, 883 S.W.2d at 184*; *Gerst, 411 S.W.2d at 354*; *Flores, 74 S.W.3d at 541*; *Starr County, 584 S.W.2d at 356*; *see also Rodriguez, 997 S.W.2d at 255* (***HN38***[↑] "If the Commission does not follow the clear, unambiguous language of its own regulation, we reverse its action as arbitrary and capricious."). Accordingly, we reverse the district court's judgment affirming the Commission's order, reverse the Commission's order, and remand to the Commission for further proceedings consistent with this opinion.

Bob Pemberton, Justice

Before Justices Patterson, Puryear and Pemberton; Justice Patterson Not Participating

Reversed and Remanded on Rehearing

Filed: June 17, 2011

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