

Motion at Exhibit 8-B, art. 8, ¶ 19; Response at Exhibit 10, p. 17, 46; *id.* at Exhibit 12, pp. 133-34. They do not explain how the 2019 Board Directors can be held personally liable for decisions made to rectify mistakes they saw in the Original Transaction and ensure a superseded agreement was entered at meetings that fully complied with TOMA. Once more, the Plaintiffs improperly stack inference upon inference and suspicion upon suspicion in claiming the 2019 Board acted in bad faith. *Marathon Corp.*, 106 S.W.3d at 727-28.

**b. Piper Lane**

The Plaintiffs complain about Piper Lane, contending that the Original Transaction did not include Piper Lane and that the 2019 Board somehow “gave away” Piper Lane to Friendship in the 2019 Transaction. The Directors addressed this in their Motion. The Original Transaction was for 4.3 acres—the exact acreage that includes Piper Lane. Motion at Exhibit 8-G (WOWSC000027). At the WOWSC corporate representative deposition, Mike Nelson explained that the company (the 2019 Board) believed the Original Transaction included Piper Lane on the basis of the Original Transaction Contract (4.3 acres) and the Stewart Watson survey of the conveyed property from early 2016. Response at Exhibit 12, pp. 20-33, 43-46, 138; *see also* Motion at Exhibits 8-G, 8-DD; Response at Exhibit 11, pp. 5-6. WOWSC sold the 4.3 acres to Friendship for \$203,000 and then received additional consideration when entering the 2019 Transaction. Motion at Exhibits 8-G, 8-X; Response at Exhibit 12, p. 139. There is no evidence the 2019 Board acted in bad faith or in a manner they did not reasonably believe was in the best interest of the corporation in agreeing to correct the deed to include Piper Lane. Motion at Exhibits 8-L, 8-X.

The Directors further note that, at least according to the Burnet County Appraisal District, Piper Lane is currently appraised at **\$12,902**. <https://propaccess.trueautomation.com/c>

[lientdb/Property.aspx?cid=85&prop\\_id=117532](#). The Plaintiffs are well aware that the 2019 Transaction provided WOWSC with additional consideration for the transaction. Motion at Exhibit 8-X. Even if there is debate regarding whether the Original Transaction included Piper Lane, the Plaintiffs' idea that WOWSC "gave away" Piper Lane is unsupportable. At most, it would be a complaint, once more, that the Board was wrong for assigning a value of \$5 rather than the \$10 the Plaintiffs seem to believe is the "true" value of Piper Lane. There is no Texas case holding a director personally liable for being mistaken about the "true" value of property.

The Plaintiffs suggest that only members of the Spicewood Airport and Pilots Association have the right to use Piper Lane and that the 2019 Transaction cut off WOWSC's access to its remainder tract. This is demonstrably false. The 2019 Board strengthened an easement to the remainder tract to ensure it can be accessed. Motion at Exhibits 8-V, 8-X. And there is no evidence in this record that only Pilots Association members can "use" Piper Lane and that WOWSC is somehow precluded from "using" Piper Lane.<sup>15</sup> The Plaintiffs' entire "landlocked" argument regarding Piper Lane and the remainder tract is a red herring.

But more to the point, the Plaintiffs provide no real explanation of how the 2019 Board Directors can be *personally liable* if they were wrong regarding Piper Lane. That mistake would amount to no more than mismanagement or neglect—not subjective bad faith—which are

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<sup>15</sup> Martin's declaration does not state that Pilots Association members have exclusive use of Piper Lane. Motion at Exhibit 1, ¶ 7. She stated that all members of the Pilots Association have access to Piper Lane. *Id.* In any event, because WOWSC is a water supply corporation that, under its articles of incorporation, serves the sole purpose of furnishing water supply and sewer services, it is unclear why WOWSC would be "using" an airport taxiway. Motion at Exhibit 8-A, art. 4. WOWSC is obviously not a pilot or in the airplane or airport business. The only reason WOWSC would have "used" Piper Lane in the past is because its wastewater treatment plant was previously on the airport property. That is no longer the case—WOWSC airport land is now vacant, surplus property. Presumably, if WOWSC were to sell its remainder tract in the future, the purchaser would either choose to develop that land for airport use (and thus join the Pilots Association, as other airport users do) or else develop it for residential use and access the land by Soda Creek Road. *See* Motion at 23-27.

protected from the business judgment rule and safe harbor provisions. *Poe*, 591 S.W.3d at 641; *Life Partners Holdings*, 2015 WL 8523103, at \*14. To the extent the Court believes a fact issue exists regarding whether the Piper Lane piece of the transactions is valid, it can limit trial to the validity of that part of the transaction. The Directors (besides Martin to the 2019 Transaction) were not parties to either transaction and need not be parties to such a trial.

**c. Advancement of Legal Expenses**

The Plaintiffs complain, without briefing, that the WOWSC should not advance legal expenses to sued Directors. The Directors explained the legal framework authorizing advancement of expenses under Business Organizations Code Chapter 8 in their Motion, which the Plaintiffs do not contradict. Motion at pp. 35-37. There is no evidence WOWSC did not comply with Chapter 8 in advancing legal expenses, and the Plaintiffs do not even attempt to explain how this chapter was not complied with. The WOWSC also previously adopted policies expressly authorizing the company to advance legal costs. Supplemental Evidence at Exhibit 15-B, art. IV. The 2019 Board relied on advice of counsel that the advancement of litigation expenses complied with Texas law. Motion at Exhibits 5-8.<sup>16</sup>

The Plaintiffs also state, without argument, that the Directors did not provide written affirmations until November 2019, when the 2015 Board was first sued for damages and the 2019 Board first named as defendants. Response at 55. They do not address that Chapter 8 does not require written affirmations from former Directors, nor that the Directors' legal expenses were minimal until the Plaintiffs elected to considerably complicate and ramp up expenses in this case

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<sup>16</sup> The Plaintiffs complain that an attorney opinion regarding advancement has not been produced in this case. Response at 55. They again mislead. They are well aware that the 2019 Board Directors stated in response to interrogatories that they received advice of counsel orally during executive session. Bill Earnest Response to Interrogatory No. [14] (Dec. 10, 2020); Mike Nelson Response to Interrogatory No. [14] (Dec. 10, 2020); Joe Gimenez Response to Interrogatory No. [14] (Dec. 10, 2020); Dorothy Taylor Response to Interrogatory No. [14] (Dec. 10, 2020). There is no written opinion to produce.

by suing for damages virtually every Director who has served on the Board the past six years. *See* Motion at 35-37.<sup>17</sup>

Finally, the Plaintiffs suggest, without argument, that WOWSC cannot advance Martin's fees when the company has released her from liability. Response at 55. The Plaintiffs do not explain this theory. But WOWSC has not sued Martin—the Plaintiffs have. If WOWSC sued Martin, it would likely be in breach of the 2019 Transaction—but it has not. Motion at Exhibit 8-X, art. III. Additionally, Chapter 8 contains no provision prohibiting a company from advancing defense costs to a sued former or current director under circumstances suggested by the Plaintiffs. Chapter 8 broadly authorizes advancement of legal expenses to current and former directors. TEX. BUS. ORGS. CODE §§ 8.104, 8.105.

Notably, if the Directors prevail in this suit, it is *mandatory* for the company to fully pay the Directors' legal costs. *Id.* § 8.051. Thus, if this Court grants summary judgment in the Directors' favor, WOWSC will be required to pay the Directors' fees anyway, as a matter of law.

### **3. Business Organizations Code Section 7.001**

As explained, to overcome the Directors' safe harbor immunity, the Plaintiffs are required to put forth evidence that the Directors did not act (1) in good faith, (2) with ordinary care, *and* (3) in a manner they reasonably believed was in the best interest of the corporation. They must show all three. The Directors have explained above that there is no evidence supporting subjective bad faith or that they did not reasonably believe they were acting in the best interest of the corporation. The Plaintiffs also cannot establish a lack of ordinary care because the Directors are

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<sup>17</sup> The Plaintiffs previously sued former directors Norm Morse and David Bertino as well, who did not even participate in the transactions the Plaintiffs complain of. The Plaintiffs exempted their allies, Bill Stein and Bill Billingsley, who also served on the Board during this time period.

As Mike Nelson testified at his deposition, if the Plaintiffs' lawsuits were dropped, WOWSC and its Directors would no longer be in litigation and the legal expenses the Plaintiffs complain about—and which they are causing—would stop. Response at Exhibit 10, p. 10.

immunized against liability for violating any duty of care under Business Organizations Code section 7.001 and the WOWSC bylaws. TEX. BUS. ORGS. CODE § 7.001; Motion at Exhibit 8-B, art. 8, ¶ 18.

Section 7.001 exculpates directors for liability for breach of the duty of care (i.e., gross negligence). *Life Partners Holdings*, 2015 WL 8523103, at \*8. As authorized by section 7.001, the WOWSC bylaws similarly limit Director liability for violations of a duty of care. Motion at Exhibit 8-B, art. 8, ¶ 18. Because the Directors are immunized from liability for any violation of a duty of care, the Plaintiffs cannot satisfy the “ordinary care” element of the safe harbor provisions. Thus, the Plaintiffs cannot be held personally liable as a matter of law.

**4. Texas courts routinely rule in directors’ favor as a matter of law under the business judgment rule and safe harbor provisions.**

This Court can rest assured that Texas courts routinely grant summary judgment and other dispositive motions in favor of directors under the business judgment rule and safe harbor provision in cases similar to this one. A representative sample is below:

- *Burns*, 2012 WL 3776513: The Houston (First) Court of Appeals affirmed a take-nothing summary judgment in favor of non-profit corporation directors under the safe harbor provision. The plaintiffs failed to put forth evidence demonstrating the directors acted in bad faith or did not “reasonably believe[] their conduct was in the best interest of the corporation” in allegedly destroying condo owner’s property. *Id.* at \*9-10.
- *Young*, 2017 WL 2376828: The Houston (First) Court of Appeals affirmed a take-nothing summary judgment in favor of non-profit directors. Plaintiffs had sued directors for breach of fiduciary duty, breach of contract, and other claims, contending that the directors knowingly enforced in an unlawful way HOA covenants against him, knowingly misapplied his payments for maintenance assessments, and violated statutes and deed restrictions. The plaintiffs failed to put forth evidence that the directors did not act in good faith, with ordinary care, and in a manner they reasonably believed to be in the best interest of the company. *Id.* at \*9-10.

- *Priddy*, 282 S.W.3d 588: The Houston (Fourteenth) Court of Appeals affirmed summary judgment in nonprofit directors' favor under the safe harbor statute. The plaintiffs sued the directors of a non-profit corporation that administered the common areas of a subdivision comprised of airplane hangars and homes for fraud, breach of fiduciary duty, and violations of deed restrictions. The court of appeals concluded that the summary judgment evidence supported the directors' position that they relied in good faith on information prepared by previous boards and that the safe harbor statute immunized them from personal liability. *Id.* at 595-97.
- *Green v. Port of Call Homeowners Ass'n*, No. 03-18-00264-CV, 2018 WL 4100855 (Tex. App.—Austin Aug. 29, 2018, no pet.): The Austin Court of Appeals affirmed the grant of a take-nothing summary judgment rendered in favor of non-profit corporation directors. *Id.* at \*4-6. The property owner plaintiffs alleged that the board of directors failed to comply with governing documents, violated statutes, misappropriated funds, and engaged in other misconduct regarding their management of the homeowners' association. The court of appeals concluded that the plaintiffs did not raise genuine issues of material fact regarding whether the directors acted in good faith, with ordinary care, or in a manner they reasonably believed to be in the best interest of the association. *Id.* at \*5.
- *Resolution Trust Corp. v. Norris*, 830 F. Supp. 351 (S.D. Tex. 1993): Corporation sued directors for ultra vires acts, breach of fiduciary duty, fraud, and other claims to recover over \$200 million in alleged losses related to real estate loans. The district court granted a 12(b)(6) motion to dismiss. The failure of the directors to monitor the acts of individuals charged with preparing the loans and then presenting loans that did not comply with federal or state regulations for board approval was not an "ultra vires" act so as to be excluded from the protection of the Texas business judgment rule. *Id.* at 356-57. Because there was no indication that the directors knowingly engaged in illegal conduct, the actions (including approval of loans that violated state and federal law) was not ultra vires and therefore not taken outside the business judgment rule. *Id.* at 357.
- *Life Partners Holdings*, 2015 WL 8523103, at \*14: The federal district court granted summary judgment in favor of the directors of a corporation who were sued for breach of fiduciary duty and other claims. There was no genuine issue of material fact that the directors at issue were disinterested or that they acted in bad faith, which requires "*scienter* on the part of the defendant director." *Id.* at \*14, 20-21 (emphasis added).
- *Roels*, 2020 WL 4930041: The Austin Court of Appeals dismissed most of a shareholder suit brought against for-profit corporation directors under the TCPA because the shareholders did not put forth evidence overcoming the business judgment rule. *Id.* at \*1, 10. Rather, the plaintiffs' true allegations concerned director actions that were "negligent, unwise, inexpedient, or imprudent"—not that were ultra vires or fraudulent. *Id.* at \*9.

- *Chapman*, 2018 WL 4139001: The court of appeals affirmed the grant of summary judgment in favor of company directors under the business judgment rule. The court noted that the business judgment rule protects against negligence and even gross negligence. *Id.* at \*15. Because the plaintiff's claims regarding the director's actions amounted to gross negligence rather than fraud, dishonesty, or self-dealing, summary judgment under the business judgment rule was appropriate. *Id.*
- *Moody v. Nat'l Western Life Ins. Co.*, No. 01-18-01106-CV, 2020 WL 7251459 (Tex. App.—Houston [1st Dist.] Dec. 10, 2020, no pet.): Applying Delaware law (the law of that case), the Houston (First) Court of Appeals affirmed the dismissal of the shareholder plaintiff's claims because the plaintiff failed to scale the business judgment rule. *Id.* at \*14. The plaintiff's allegations that the directors "may have been motivated by some interest other than a genuine attempt to advance the best interest of the corporations" was not sufficient to survive a plea to the jurisdiction. *Id.* at \*11.
- *Sneed*, 465 S.W.3d at 187: The Texas Supreme Court observed: "It is insufficient for a shareholder plaintiff to allege a derivative right to relief against a corporation's officers or directors for breach of a duty based upon "mere mismanagement or neglect ..., or the abuse of discretion lodged in them in the conduct of the company's business. ***Such allegations may be disposed of on special exceptions or summary judgment.***" (Emphasis added.) (Citations omitted.)

This Court should render a take-nothing judgment in the Directors' favor in this case as well.

## C. The So-Called "Illegal and Unauthorized Acts" the Plaintiffs Allege

### 1. The Plaintiffs misconstrue Texas Law.

The Plaintiffs claim the business judgment rule, safe harbor provisions, and other exculpatory provisions do not apply because the Directors' acts were purportedly unauthorized by WOWSC governing documents and were fraudulent. The Plaintiffs misinterpret Business Organizations Code section 20.002 and the ultra vires exception to the business judgment rule and safe harbor provisions.<sup>18</sup>

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<sup>18</sup> For sure, there are very few cases concerning alleging ultra vires acts, likely because of how expansive corporate powers are in Texas and because of the robust protections shielding directors from personal liability. *See, e.g.*, TEX. BUS. ORGS. CODE §§ 2.001, 2.003, 2.008, 2.101, 3.005(a)(3), 22.221, 22.230, 22.235.

**a. Plaintiffs must show unauthorized, illegal acts.**

Section 20.002 provides that an act of the corporation to transfer property is **not** invalid by virtue of being beyond the scope of the purpose of the corporation or inconsistent with a limitation on the authority of a director to exercise a statutory power of the corporation, as expressed in the articles of incorporation. TEX. BUS. ORGS. CODE § 20.002(b). As relevant here, the provision goes on to state that: “The fact that an act or transfer is beyond the scope of the expressed purpose or purposes of the corporation or is inconsistent with an expressed limitation on the authority of an officer or director may be asserted in a proceeding ... by the corporation, acting ... through members in a representative suit, against an officer or director or former officer or director of the corporation for exceeding that person’s authority....” *Id.* § 20.002(c)(2).

Notably, section 20.002(c) says nothing about damages or holding a director personally liable.<sup>19</sup> Texas case law and other statutory provisions, though, confirm there are heightened protections against holding a director **personally liable**. First, as explained above, safe harbor provisions and the business judgment rule immunize directors from personal liability for negligence and even gross negligence. Second, what is considered an “ultra vires” act so that a director might lose those statutory and common law protections is not simply failure to comply with a governing document. Case law is clear that a director may only be potentially held personally liable for an alleged ultra vires act if the director knowingly commits an unauthorized **and** an illegal act. *See, e.g., Staacke v. Routledge*, 241 S.W. 994, 999 (Tex. 1922); *Campbell v. Walker*, No. 14-96-01425-CV, 2000 WL 19143, at \*11 (Tex. App.—Houston [14th Dist.] 2000,

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<sup>19</sup> The only part of the section addressing damages is the provision authorizing the Court to award damages to the corporation (WOWSC) or the other party to the contract (Friendship/Martin) for loss or damages resulting from the court setting aside and enjoining performance of the contract. *Id.* § 20.002(d).



no pet.); *Sutton v. Reagan & Gee*, 405 S.W.2d 828, 836 (Tex. Civ. App.—San Antonio 1966, writ ref’d n.r.e.); *Gearhart*, 741 F.2d at 719; *Resolution Trust*, 830 F. Supp. at 357.

The Plaintiffs suggest this principle does not apply in a representative suit alleging ultra vires acts because, in that context, a director does not enjoy the protection of the corporate veil. No case supports this, and certainly not the *Sutton* case cited by the Plaintiffs. *Sutton* contains a discussion of piercing the corporate veil as a way to hold a **shareholder** personally liable for acts of the corporation. 405 S.W.2d at 836-37. Earlier in the opinion, *Sutton* directly addresses **director** liability for alleged ultra vires acts:

While there is authority to the effect that a director is personally liable if he participates, or allows the corporation to engage, in ultra vires acts, our Supreme Court has held that the doing of an ultra vires act is not a sufficient basis for imposing liability on the officers or directors of a corporation.

*Id.* at 836. This is not a corporate veil-piercing case, and there is no claim attempting to pierce the WOWSC corporate veil. Texas case law is clear that a plaintiff must demonstrate an unauthorized, illegal act done knowingly to potentially hold a director personally liable.

The Plaintiffs additionally claim that “illegal acts” can be more than just violations of statute. The Directors’ Motion recognizes case law stating an illegal act is one that is inherently and essentially evil or immoral, violates a positive statutory prohibition, or is against public policy. Motion at 20 (citing *Whitten v. Republic Nat’l Bank of Dallas*, 397 S.W.2d 415, 418 (Tex. 1965)). But the Texas Supreme Court has made clear that an act is not against public policy when only shareholders and creditors of a corporation are impacted because the act would not impact the public at large. *Whitten*, 397 S.W.2d at 418. And to call the actions the Plaintiffs complain about “evil or immoral” would take the ultra vires doctrine to an absurd place and is not what the term “malum in se” means. *See id.* (using corporate funds to pay the personal debt of an officer is not “evil or immoral,” despite the Texas Business Corporation Act prohibiting lending money to

directors or officers); *Tovar v. State*, 978 S.W.2d 584, 587 n.4 (Tex. Crim. App. 1998) (defining “malum in se” as being “evil” and including such offenses as murder and larceny). *Any* alleged dereliction of corporate duties would be “evil” and akin to murder or larceny under the Plaintiffs’ logic. Allegedly mismanaging corporate assets and authorizing an interested director transaction in violation of TOMA does not fall within the serious nature of malum in se. *See Aleman v. Tex. Med. Bd.*, 573 S.W.3d 796, 812 & n.3 (Tex. 2019) (Blacklock, J., concurring) (noting distinction between malum in se (lawbreaking that is wrong in itself) and malum prohibitum (lawbreaking that is “wrong only because the government happens to have made it illegal”)).

**b. Plaintiffs must show “knowing” violations of law.**

The Plaintiffs also claim a violation need not be “knowing” to hold a director personally liable. That flies in the face of the business judgment rule, which protects directors against negligence and even gross negligence, and the safe harbor provisions, which require subjective bad faith for a director to lose its protections. *See* Section II.B., *supra*. WOWSC’s bylaws similarly require “intentional misconduct” or a “knowing violation of the law on the part of the director” for the corporation or the corporation’s membership to seek monetary damages from the director. Motion at Exhibit 8-B, art. 8, ¶ 18; *see also* TEX. BUS. ORGS. CODE § 7.001 (authorizing companies to immunize directors from liability for damages).

Clearly, a director mistakenly violating a bylaw or statute is not sufficient to impose personal liability under Texas law or the WOWSC bylaws. Contrary to what the Plaintiffs seem to argue, the law does not impose a strict liability standard for any of the alleged violations of bylaws or statutes. *See Sutton*, 405 S.W.2d at 836 (merely committing ultra vires act is not sufficient to hold a director personally liable); *Resolution Trust*, 830 F. Supp. at 357 (“[T]o call such actions ultra vires, absent an allegation of actual knowledge of illegal conduct, distorts the meaning of

ultra vires. It blurs the already murky distinction between ultra vires acts that are outside the business judgment rule and negligent acts that are protected by the rule.”).<sup>20</sup> The Plaintiffs seem to believe if they use the phrase “ultra vires” or bring a purported “claim” under section 20.002(c)(2), then they have automatically overcome the safe harbor provisions, business judgment rule, section 7.001, and the WOWSC bylaws. That is incorrect.

**c. The Directors acted in their capacity as WOWSC directors.**

The Plaintiffs also allege that the Directors were not acting as WOWSC directors in causing WOWSC to enter the Original Transaction or the 2019 Transaction. This argument is puzzling. Both transactions were entered into by WOWSC. The affairs of WOWSC are managed by its board of directors. TEX. BUS. ORGS. CODE § 22.201; Motion at Exhibit 8-A, art. 9. The Plaintiffs may believe WOWSC should not have entered into those transactions, but there is no evidence that any of these Directors were engaging in any acts except on behalf of WOWSC. There is also no evidence any Director besides Martin had any personal interest in either transaction—the evidence instead establishes the opposite. Motion at Exhibits 2-8.

**2. The Plaintiffs’ Laundry List of Purported Illegal, Unauthorized Acts**

The Directors address below the actions the Plaintiffs claim are ultra vires and illegal.<sup>21</sup> See Response at 65-66 (listing alleged ultra vires, illegal acts). At the outset, the Plaintiffs’ arguments regarding illegality are smoke and mirrors. The Plaintiffs’ issue is really price. If the 2015 Board had fully complied with TOMA but still sold the land to Friendship for \$203,000, the

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<sup>20</sup> The Plaintiffs claim *Resolution Trust* is inapplicable because it concerned alleged illegal acts by employees. The opinion explains the distinction between protected acts of negligence and unprotected acts of knowing violation of the law. 830 F. Supp. at 357. Additionally, the WOWSC bylaws and Texas statutes and case law state the same, as explained above.

<sup>21</sup> The Plaintiffs also identify, without briefing, advancement of legal expenses, a purported “violation” of the safe harbor provisions and purported gross negligence, as supposed “illegal” acts. Response at 65-66. Those are all addressed in Section II.B. above.

Plaintiffs would invariably still have brought this suit. If the corporate resolution contained no alleged flaws, that would not resolve the Plaintiffs' complaint. That the Plaintiffs are *still* suing after the 2019 Board corrected many of the issues they complain about tells the full story of the nature of the Plaintiffs' complaint. Purported TOMA violations or failure to adopt a proper corporate resolution did not cause the alleged damages the Plaintiffs are claiming.<sup>22</sup>

**a. Purported "Use of Unauthorized Powers for an Unauthorized purposes" or "Exceeding Limits on Powers"**

The Plaintiffs claim the Directors exceeded expressed limitations on their powers. Apparently, they refer to the provision of WOWSC's articles of incorporation cited in their Third Amended Petition, which provides: "The Corporation shall have no power to engage in activities or use its assets in a manner that are not in furtherance of the legitimate business of a water supply cooperative...." Motion at Exhibit 8-A, art. 6. The Directors addressed this in their Motion. The WOWSC may sell property to pay down debt incurred in building a new wastewater treatment plant. Motion at 21-29 (and cited exhibits); *see also* Supplemental Evidence at Exhibit 15-D, Exhibit 20.

Again, the Plaintiffs' issue in this case and damage model is, in reality, about the selling price. And no provision of WOWSC's governing documents, nor any state law, mandates that the corporation must sell its assets for any particular price or market property with a realtor before selling. Further, as explained, the 2015 Board believed it *was* getting a good price based on all the information before it at that time. *See* Section II.B., *supra*. The Plaintiffs point to *Golson v.*

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<sup>22</sup> It is also noteworthy that the Plaintiffs have not brought a declaratory judgment action to invalidate the transaction under the interested director provision (TEX. BUS. ORGS. CODE § 22.230), as plaintiffs normally do when attempting to attack interested director transactions, nor sued under TOMA to attempt to invalidate the transaction. They seem to want to *personally* target the Directors for money damages rather than pursue avenues that could arguably unwind the transaction. This fact highlights the Plaintiffs' motive in this suit is to hurt the Directors rather than pursue other potentially available remedies.

*Capehart* as supporting a suit for damages against a director for purportedly selling property for less than it is worth. Response at 63-64 (citing 473 S.W.2d 627, 628 (Tex. Civ. App.—Eastland 1971, writ ref’d n.r.e.)). That is not what that case says. In that estate dispute, the executor sued to set aside a land sale when land was “sold” for \$1.00. *Id.* at 627-28. That was not a suit seeking to hold a corporate director personally liable, but an estate suit to unwind a transaction. The Directors can locate **no** case in which disinterested corporate directors have been found personally liable for purportedly selling property for an insufficient price.

In terms of the 2019 Board, it is unclear how the Plaintiffs believe they acted inconsistently with the WOWSC governing documents. WOWSC has the right to settle potential litigation, advance defense costs, and negotiate an agreement that it believes is more favorable than the initial one. *See* Section II.B., *supra*. The Plaintiffs continue to provide no real explanation regarding how the 2019 Board even conceivably acted ultra vires and illegally in taking these actions.

Finally, in many of the numerous cases set forth in Section II.B above, those plaintiffs alleged corporate directors exceeded their authority under their governing documents and violated statutory provisions. Yet courts granted judgment as a matter of law under the safe harbor provisions or business judgment rule. *See, e.g., Green*, 2018 WL 4100855, at \*1-2, 4-5 (allegation that directors failed to comply with Articles of Association and Debt Collection Practices Act); *Young*, 2017 WL 2376828, at \*3 (alleging directors violated deed restrictions governing HOA and Texas Property Code provisions). Simply slapping the “ultra vires” label on an allegation does not mean the Directors are not protected from personal liability.<sup>23</sup>

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<sup>23</sup> The Plaintiffs point to previous Director or Board statements before the Original Transaction expressing that the Board intended to sell the entire 11 acres (rather than only a part) and that WOWSC had a duty to its members to market the land and obtain the best price for the property. The Directors do not dispute those statements were made. What they dispute is (1) that they were prohibited, as directors, from changing their mind based on new information before them, or (2) that they did not believe they were getting the best price for the land, as the summary judgment record conclusively proves.

**b. Interested Director Transaction**

The Plaintiffs suggest the Directors are personally liable because the Original Transaction was purportedly an invalid interested director transaction.<sup>24</sup> At the outset, when transactions are invalid interested director transactions, a plaintiff's primary remedy is to bring a declaratory judgment action seeking to invalidate the transaction. *See* TEX. BUS. ORGS. CODE § 22.230. Section 22.230 “saves” interested director transactions and immunizes interested directors from personal liability so long as that provision applies.

An interested director transaction is one in which a corporation enters a transaction with a sitting director or an entity in which a director is a member or has a financial interest. *Id.* § 22.230(a). Undisputedly, Martin was an interested director in regard to the Original Transaction. There is no evidence, however, that the Directors who approved the Original Transaction—Madden, Mebane, and Mulligan—had any personal interest in the transaction. The uncontroverted evidence establishes the opposite. Motion at Exhibit 2, ¶ 9; *id.* at Exhibit 3, ¶ 8; *id.* at Exhibit 4, ¶ 8; *see* Supplemental Evidence at Exhibit 20 (transcript of December 19, 2015 board meeting providing no indication Madden, Mebane, or Mulligan have any personal financial interest in Friendship or the transaction).<sup>25</sup> As relevant here, section 22.230 “saves” such an interested director transaction, if:

The material facts as to the relationship or interest and as to the contract or transaction are disclosed to or known by... the corporation's board of directors..., and the board... in good faith and with ordinary care authorize the contract or transaction by the affirmative vote of the majority of the disinterested directors....

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<sup>24</sup> The 2019 Transaction was not an interested director transaction because Martin was no longer on the WOWSC board. There is no evidence any Director from the 2019 Board has any personal interest in the Original Transaction or the 2019 Transaction. The evidence establishes the opposite. Motion at Exhibits 5-9. The Original Transaction, however, was undisputedly an interested director transaction because Martin was then on the board. The 2019 Transaction superseded the Original Transaction. *Id.* at Exhibit 8-X.

<sup>25</sup> Again, it is uncontroverted that Bill Earnest was not at the December 19, 2015 meeting and did not vote to approve the Original Transaction. *See, e.g.,* Motion at Exhibit 5; Supplemental Evidence at Exhibit 20.

TEX. BUS. ORGS. CODE § 22.230(b); *see also Roel*, 2020 WL 4930041, at \*5.<sup>26</sup>

The uncontroverted evidence establishes the 2015 Board complied with this provision. It is undisputed that the 2015 Board (1) knew of the relationship between Martin and Friendship (that Friendship was her company), (2) Martin (the interested director) recused herself from the vote on Friendship's offer, and (3) a majority of disinterested Directors approved the transaction. Motion at Exhibits 1-4; Supplemental Evidence at Exhibit 20. These fundamental facts are not in dispute, and this is all the Business Organizations Code requires. The Plaintiffs seem to suggest that the "material facts" regarding the "contract or transaction" were not disclosed at the December 19, 2015 meeting. The contract, which was presented by Martin to the disinterested Directors, says what it says, and its terms were before the 2015 Board because the contract itself was presented and signed at that meeting. Motion at Exhibit 8-G; Supplemental Evidence at Exhibit 20. The material terms of the Original Transaction are contained in the contract itself.<sup>27</sup> The Plaintiffs also claim that Martin told the 2015 Board that she had "a partner who owned an unspecified equity interest." Response at 48. The December 19, 2015 recording does not back that up. Martin stated at the meeting that she had it "worked out with a partner and I've got the financing arranged." Supplemental Evidence at Exhibit 20, pp. 3, 7. She did not state that Friendship had other members beyond herself.<sup>28</sup> In any event, section 22.230 just requires that the "material facts as to the

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<sup>26</sup> An interested director transaction can also be "saved" even if a majority of disinterested directors do not approve the transaction, if the transaction is fair to the corporation. TEX. BUS. ORGS. CODE § 22.230(b)(2). The fairness prong is not at issue in this summary judgment Motion since a majority of disinterested Directors approved the transaction.

<sup>27</sup> The Plaintiffs suggest Martin was required to disclose various items that are not true and represent nothing except the Plaintiffs' opinion regarding Martin's purported motives. Response at 48. Again, the contract itself sets forth its terms, and the Board reviewed and approved the contract at the meeting.

<sup>28</sup> The partner she could have been referring to may have been her lender for the purchase, the Whiddens. Response at Exhibit 6, pp. 167, 180, 233.

relationship or interest” are disclosed to or known by the Board. TEX. BUS. ORGS. CODE § 22.230(b). The uncontroverted evidence establishes the 2015 Board members present at the December 19, 2015 meeting knew that Friendship was Martin’s business. Supplemental Evidence at Exhibit 20, pp. 39, 40, 69; *see also* Motion at Exhibits 2-4.

Additionally, section 22.230 envisions that only the *interested* director might potentially be liable for an interested director transaction, and this is because only an interested director could engage in self-dealing behavior that might breach the duty of loyalty to the company. TEX. BUS. ORGS. CODE § 22.230(e); *see Imperial Grp. (Tex.), Inc. v. Schonick*, 709 S.W.2d 358, 365 (Tex. App.—Tyler 1986, writ ref’d n.r.e.) (duty of loyalty demands there shall be no conflict between duty and self-interest). Disinterested Directors like Madden, Mulligan, and Mebane have no self-interest in a transaction. But even the interested director is immune from liability if section 22.230 is satisfied.

The Plaintiffs grasp at straws in claiming section 22.230 does not apply because the contract was not “otherwise valid and enforceable.” They contend WOWSC contracted with a “nonexistent entity,” that the contract was “tainted by fraud,” and that it was a contract with a sitting director. Response at 74. First, there is zero evidence of fraud in this case. To recover for fraud, a plaintiff must establish the defendant knowingly or recklessly made a false, material misrepresentation to the plaintiff with intent that the plaintiff act on it, causing the plaintiff damages. *Int’l Bus. Machs. Corp. v. Lufkin Indus.*, 573 S.W.3d 224, 228 (Tex. 2019). The Plaintiffs do not identify any “knowing” or “reckless” “false, material misrepresentation” that was made by a Director in connection with the Original Transaction or 2019 Transaction. *See* Motion at 44-45.<sup>29</sup>

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<sup>29</sup> The Plaintiffs again claim appraiser Jim Hinton’s appraisal was fraudulent. Response at 35. There is no evidence it was “fraudulent,” and Jim Hinton is not a party in this case.



As explained above, if anything, there was negligence. Second, the unrefuted evidence demonstrates Friendship was Martin's DBA (with its own checking account and so forth) that was converted to an LLC before the Original Transaction closed. Motion at Exhibit 1, ¶ 3.<sup>30</sup> The Plaintiffs cite no authority supporting that the Original Transaction was invalid due to the Friendship business structure.

Finally, in regard to conflicts of interest, section 22.230 itself is what saves interested director transactions. The Plaintiffs complain the 2015 Board had not adopted a written conflict of interest policy as required by WOWSC's bylaws. Motion at Exhibit 8-B, art. 8, ¶ 18. The bylaws, though, authorize a director to engage in business with the company if the director does not vote on any matter in which they may have a pecuniary interest. *Id.* And section 22.230(d) expressly authorizes an interested director to be present in and participate in a meeting regarding the interested director transaction TEX. BUS. ORGS. CODE § 22.230(d).

**c. Purported "Corporate Waste"**

The Plaintiffs argue the Directors "wasted" corporate assets by selling land for less than they believe it was worth. The Directors addressed price above. A Director does not act ultra vires and illegally by selling property for less than it is arguably worth—and particularly here where all the evidence demonstrates the Directors believed WOWSC was getting a good price. *See* Section II.B., *supra*.

Few Texas cases discuss "corporate waste." Under Delaware law, a plaintiff may in rare circumstances recover on a claim of waste. "To recover on a claim of waste, a plaintiff must prove

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<sup>30</sup> Exhibit 13 of Plaintiffs' Response was apparently supposed to have been Dana Martin's deposition transcript from the Friendship corporate representative deposition, but it was not filed or attached. In any event, as Plaintiffs are aware, Martin testified that before Friendship converted to an LLC in early 2016, Friendship operated as Martin's DBA, had done business around Windermere Oaks for years, had its own checking account, and so forth. Friendship Corporate Representative Deposition, pp. 11-15, 23-25.

that the relevant exchange was ‘so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.’ Thus, a claim of waste will lie ‘only in the rare, unconscionable case where directors irrationally squander or give away corporate assets.’” *Zutrau v. Jansing*, No. 7457-VCP, 2014 WL 3772859, at \*17 (Del. Chan. July 31, 2014) (quotations omitted). It is limited to extreme cases such as where “the challenged transaction served no corporate purpose or where the corporation received no consideration at all.” *Arnaud van der Gracht de Rommerswael on Behalf of Rent-A-Center, Inc. v. Speese*, No. 4:17CV227, 2017 WL 4545929, at \*8 (E.D. Tex. Oct. 12, 2017) (quoting *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)). “This stringent standard is a corollary of the proposition that where business judgment presumptions are applicable, the board’s decision will be upheld unless it cannot be attributed to any rational business purpose.” *Id.* at \*20; *see also In re Denbury Res., Inc.*, No. 05-09-01206-CV, 2009 WL 4263850, at \*1 (Tex. App.—Dallas Dec. 1, 2009, orig. proceeding). “A corporate waste claim fails ‘if there is any substantial consideration received by the corporation, and ... there is a good faith judgment’ that under the circumstances the transaction was worthwhile.” *Arnaud*, 2017 WL 4545929, at \*8 (quoting *White v. Panic*, 783 A.2d 543, 583 (Del. 2001)).

In Section II.B above and in their Motion, the Directors explain their business purpose for the Original Transaction and 2019 Transaction. The 2015 Board believed, based on previous offers and professional opinions, that they were receiving a good price. The 2019 Board, after receiving public input, entered the 2019 Transaction to improve the terms of the Original Transaction and resolve the company’s dispute with Friendship and Martin. It is undisputed that WOWSC netted \$200,000 from the land sale, that it then used to pay down its debt incurred building its new wastewater treatment plant. Motion at Exhibits 2-4, 8-F, 8-G; Supplemental Evidence at Exhibit

15-D. This is hardly a case where the sale and later settlement “cannot be attributed to any rational business purpose” or where WOWSC received no consideration at all.

**d. The Corporate Resolution**

The Plaintiffs argue that WOWSC’s March 2016 corporate resolution was not actually approved at the February 2016 board meeting and is therefore “fictitious” and “fraudulent.” But they cannot dispute the 2015 Board did, in fact, approve the sale of the land to Friendship at the December 19, 2015 Board meeting. Motion at Exhibit 8-F; Supplemental Evidence at Exhibit 20, pp. 69-71. That the corporate resolution may bear the wrong date or was allegedly not formally and separately approved from the December 19, 2015 transaction approval does not make it somehow fraudulent. The Plaintiffs do not point to any law mandating that a board adopt a resolution at a separate board meeting from the meeting where the vote to approve the transaction occurred. TEX. BUS. ORGS. CODE § 22.255 (“A corporation may convey real property of the corporation when authorized by appropriate resolution of the board of directors or members.”) The Plaintiffs also do not point to any evidence that the resolution is somehow “fraudulent” when WOWSC’s board *had* approved the transaction at the December 19, 2015 meeting. The resolution does not memorialize a vote that never occurred.

Further, the Directors can locate no case in which a director has been held *personally liable* for a resolution purportedly not being “appropriate” or including wrong information. The lone case relied on by Plaintiffs regarding the corporate resolution is *Guarneri v. Kessler*, a Fifth Circuit case from 1938 concerning a deportation under the federal Immigration Act. 98 F.2d 580 (5th Cir. 1938). The immigrant was convicted of smuggling, served a prison term, and then was subject to deportation. The Fifth Circuit concluded the smuggling conviction was a crime of moral turpitude because it involved dishonesty and fraud and so the immigrant could be deported. *Id.* at 580-81.

The Plaintiffs cannot seriously equate a conviction of smuggling with a corporate resolution allegedly not being properly prepared and adopted—particularly when at an earlier meeting the 2015 Board undisputedly approved the land sale that was the subject of the resolution. Again, the Plaintiffs do not, in fact, seek to hold the Directors personally liable for the resolution purportedly not being proper. They seek to hold the Directors personally liable because they believe the land was sold to a sitting director for too little. That is the actual crux of their claim.<sup>31</sup> If the resolution had been formally approved in February 2016, there can be no doubt the Plaintiffs would still have brought their claim.

The Plaintiffs finally suggest the 2019 Board was required to adopt a corporate resolution under Business Organizations Code section 22.255 as well. The 2019 Transaction did not convey property—it superseded the Original Agreement, including by correcting a deed mistake in the Original Transaction. Motion at Exhibits 8-L, 8-X. Regardless, to the extent the 2019 Board was supposed to adopt a corporate resolution, the Plaintiffs do not explain how that failure would make those Directors *personally liable* for any alleged damages caused by the underlying transactions. There is no case or statute suggesting that failure to adopt a corporate resolution is grounds for holding a director personally liable. And there is certainly no evidence this was a “knowing” failure.

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<sup>31</sup> Texas Civil Practice and Remedies Code section 16.033 *does* time-bar any claim the Plaintiffs may have regarding the 2016 corporate resolution. The Plaintiffs have filed suit to recover real property, and they complain about defects in the corporate resolution approving the conveyance. Their pleading states they seek damages against the Directors to the extent their recovery of the real property does not compensate WOWSC for all loss and injury. Third Amended Petition ¶ 7.32. Section 16.033(a)(1) imposes a two-year limitations period on a person with *any* “right of action for the recovery of real property” for “failure of the record to show authority of the board of directors ... of a corporation....” The transaction deeds that the Plaintiffs claim were not properly approved by corporate resolution have been on file since 2016. Motion at Exhibit 8-H. This complaint is barred by limitations.

**e. The Texas Open Meetings Act**

The Plaintiffs do not appear to allege the 2019 Board violated TOMA, as they cannot. In approving the 2019 Transaction, WOWSC published notice of the subject of the meeting, solicited robust membership participation, and voted on the transaction in open meeting. Motion at Exhibits 8-T, 8-U, 8-X; *see also id.* at Exhibit 6, ¶ 10; *id.* at Exhibit 7, ¶ 10; *id.* at Exhibit 8, ¶¶ 6-7.

The Plaintiffs' alleged TOMA violations solely appear to concern the 2015 Board. As in their *TOMA Integrity* lawsuit, the Plaintiffs allege that the 2015 Board did not properly comply with TOMA in relation to the Original Transaction. They cite Texas Government Code section 551.002 (requiring meetings to be open except as provided by TOMA); 551.005 (requiring officials to complete open meetings training within a certain timeframe); 551.021 (requiring minutes or recordings of open meeting); 551.072 (requiring discussions of real property to occur in closed meeting); and section 551.102 (requiring final votes to occur in open meeting).<sup>32</sup> Notably, the Plaintiffs discuss TOMA extensively in their Response while simultaneously claiming this is not a TOMA suit.

This Court already adjudicated that WOWSC violated TOMA at the December 19, 2015 meeting. *See TOMA Integrity, Inc. v. Windermere Oaks Water Supply Corp.*, No. 06-19-00005-CV, 2019 WL 2553300, at \*1 (Tex. App.—Texarkana Jun. 21, 2019, pet. denied). The court of appeals specifically discussed the requirements of several provisions of TOMA, including some of the ones the Plaintiffs point to now, in agreeing with this Court a TOMA violation occurred. *Id.*

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<sup>32</sup> Some of these alleged violations are untrue and some debatable. For instance, the recording and transcript demonstrate the 2015 Board stated that they would bring Martin back in when they came out of executive session. Supplemental Evidence at Exhibit 20, p. 62, 70. They did not formally announce coming out of executive session, but they had stated executive session would end when she came back in. *Id.* at Exhibit 20. Another example is that, contrary to what the Plaintiffs suggest, the 2015 Board *did* create and publish minutes of their meetings, including the December 19, 2015 meeting. Motion at Exhibit 8-F. TOMA does not mandate publication of minutes on a website.

The Directors cannot see how any complaint concerning TOMA in relation to the Original Transaction is not barred by res judicata. *See Igal v. Brightstar Info. Tech. Grp.*, 250 S.W.3d 78, 86 (Tex. 2008); *Hallco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 58 (Tex. 2006) (res judicata applies to claims which, through the exercise of diligence, could have been litigated in a prior suit).

But there are several other issues with attempting to use TOMA as the “hook” for opening up the 2015 Board Directors to personal liability. First, any complaint under TOMA is barred by limitations. The limitations period for a criminal action against an individual under TOMA is two years, and the limitations period for a civil action is four years. TEX. CODE CRIM. PROC. art. 12.02; TEX. CIV. PRAC. & REM. CODE § 16.051. No Director has ever been convicted, indicted, or even investigated for a criminal violation of TOMA. *See, e.g.*, § 551.144 (a person commits an offense by knowingly participating in a close meeting that is not permitted under TOMA); § 551.143 (a person commits an offense if the person knowingly conspires to circumvent TOMA by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of TOMA). *But see State v. Doyal*, 589 S.W.3d 136 (Tex. Crim. App. 2019) (concluding that section 551.143 is unconstitutionally vague on its face).

Second, any alleged TOMA violations in regard to the Original Transaction were cured and mooted when the 2019 Board approved the 2019 Transaction. The 2019 Transaction, which superseded the Original Transaction, was undisputedly done in compliance with TOMA. Motion at Exhibits 8-T, 8-U, 8-X; *see also id.* at Exhibit 6, ¶ 10; *id.* at Exhibit 7, ¶ 10; *id.* at Exhibit 8, ¶¶ 6-7; *see Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).<sup>33</sup>

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<sup>33</sup> The Plaintiffs claim that because they seek damages, the 2019 Transaction could not have mooted any controversy regarding the Original Transaction. Response at 69-70. Yet if the alleged “illegal” acts by the 2015 Board were rectified by the 2019 Board, such as adopting a superseding agreement that was undisputedly adopted in compliance with TOMA, the Plaintiffs do not explain how they would still somehow have a claim for damages related to the transactions under TOMA.

Third, and more critically, and with only one inapplicable exception, there is nothing in TOMA that imposes **personal, civil liability** on a person for a violation of its provisions. The purpose of TOMA is “to safeguard the public’s interest in knowing the workings of its governmental bodies.” *Hays Cty. v. Hays Cty. Water Planning P’ship*, 69 S.W.3d 253 (Tex. App.—Austin 2002, no pet.); *see also Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 300 (Tex. 1990). Texas courts **do** at times grant relief under TOMA to ensure it serves this purpose. That relief is generally an injunction to stop the body from holding meetings in violation of TOMA, or, when appropriate, invalidating an action that violated TOMA. TEX. GOV’T CODE § 551.141 (an action taken by a governmental body in violation of TOMA is voidable); *id.* § 551.142 (an interested person may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of TOMA by a governmental body); *Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners’ Ass’n*, 2 S.W.3d 459, 461-62 (Tex. App.—San Antonio 1999, pet. denied) (enjoining water district from holding meetings in violation of TOMA); *City of Leon Valley v. Wm. Rancher Estates Joint Venture*, No. 04-14-00542-CV, 2015 WL 2405475, at \*4 (Tex. App.—Austin May 20, 2015, no writ) (remedy for TOMA violation is an injunction or a reversal of the TOMA violation); *Rivera v. City of Laredo*, 948 S.W.2d 787, 793 (Tex. App.—San Antonio 1997, writ denied) (appointment of an officer made in violation of TOMA was set aside as void).

TOMA contains **one** provision imposing personal civil liability that does not apply here. *See* TEX. GOV’T CODE § 551.146 (imposing personal liability if a person without lawful authority knowingly discloses to a member of the public the certified agenda or recording of a meeting that was lawfully closed to the public, causing injury); *City of Leon Valley*, 2015 WL 2405475, at \*3. That is the **sole** provision imposing potential civil liability for a TOMA violation. Indeed, one

searches Texas case law in vain to find even one case imposing *personal liability* on an individual for a violation of TOMA. Even worse, the Plaintiffs seek to hold the Directors *strictly liable* for allegedly violating TOMA. The one inapplicable provision authorizing personal liability under TOMA imposes a “knowing” standard, highlighting that TOMA is not intended to impose strict liability against a director in a claim for damages.<sup>34</sup> Under the Plaintiffs’ proposed “rule,” a plaintiff could forego the remedies available under TOMA and immediately seek damages under Business Organizations Code section 20.002(c)(2) from a director. Indeed, a plaintiff could do the same under the Public Information Act and various other laws that set forth specific remedies for their violation. That result is plainly absurd and cannot be what the Legislature intended in enacting section 20.002(c)(2).<sup>35</sup>

TOMA is a red herring in regard to the Plaintiffs’ claim for damages against the Directors.<sup>36</sup>

**f. The Meeting Minutes**

The Plaintiffs finally complain that the 2015 Board prepared “fictitious” and “fraudulent” meeting minutes, presumably referring to the December 19, 2015 meeting minutes stating the board voted in open session to approve the Original Transaction. Motion at Exhibit 8-F. As explained in Note 32 above, it is debatable whether the 2015 Board left executive session to vote on the Original Transaction, though they several times discussed going out of executive session to

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<sup>34</sup> The Plaintiffs state, without citing any evidence, that TOMA violations were “known” to the Director Defendants. Response at 69. That is a flagrant misrepresentation that is easily refuted by the record. The 2015 Board believed it was complying with TOMA. Response at Exhibit 11, pp. 71-81. There is no evidence any Director “knew” any alleged violation of TOMA was occurring.

<sup>35</sup> The Plaintiffs seem to ask this Court to “import” TOMA into section 20.002(c). Courts may not interpret separate statutory schemes enacted for different purposes years apart *in pari materia* (i.e., together). See, e.g., *DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407, 410-11 (Tex. App.—Dallas 2010, pet. denied).

<sup>36</sup> The Directors are not aware of any statement by WOWSC’s counsel that the Original Transaction was “illegal.” Response at 7. Presumably, Plaintiffs are referring to WOWSC’s counsel’s demand letter to Friendship and Martin before the settlement, which referenced the adjudicated TOMA violation but did not make any accusation that the transaction itself was illegal. Motion at Exhibit 8-S.



accept Friendship's offer. *See* Supplemental Evidence at Exhibit 20. If anything, there is ambiguity in the meeting recording. The Plaintiffs cannot refute, though, that the 2015 Board *did* create minutes for the December 19, 2015 board meeting. Motion at Exhibit 8-F.

TOMA requires a record of minutes of open meeting. TEX. GOV'T CODE § 551.021. The minutes must (1) state the subject of each deliberation, and (2) indicate each vote, order, decision, or other action taken. *Id.* The 2015 Board's minutes from December 19, 2015 state they considered and voted on the Original Transaction, as required under TOMA. *Id.*; Motion at Exhibit 8-F. And once more, regardless, the Plaintiffs do not identify—and the Directors cannot locate—any case or statute holding a director personally liable for meeting minutes purportedly containing an inaccuracy.

#### **D. Volunteer Immunity Statutes**

The volunteer immunity state and federal statutes provide additional immunity for the Directors. TEX. CIV. PRAC. & REM. CODE ch. 84; 42 U.S.C. § 14501, *et seq.* The Plaintiffs claim these statutes do not apply because the statutes purportedly do not apply to WOWSC. The language of the statutes belies the Plaintiffs' assertion. The Texas Charitable Immunity and Liability Act ("Texas Act") applies to any organization "organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community." TEX. CIV. PRAC. & REM. CODE § 84.003(1)(B). The Federal Volunteer Protection Act ("Federal Act") similarly applies to any non-profit organization organized and conducted for public benefit and includes organizations operated primarily for civic purposes. 42 U.S.C. § 14505. WOWSC, as a non-profit providing water and wastewater services to the Windermere Oaks community, provides for the welfare of the Windermere Oaks community and operates for "civic purposes." Courts have concluded that volunteer protection acts are extremely broad and that a variety of non-profit directors enjoy volunteer immunity. *See Ventres*

*v. Goodspeed Airport, LLC*, No. X07CV01402085S, 2008 WL 2426790, at \*23 n.25 (Conn. Super. Ct., May 27, 2008) (directors for land trust non-profit enjoyed volunteer immunity and reciting some of the many other organizations that enjoy volunteer immunity); *Elliot v. La Quinta Corp.*, No. 2:06CV56, 2007 WL 757891, at \*3 (N.D. Miss. Mar. 8, 2007) (noting the “extremely broad definition of ‘organization’ under the Volunteer Protection Act” and applying it to a youth athletic club).

The Plaintiffs also claim the Federal Act does not immunize the Directors from a suit brought by WOWSC. *See* 42 U.S.C. § 14.503(c). First, the Texas Act does not contain the same provision. And, the Federal Act preempts the Texas Act, “except that this chapter shall **not** preempt any State law that provides additional protection from liability relating to volunteers....” 42 U.S.C. § 14.502(a) (emphasis added). Second, while the Directors concede that a court in another state excluded a representative suit against directors, Response at 77 (citing *Melucci v. Sckman*, No. 516/12, 2012 WL 5192763 (N.Y. Sup. 2012)), no Texas state or federal court has held this. Thus, that case is not binding. As the Directors have explained, the Plaintiffs lack standing or capacity to bring a representative suit against the Directors in Texas.<sup>37</sup>

The Plaintiffs also suggest the Federal Act does not apply because the Directors purportedly did not act within the scope of their responsibilities to WOWSC. Response at 77 (citing *Owen v. Bd. of Dirs. of Washington City Orphan Asylum*, 888 A.2d 255 (D.C. 2002)). As explained above, there is no evidence the Directors somehow did not act within their capacity as WOWSC directors in approving either transaction. The Directors are entitled to sell land to pay for a wastewater treatment plant. They are entitled to settle potential litigation and improve the Original

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<sup>37</sup> At a minimum, the Plaintiffs’ own cited authority disavows their ability to sue the Directors as **individuals**. The volunteer protection statutes preclude any suit by the Plaintiffs in their individual capacity against the Directors.

Transaction. They are entitled to rely on professional advice. To the extent the 2015 Board violated TOMA or purportedly did not prepare a “proper” resolution, that does not equate to the land sale itself being undertaken outside their capacity as WOWSC directors.

The Plaintiffs also do not explain any provision of law or governing document that the 2019 Board is alleged to have violated in entering the 2019 Transaction.

Thus, the Directors are immunized from liability under the volunteer protection acts. *See Brown v. Hensley*, 515 S.W.3d 442, 447-49 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (affirming summary judgment against volunteer board members of an HOA under the Texas Charitable Immunity and Liability Act).

#### **E. Non-Interference in Affairs of Non-Profits**

As explained in the Directors’ Motion, Texas courts particularly refuse to interfere in the affairs of non-profits. The Plaintiffs claim this doctrine does not apply because of the Directors’ purported illegal acts. These so-called “illegal” acts are addressed above. *See* Section II.C., *supra*. The Directors simply note that the purpose of the doctrine is to prevent court interference “every time some member, or group of members, had a grievance, real or imagined” (like in this case) because the interference would frustrate the ability of the non-profit to operate (like here). *Harden v. Colonial Country Club*, 634 S.W.2d 56, 60 (Tex. App.—Fort Worth 1982, no writ). Texas courts grant summary judgment in directors’ favor because of this non-interference even when plaintiffs allege directors violated corporate bylaws. *Butler v. Hide-A-Way Lake Club, Inc.*, 730 S.W.2d 405 (Tex. App.—Eastland 1987, writ ref’d n.r.e.).

Additionally, it is not surprising the Plaintiffs cite historic cases regarding limitations on the scope of corporate powers. Response at 67 (citing cases from 1919). As explained in Note 18 above, the modern ultra vires exception to the business judgment rule is narrow in Texas because

the Business Organizations Code grants corporations such expansive powers. *See, e.g.*, TEX. BUS. ORGS. CODE §§ 2.001, 2.003, 2.008, 2.101, 3.005(a)(3), 22.221, 22.230, 22.235.

**F. The Plaintiffs lack capacity or standing to bring their claims either individually or derivatively.**

**1. A pleading asserting lack of capacity need not be verified if lack of capacity is apparent on the face of the record.**

A pleading claiming lack of legal capacity need not be verified if “the truth of such matters appear of record.” TEX. R. CIV. P. 93. The Directors’ argument that the Plaintiffs lack capacity (or standing) to bring claims individually or as representatives of WOWSC is made as a matter of law and needs not be verified by affidavit. In fact, it is not clear what the Directors would even aver to. The Plaintiffs state in the Third Amended Petition that they are members of WOWSC and are suing individually and as purported representatives of WOWSC. Third Amended Petition, pp. 1, 3, 7. The Directors attack Plaintiffs’ lack of capacity to sue the Directors as members of WOWSC or as representatives of WOWSC. The Plaintiffs’ lack of capacity is apparent on the face of their pleading, and the Directors need not aver to that. TEX. R. CIV. P. 93.

**2. There is a split in authority regarding the Plaintiffs’ standing or capacity to bring representative claims—but Texas law is clear that they lack standing or capacity as individuals to directly sue the Directors.**

The Directors’ Motion summarizes the case law on standing and capacity. First, in regard to representative claims, two Texas court of appeals cases conflict on the issue of representative capacity to bring claims against directors of a non-profit. The Amarillo Court of Appeals rejected the ability of non-profit members to sue directors representatively, including when bringing ultra vires claims. *Flores v. Star Cab Co-op. Ass’n, Inc.*, No.07-06-0306-CV, 2008 WL 3980762, at \*7 (Tex. App.—Amarillo Oct. 22, 2008, pet. denied).<sup>38</sup> Conversely, the Houston (Fourteenth) Court

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<sup>38</sup> Contrary to what the Plaintiffs claim, the *Flores* court suggested that ultra vires claims could not be brought representatively either. 2008 WL 3980762, at \*7.

of Appeals recognized that non-profit members have standing to bring representative ultra vires claims against directors. *Carmichael v. Tarantino Props., Inc.*, 604 S.W.3d 469, 481-82 (Tex. App.—Houston [14th Dist.] 2020, no pet.). The Directors are aware of the language of section 20.002(c)(2). But the Directors propose that, when reading section 20.002(c)(2) together with Chapter 22—which provides no “policing” or procedures governing representative suits as the for-profit chapter does—the preferred reading is that section 20.002(c)(2) does not authorize representative actions in the non-profit context. *See* Motion at pp. 52-54. The Texas Supreme Court has not yet spoken on this issue.

The Plaintiffs rely on *Governing Board v. Pannill* to support their standing or capacity to bring a representative suit. 561 S.W.2d 517, 524 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.). First, that was a suit to enjoin a transaction—not a suit for damages. Second, that court suggested that a plaintiff seeking to bring a derivative suit must satisfy the requirements for class action lawsuits under Texas Rule of Civil Procedure 42 in seeking to represent the entirety of shareholders. *Id.*; *see also Ford v. Bimbo Corp.*, 512 S.W.2d 793, 795 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). It makes sense that if a plaintiff *can* bring a representative action on behalf of a non-profit, there must be *some* procedure governing this action.<sup>39</sup> Otherwise, like here, a disgruntled group of neighbors could bring actions on behalf of a community non-profit against other neighbors regardless of how representative they are of the entire “class” of members. This is obviously a neighborhood divided, and the Plaintiffs present no evidence they represent the interest of *all* WOWSC members. And they certainly present no evidence that *they* can represent the best interests of the WOWSC. To the extent the class action procedural requirements apply as *Pannill*

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<sup>39</sup> As explained in the Directors’ Motion, the for-profit chapter of Business Organizations Code contains procedures governing representative suits (Chapter 21). The non-profit chapter does not (Chapter 22).

suggests, the Plaintiffs have not demonstrated they have met them. Thus, they lack capacity to bring a representative suit. At a minimum, their standing or capacity is limited to bringing a true representative ultra vires claim—not common law breach of fiduciary duty claims “dressed” as ultra vires claims. *Carmichael*, 604 S.W.3d at 481.

Additionally, regardless of whether it should be framed as an issue of standing or capacity, *Pike v. Texas EMC Management, LLC* does not support that the Plaintiffs can *individually* sue the Directors for personal damages. 610 S.W.3d 763 (Tex. 2020); *see also Cooke v. Karlseng*, 615 S.W.3d 911, 913 (Tex. 2021).<sup>40</sup> The Texas Supreme Court noted that a limited partner, the partnership, and the general partner did not lack standing in the jurisdictional sense to bring claims against limited partners. 610 S.W.3d at 778. This is because a partner could be individually injured by virtue of loss in value of its interest in the organization. *Id.* The Plaintiffs have never explained how they have suffered individualized injury by virtue of the Original Transaction or 2019 Transaction. The Plaintiffs suggest that WOWSC would have excess money in its reserves that it could distribute to WOWSC members if only it had sold the land for more money. Response at 8, 60. But the WOWSC articles of incorporation prohibit payment of dividends or income to members. Motion at Exhibit 8-A, art. 6 (“No dividends shall ever be paid upon the memberships of the Corporation. No income of the Corporation may be distributed to members, directors, or officers in these roles.”). So the Plaintiffs’ suggestion that WOWSC would have provided money to its members but-for the transactions is not convincing.<sup>41</sup> The Plaintiffs also state, without

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<sup>40</sup> As noted by the Plaintiffs, *Pike* applies to a partnership. The Supreme Court’s rationale, though, may apply in the corporate context given language in the opinion and holding. The Supreme Court stated: “we hold that a partner *or other stakeholder in a business organization* has constitutional standing to sue for an alleged loss in the value of its interest in the organization.” *Pike*, 610 S.W.3d at 778 (emphasis added).

<sup>41</sup> The Plaintiffs point to federal tax provisions in suggesting WOWSC is required to pay amounts to its members. That is not what the WOWSC articles of incorporation state. This is not a tax case or a case challenging the WOWSC tax-exempt status, which this Court does not have jurisdiction to decide. Motion at 23 n.17.

evidence, that the Directors' actions caused rate increases. Response at 60. A conclusory statement in a pleading or motion is no evidence. *See, e.g., Thanh Le v. North Cypress Med. Ctr. Operating Co., Ltd.*, No. 14-16-00314-CV, 2017 WL 1274241, at \*6 (Tex. App.—Houston [14th Dist.] April 4, 2017, no pet.) (mem. op.) (“Le’s unsworn assertions in his response ... are merely conclusory statements that do not constitute competent summary judgment evidence.”); *La China v. Woodlands Operating Co., L.P.*, 417 S.W.3d 516, 528 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Further, the Supreme Court acknowledged that even if a stakeholder has standing, that does not mean the stakeholder has capacity to sue or can overcome statutory provisions defining and limiting the stakeholder’s ability to recover damages. *Pike*, 610 S.W.3d 763. In regard to capacity, the Supreme Court held that “whether a claim brought by a partner actually belongs to the partnership is likewise a matter of capacity because it is a challenge to the partner’s legal authority to bring the suit.” *Id.* at 779. The Supreme Court has many times concluded that “the cause of action for injury to the property of a corporation, or the impairment or destruction of its business, is vested in the corporation.” *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990); *see also, e.g., Myer v. Cuevas*, 119 S.W.3d 830, 836 (Tex. App.—San Antonio 2003, no pet.) (“Corporate officers owe fiduciary duties to the corporations they serve. However, corporate officers do not owe fiduciary duties to individual shareholders unless a contract or special relationship exists between them in addition to the corporate relationship.”) (citations omitted).

In regard to liability limitations, the Supreme Court acknowledged those arguments go to the merits of a case, and the Directors have addressed this above (business judgment rule, safe harbor provisions, protections for volunteer directors, and so forth). *See* Section II.B-D, *supra*.

The Plaintiffs lack standing or capacity to bring individual or representative claims against the Directors.

**G. The Plaintiffs provide no argument in support of their claim for attorney’s fees.**

The Plaintiffs provide no briefing in support of their claim for attorney’s fees. In one sentence, they state that there is a fact dispute regarding the recovery of attorney’s fees. Response at 2. But whether a statute provides for the recovery of attorney’s fees is a question of law for this Court. *Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, L.L.C.*, 596 S.W.3d 370, 374 (Tex. App.—Dallas 2020, pet. denied). The Plaintiffs have not identified any statute that would provide for the recovery of attorney’s fees against the Directors in this case.<sup>42</sup> This Court should render a take-nothing judgment in the Directors’ favor on the Plaintiffs’ claim for attorney’s fees. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019); *Tucker v. Thomas*, 419 S.W.3d 292, 295); *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011).

**CONCLUSION AND PRAYER**

The Plaintiffs’ Response is replete with strained legal arguments “supported” by suspicion stacked upon suspicion and inferences stacked upon inferences. But there is no actual evidence of the subjective bad faith and other factors that could open the Directors up to personal liability. The evidence instead establishes that the Directors acted with nothing but good faith and in a manner they reasonably believed was in the best interest of WOWSC. That the Plaintiffs take **57 pages** to even get to the law highlights the obvious. A review of Texas law shows that it is only in the most egregious circumstances that a director can be held personally liable. This case does not present anything approaching those sorts of egregious circumstances.

---

<sup>42</sup> The Plaintiffs have not sued under a contract that provides for the recovery of fees.



For the reasons set forth in their Motion and this Reply, Defendants Windermere Oaks Water Supply Corporation Directors William Earnest, Thomas Michael Madden, Dana Martin, Robert Mebane, Patrick Mulligan, Joe Gimenez, Mike Nelson, and Dorothy Taylor respectfully request the Court to grant their Motion for Summary Judgment and render a take-nothing judgment in their favor on each of the Plaintiffs' claims against them. The Directors further seek such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

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PATRICK MULLIGAN, JOE GIMINEZ, MIKE  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 24, 2021, a true and correct copy of the foregoing was served electronically, via e-file Texas, on all counsel of record:

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**SOAH DOCKET NO. 473-20-4071.WS**

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<b>RATEPAYERS APPEAL OF THE          DECISION BY WINDERMERE OAKS          WATER SUPPLY CORPORATION TO          CHANGE WATER AND SEWER          RATES</b>	§ § § § §	<b>PUBLIC UTILITY COMMISSION          OF TEXAS</b>
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**PRELIMINARY ORDER**

Ratepayers of the Windermere Oaks Water Supply Corporation filed a petition under Texas Water Code (TWC) § 13.043(b) appealing the decision by Windermere Oaks Water Supply Corporation to change its water and sewer rates. This preliminary order identifies the issues that must be addressed and that shall not be addressed.

Windermere Oaks provides water and sewer services under water service area certificate of convenience and necessity (CCN) number 12011 and sewer service area CCN number 20662, which are both located in Spicewood, Texas. The petitioning ratepayers filed their petition on April 27, 2020 and an amended petition on April 30, 2020. According to the petition, Windermere Oaks serves at least 250 ratepayers, and 52 ratepayers signed the petition. Petitioners contend that the increases in retail water and sewer rates effective March 23, 2020 are excessive. Specifically, the changes in rates include a base-rate increase for water service of a 5/8" x 3/4" meter from a previous rate of \$50.95 per month to a new rate of \$90.39 per month, and a base-rate increase for sewer service of a 5/8" x 3/4" meter from a previous rate of \$40.12 per month to a new rate of \$66.41 per month.<sup>1</sup> Petitioners assert that the new water and sewer rates represent a 71% increase in base rates.<sup>2</sup>

Petitioners assert that the board of directors of Windermere Oaks justified legal expenditures as the exclusive reason for the rate increases.<sup>3</sup> Petitioners argue that Windermere Oaks increased rates due to its mismanagement of system finances and wasteful legal expenditures:

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<sup>1</sup> First Amended Ratepayers Appeal of the Decision by Windermere Oaks Water Supply Corporation to Change Water and Sewer Rates at 1–2, 5–6 (April 30, 2020).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 2.

not allocating funds properly to reserve accounts; and negligence in selling valuable real estate assets below market value and in refusing to sell current real estate assets to offset corporate debt or legal fees or supplement income for capital improvements.<sup>4</sup> Petitioners request the Commission to review if the rate increases, including water fees, sewer fees, stand-by fees, membership fees, and equity buy-in fees, are just and reasonable.<sup>5</sup>

On May 27, 2020, Windermere Oaks responded that the March 23, 2020 rate increases are just and reasonable. Windermere Oaks contends it increased rates due to litigation brought against Windermere Oaks by a small subset of petitioners over a sale of real property in 2016, as the litigation threatened Windermere Oaks's financial health.<sup>6</sup> Windermere Oaks asserts that the amount of the rate increases were determined through a rate analysis of all operating expenses, which included \$169,000 in legal fees.<sup>7</sup> Additionally, Windermere Oaks asserts that the petitioners' appeal should proceed solely on the issues of whether the March 23, 2020 rate increases, which accounted for the legal fees Windermere Oaks has incurred to date and budgeted to incur in defending lawsuits, were just and reasonable.<sup>8</sup> Furthermore, Windermere Oaks requests the Commission to evaluate additional fees incurred by Windermere Oaks in defending this rate appeal under 16 Texas Administrative Code (TAC) § 24.101(e).

On June 17, 2020, Commission Staff filed its response to Order No. 2 in which Commission Staff recommended that the application be deemed administratively complete in accordance with TWC § 13.043(b) and (c) and 16 TAC § 24.101(b). In its response, Commission Staff further recommended that this proceeding be referred to the State Office of Administrative Hearings (SOAH). In Order No. 3 filed on June 23, 2020, the administrative law judge (ALJ) found the petition administratively complete. The Commission referred this proceeding to SOAH on June 23, 2020.

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<sup>4</sup> *Id.* at 2–3.

<sup>5</sup> *Id.* at 3, 8–16.

<sup>6</sup> Windermere Oaks Water Supply Corporation's First Response to Order No. 1 at 1–2 (May 27, 2020).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 4

Petitioners and Windermere Oaks were directed, and Commission Staff and other interested persons were allowed, to file by July 1, 2020 a list of issues to be addressed in the docket and also identify any issues not to be addressed and any threshold legal or policy issues that should be addressed. Windermere Oaks and Commission Staff each timely filed a list of issues. Petitioners filed a list of issues on July 2, 2020.

### **I. Issues to be Addressed**

The Commission must provide to the ALJ a list of issues or areas to be addressed in any proceeding referred to SOAH.<sup>9</sup> After reviewing the pleadings submitted by the parties, the Commission identifies the following issues that must be addressed in this docket:

1. Did the petition appealing the rate change by Windermere Oaks follow the requirements of TWC § 13.043(b), (c), and (d); 16 TAC § 24.101(b), (c), and (d); and 16 TAC § 24.103(a) and (b)?
  - a. Was the petition filed within 90 days after the effective date of the rate change as required by TWC § 13.043(c) and 16 TAC § 24.101(b)?
  - b. What number of ratepayers had their rates changed and were eligible to appeal the rate change in accordance with TWC § 13.043(b)(3) and (d) and 16 TAC § 24.101(c) and (d)?
  - c. Did the lesser of 10,000 or 10% of those ratepayers file valid protests to the rate change in accordance with TWC § 13.043(c); and 16 TAC §§ 24.101(b) and 24.103(a) and (b)?
2. Did Windermere Oaks provide written notice of the hearing to all affected customers as required by 16 TAC § 24.101(c)(6)?
3. Should the Commission establish or approve interim rates under TWC § 13.043(h) and 16 TAC § 24.101(e)(6) and (h) to be in effect until a final decision is made?

---

<sup>9</sup> Tex. Gov't Code § 2003.049(e).

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4. Do the retail water and sewer rates being charged to petitioners by Windermere Oaks fulfill the requirements of TWC § 13.043(j)<sup>10</sup> and 16 TAC § 24.101(i)? In addressing this question, evaluate the following:
  - a. Are the rates just and reasonable?
  - b. Are the rates unreasonably preferential, prejudicial, or discriminatory?
  - c. Are the rates sufficient, equitable, and consistent in application to each class of customers?
5. If the rates being charged to petitioners by Windermere Oaks meet the requirements of TWC § 13.043(j), must this appeal be dismissed?<sup>11</sup>

If the rates being charged to petitioners by Windermere Oaks do not meet the requirements of TWC § 13.043(j), address the following issues:

6. What information was available to Windermere Oaks at the time it made its decision to increase the water and sewer utility service rates under TWC § 13.043(e)?
7. Considering only the information available to Windermere Oaks at the time of its decision, what are the just and reasonable rates for Windermere Oaks's customers that are sufficient, equitable, and consistent in application to each customer class and that are not unreasonably preferential, prejudicial, or discriminatory under TWC § 13.043(e) and (j) and 16 TAC § 24.101(e) and (i)?
  - a. What is the appropriate methodology to determine just and reasonable rates for Windermere Oaks's customers?
  - b. What is the revenue requirement that would give Windermere Oaks sufficient funds to provide adequate retail water and sewer service to petitioners?

---

<sup>10</sup> See TWC § 13.043(j); see also *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 335–36 (Tex. App.—Austin 1994) (applying TWC § 13.043(j) in an appeal under § 13.043(f)).

<sup>11</sup> See *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.—Austin 1994). In the *Fort Worth* case, the Austin Court of Appeals found that “the Commission made no finding as to the reasonableness of rates . . . which is the initial inquiry under § 13.043(j) defining the scope of agency review.” *Id.* at 335. The Court ruled that the scope of appellate review under § 13.043(f) requires an initial determination under § 13.043(j). *Id.* at 336. However, the TWC does not limit the application of subsection (j) to appeals under § 13.043(f). Therefore, the same initial inquiry under subsection (j) must be made in this appeal under § 13.043(b) before the Commission can reset rates.

- c. What is the appropriate allocation of the revenue to customer classes?
- d. What is the appropriate design of rates for each class to recover Windermere Oaks's revenue requirement?
- 8. Were Windermere Oaks's outside legal expenses related to defending civil suits included in the rates appealed? If so, what amount of outside legal expenses was included in the rates appealed?
- 9. What are the reasonable expenses incurred by Windermere Oaks in this proceeding under TWC § 13.043(e) and 16 TAC § 24.101(e)(2) and (5)?
  - a. Should the Commission allow recovery of these reasonable expenses?
  - b. If so, what is the appropriate recovery mechanism?
- 10. What is the appropriate effective date of the rates fixed by the Commission in this proceeding under TWC § 13.043(e) and 16 TAC § 24.101(e)(3)?
- 11. If the Commission establishes rates different from the rates set by Windermere Oaks, should the Commission order refunds or allow surcharges to recover lost revenues under TWC § 13.043(e) and 16 TAC § 24.101(e)(4)? If so, what is the appropriate amount and over what period should the refund or surcharge be in place?

This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by the ALJ or by the Commission in future orders issued in this docket. The Commission may identify and provide to the ALJ in the future any additional issues or areas that must be addressed, as permitted under Texas Government Code § 2003.049(e).

## **II. Issues Not to be Addressed**

The Commission identifies the following issue that need not be addressed in this proceeding for the reasons stated.

- 1. *Whether the stand-by fees, membership fees, and equity-buy in fees charged by Windermere Oaks are subject to appeal under TWC § 13.043 and 16 TAC § 24.101.*



Petitioners assert that the stand-by fees, membership fees, and equity buy-in fees charged by Windermere Oaks are not just and reasonable.<sup>12</sup> Under TWC § 13.043(g) and 16 TAC § 24.101(g), *an applicant for service* from a water supply or sewer service corporation may appeal to the Commission a decision of the water supply or sewer service corporation affecting the amount to be paid to obtain service other than the regular membership or tap fees. However, the question of whether the stand-by fees, membership fees, and equity-buy in fees charged by Windermere Oaks are subject to appeal under TWC § 13.043(g) is not relevant in this proceeding because petitioners have not established they are applicants for service. Furthermore, even if petitioners had established they are applicants for service from Windermere Oaks, petitioners' assertions regarding stand-by fees, membership fees, and equity buy-in fees appear to be associated with regular membership fees, which are not subject to appeal under Section 13.043(g).

### III. Effect of Preliminary Order

The Commission's discussion and conclusions in this Order regarding issues that are not to be addressed should be considered dispositive of those matters. Questions, if any, regarding issues that are not to be addressed may be certified to the Commission for clarification if the SOAH ALJ determines that such clarification is necessary. As to all other issues, this Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order before the SOAH ALJ at hearing. The SOAH ALJ, upon his or her own motion or upon the motion of any party, may deviate from the non-dispositive rulings of this Order when circumstances dictate that it is reasonable to do so. Any ruling by the SOAH ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of a SOAH ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

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<sup>12</sup> First Amended Ratepayers Appeal at 3, 8–16.

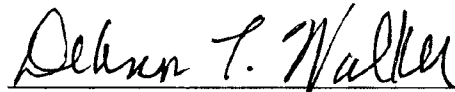
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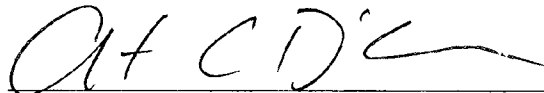
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Signed at Austin, Texas the 16<sup>th</sup> day of July 2020.

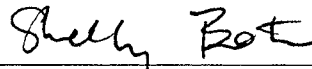
PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



ARTHUR C. D'ANDREA, COMMISSIONER



SHELLY BOTKIN, COMMISSIONER

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PUC DOCKET NO. 50788

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RATEPAYERS APPEAL OF THE  
DECISION BY WINDERMERE OAKS  
WATER SUPPLY CORPORATION TO  
CHANGE WATER AND SEWER RATES §  
§  
§  
§

BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS



DIRECT TESTIMONY OF  
MAXINE GILFORD  
RATE REGULATION DIVISION  
PUBLIC UTILITY COMMISSION OF TEXAS  
MAY 5, 2021

SOAH Docket No. 473-20-4071.WS  
PUC Docket No. 50788

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**ATTACHMENTS**

MG-1	Résumé
MG-2	List of Previous Testimony
MG-3	Revenue Requirement – Detail
MG-4	Windermere’s Response to Staff 1-5
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MG-10	Windermere’s Response to Staff 2-1(iv)
MG-11	Windermere’s Response to Staff 2-7

1    **I.        STATEMENT OF QUALIFICATIONS**

2    **Q.        Please state your name and business address.**

3    A.        My name is Maxine Gilford. My business address is 1701 N. Congress Avenue, Austin,  
4              Texas 78701.

5    **Q.        By whom are you employed and in what position?**

6    A.        I am employed by the Public Utility Commission of Texas (Commission) as a Financial  
7              Analyst in the Rate Regulation Division.

8    **Q.        On whose behalf are you testifying in this proceeding?**

9    A.        I am testifying on behalf of Commission Staff (Staff), whose duty it is to represent the  
10             public interest in proceedings related to rates and services of retail public utilities.<sup>1</sup>

11   **Q.        What are your principal responsibilities at the Commission?**

12   A.        My responsibilities include financial and managerial reviews of applications to obtain or  
13             amend a certificate of convenience and necessity and applications for the sale, transfer, or  
14             merger of facilities and certificate rights. I am also responsible for reviewing applications  
15             for pass-through rate changes, Class D annual rate adjustments, requests for authority to  
16             change rates, including the recovery of rate-case expenses, and ratepayer appeals. Finally,  
17             I prepare testimony and exhibits for contested case matters involving investor-owned  
18             water and sewer retail public utilities and assist with settlement negotiations.

19   **Q.        Please describe your professional and educational background.**

20   A.        I received a Bachelor of Business Administration degree with a major in Finance from the  
21             University of Texas at Austin in 1986. I attended the National Association of Regulatory  
22             Utility Commissioners' Rate School in October 2019. I received extensive one-on-one  
23             training from experienced personnel in the Rate Regulation Division on applications for  
24             authority to change rates, rate appeals, and the financial and managerial review of

---

<sup>1</sup> Texas Water Code (TWC) § 13.002(a).

1 investor-owned and publicly owned utilities. While working for the Texas Water  
2 Development Board for over 17 years, I performed financial reviews of municipalities,  
3 water supply corporations, and investor-owned utilities requesting financial assistance for  
4 infrastructure improvements. I presented my findings to the Board members at their  
5 monthly meetings. Attachment MG-1 is my résumé detailing my experience.

6 **Q. Have you previously filed testimony in regulatory proceedings before the**  
7 **Commission?**

8 A. Yes, please see Attachment MG-2 for a list of previously filed testimony.

9 **II. PURPOSE AND SCOPE OF TESTIMONY**

10 **Q. What is the purpose of your testimony?**

11 A. The purpose of my testimony is to present my recommendation for the cost of service and  
12 revenue requirements, for the purpose of determining the just and reasonable rates  
13 for Windermere Oaks Water Supply Corporation (Windermere). Windermere approved  
14 the rates that are the subject of this appeal (Appealed Rates) on February 1, 2020. The  
15 rates approved on February 1, 2020 went into effect on March 23, 2020 and were appealed  
16 by the ratepayers, resulting in this proceeding. I also recommend recovery of reasonable  
17 rate-case expenses incurred by Windermere in this proceeding. My testimony addresses  
18 the following items in the Commission's Preliminary Order for this docket filed on July  
19 16, 2020:

20 7. Considering only the information available to Windermere at the time of  
21 its decision, what are the just and reasonable rates for Windermere's  
22 customers that are sufficient, equitable, and consistent in application to  
23 each customer class and that are not unreasonably preferential, prejudicial,  
24 or discriminatory under TWC §§ 13.043(e) and (j) and 16 TAC § 24.101(e)  
25 and (i)?

26 a. What is the appropriate methodology to determine just and reasonable  
27 rates for Windermere's customers?

28 b. What is the revenue requirement that would give Windermere sufficient  
29 funds to provide adequate retail water and sewer service to petitioners?

- 1  
2 8. Were Windermere's outside legal expenses related to defending civil suits  
3 included in the rates appealed? Is so, what amount of legal expenses was  
4 included in the rates appealed?  
5  
6 9. What are the reasonable expenses incurred by Windermere in this  
7 proceeding under TWC § 13.043(e) and 16 TAC § 24.101(e)(2) and (5)?  
8 a. Should the Commission allow recovery of these reasonable expenses?  
9 b. If so, what is the appropriate recovery mechanism?  
10  
11 11. If the Commission establishes rates different from the rates set by  
12 Windermere, should the Commission order refunds or allow surcharges to  
13 recover lost revenues under TWC § 13.043(e) and 16 TAC § 24.101(e)(4)?  
14 If so, what is the appropriate amount and over what period should the  
15 refund or surcharge be in place?
- 16 **Q. What is the scope of your review?**
- 17 A. My review presents an analysis of the Appealed Rates that is based on Windermere's  
18 direct testimony, the Ratepayers' direct testimony, and Windermere's responses to various  
19 requests for information.
- 20 **Q. What standards are you applying to reach your determination regarding the**  
21 **reasonableness of Windermere's revenue requirements?**
- 22 A. I am applying standards set forth in TWC § 13.043(e) and (j), which state:  
23 (e) In an appeal under Subsection (b), the utility commission shall  
24 hear the appeal de novo and shall fix in its final order the rates the  
25 governing body should have fixed in the action from which the  
26 appeal was taken. The utility commission may establish the  
27 effective date for the utility commission's rates at the original  
28 effective date as proposed by the service provider, may order  
29 refunds or allow a surcharge to recover lost revenues, and may  
30 allow recovery of reasonable expenses incurred by the retail public  
31 utility in the appeal proceedings. The utility commission may  
32 consider only the information that was available to the governing  
33 body at the time the governing body made its decision and evidence  
34 of reasonable expenses incurred by the retail public utility in the  
35 appeal proceedings. The rates established by the utility commission  
36 in an appeal under Subsection (b) of this section remain in effect  
37 until the first anniversary of the effective date proposed by the retail  
38 public utility for the rates being appealed or until changed by the



1 service provider, whichever date is later, unless the utility  
2 commission determines that a financial hardship exists.

3  
4 (j) In an appeal under this section, the utility commission shall  
5 ensure that every rate made, demanded, or received by any retail  
6 public utility or by any two or more retail public utilities jointly  
7 shall be just and reasonable. Rates shall not be unreasonably  
8 preferential, prejudicial, or discriminatory but shall be sufficient,  
9 equitable, and consistent in application to each class of customers.  
10 The utility commission shall use a methodology that preserves the  
11 financial integrity of the retail public utility. For agreements  
12 between municipalities the utility commission shall consider the  
13 terms of any wholesale water or sewer service agreement in an  
14 appellate rate proceeding.

15  
16 I am also applying standards set forth in 16 TAC § 24.101(e)(2) through (5), which  
17 state:

18  
19 The commission shall hear an appeal under this section de novo  
20 and fix in its final order the rates the governing body should have  
21 fixed in the action from which the appeal was taken. The  
22 commission may:

23 (2) in an appeal under the TWC §13.043(b), include reasonable  
24 expenses incurred by the retail public utility in the appeal  
25 proceedings;

26 (3) establish the effective date;

27 (4) order refunds or allow surcharges to recover lost revenues; and

28 (5) consider only the information that was available to the  
29 governing body at the time the governing body made its decision  
30 and evidence of reasonable expenses incurred in the appeal  
31 proceedings.

32 **Q. What is the standard that you are using to make your recommendation concerning**  
33 **the overall reasonableness of the rate-case expenses requested by Windermere?**

34 A. The standard that I am using is 16 Texas Administrative Code (TAC) § 24.44(b), which  
35 states in part:

36 Requirements for claiming recovery of or reimbursement for rate-case  
37 expenses. A utility requesting recovery of its rate-case expenses has the  
38 burden to prove the reasonableness of such rate-case expenses by a  
39 preponderance of the evidence.

1 **Q. Are you using an additional standard to make your determination concerning the**  
2 **overall reasonableness of Windermere's rate-case expenses?**

3 A. I am also using 16 TAC § 24.44(c) which states in part:

4 Criteria for review and determination of reasonableness. In determining  
5 the reasonableness of the rate-case expenses, the commission must  
6 consider the relevant factors listed in subsection (b) of this section and any  
7 other factor shown to be relevant to the specific case.

8 **Q. Does 16 TAC § 24.44 apply to a water supply corporation?**

9 A. I am not an attorney, but 16 TAC 24.44(a) specifically states that the rule applies to "rate-  
10 case expenses...incurred as a result of filing a rate-change application pursuant to TWC  
11 §13.187 or TWC §13.1871." Although this is not an application under TWC § 13.187 or  
12 § 13.1871, the Commission is permitted to consider "evidence of reasonable expenses  
13 incurred by the retail public utility"<sup>2</sup> in a ratepayer appeal. So, I am using the standard in  
14 16 TAC § 24.44 to evaluate the rate-case expenses Windermere incurred because this is  
15 the best guide available for this type of analysis.

16 **Q. If you do not address an issue or position in your testimony, should that be**  
17 **interpreted as you supporting Windermere's or the ratepayers' position on that**  
18 **issue?**

A. No. The fact that I do not address an issue in my testimony should not be construed as  
agreeing, endorsing, or consenting to any party's position on that issue.

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<sup>2</sup> TWC § 13.043(e).

1    **III.    SUMMARY OF WINDERMERE'S REVENUE REQUIREMENT**

2    **Q.    Please summarize Windermere's revenue requirement as related to the Appealed**  
3    **Rates?**

4    A.    To calculate the water and wastewater rates that are the subject of this proceeding,  
5    Windermere presented a total revenue requirement of \$576,192.<sup>3</sup> Approximately 60% of  
6    Windermere's service revenue is for water and the other 40% is for wastewater.<sup>4</sup> Using  
7    these percentages, the water revenue requirement is \$345,715 and the wastewater revenue  
8    requirement is \$230,477. The test year used to determine the revenue requirement is  
9    Windermere's calendar year beginning January 1, 2019 and ending December 31, 2019.<sup>5</sup>  
10   Details of the revenue requirement are presented in Attachment MG-3 to this testimony.

11   **IV.    SUMMARY OF STAFF'S RECOMMENDATION**

12   **Q.    Please summarize Staff's recommendation.**

13   A.    I recommend that the Commission approve a total revenue requirement of \$404,855.  
14   Using the percentages of 60% for water and 40% for wastewater, the water revenue  
15   requirement is \$242,913 and the wastewater revenue requirement is \$161,942. As shown  
16   in Attachment MG-3, I recommend an adjustment of (\$171,337) to the category of  
17   Accounting and Legal Fees. Subtracting this amount from Windermere's total revenue  
18   requirement of \$576,192 results in the recommended total revenue requirement of  
19   \$404,855. As detailed in this testimony in Section VI, I recommend removal of the entire  
20   amount of outside legal expenses from Windermere's appealed revenue requirement. The  
21   expenses are associated with unreasonable and unnecessary civil litigation matters

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<sup>3</sup> Windermere Oaks Water Supply Corporation's Response to Commission Staff's First Request for Information, Staff 1-5 at 10 (Nov. 9, 2020) (Attachment MG-4).

<sup>4</sup> *Id.*, Staff 1-16 at 32 (Attachment MG-5).

<sup>5</sup> *Id.*, Staff 1-3 at 8 (Attachment MG-6).

1 involving board members of the water supply corporation that are not just and reasonable  
2 for the inclusion in regulated rates.

3 **V. REVENUE REQUIREMENT METHODOLOGY**

4 **Q. What revenue requirement methodology did Windermere use to determine the**  
5 **revenue requirement used to establish the Appealed Rates?**

6 A. Windermere used the cash-needs method<sup>6</sup> to develop its revenue requirements for the  
7 Appealed Rates.

8 **Q. What are the cash-needs and utility methods of ratemaking?**

9 A. Both methods are used to develop a utility's revenue requirement. The following table  
10 provides a comparison of the basic equations and elements of the two methods.

**Table MG-1**

<b>Comparison of Cash-Needs Method and Utility Method</b>	
<b>Cash-Needs Method</b>	<b>Utility Method</b>
Equation: $RR = E + DSC + CI$	$RR = E + D + T + R$
RR = Revenue requirement or cost of service	RR = Revenue requirement or cost of service
E = Operating expenses	E = Operating expenses
DSC = Debt service, added coverage and possibly reserves	D = Depreciation
CI = Annually recurring capital expenditures (not funded by debt)	T = Taxes
	R = return dollars on invested capital

11 The objective of the cash basis or cash-needs approach for developing a cost of service is  
12 to provide enough revenues to recover total cash requirements for a given time.<sup>7</sup>  
13 Generally, government-owned utilities use the cash-needs method.<sup>8</sup>

<sup>6</sup> *Id.*, Staff 1-2 at 7 (Attachment MG-7).

<sup>7</sup> *Principles of Water Rates, Fees, and Charges, AWWA Manual M1*, sixth Edition at 12.

<sup>8</sup> *Id.*

1   **Q.    What methodology is generally used by water supply corporations to determine**  
2       **revenue requirements for water and sewer service?**

3    A.   Most non-profit entities, such as districts or water supply corporations, use the cash needs-  
4       method because this method focuses on providing enough revenues to pay all debt  
5       obligations in addition to expenses associated with providing utility service. Investor-  
6       owned utilities typically use the utility method that focuses on profit or return on invested  
7       capital. In place of a return, the cash-needs method establishes a revenue requirement that  
8       includes the amount of the utility's annual debt service payments plus an additional  
9       coverage amount expressed as a percentage of the total annual payments, if appropriate,  
10      that should protect the utility's ability to issue debt in the future at acceptable interest  
11      rates. In some cases, contributions to reserve funds are also a part of the cost of a cash-  
12      needs revenue requirement to help ensure payment of debt.

13   **Q.    Is Windermere required to use the cash-needs method or any other method?**

14   A.   No.

15   **Q.    Is the cash-needs method an appropriate way to determine just and reasonable rates**  
16       **in this docket?**

17   A.   Yes. The method is commonly used by water supply corporations and aligns with the  
18       financial objectives of a water supply corporation that include adequate debt service,  
19       reasonable interest rates, ability to maintain facilities, and ability to obtain funding for  
20       future infrastructure.

1 **VI. WINDERMERE'S OUTSIDE LEGAL EXPENSES**

2 **Q. Please describe Windermere's outside legal expenses that were included in the**  
3 **Appealed Rates.**

4 A. Windermere's Appealed Rates include \$171,337 of outside legal expenses incurred  
5 through March 23, 2020.<sup>9</sup> Invoices supporting these expenses total \$213,606.96.<sup>10</sup> As  
6 shown below in Table MG-2, the composition of the outside legal expenses in the amount  
7 of \$213,606.96 consists of the following litigation matters, firms, and amounts.

8 **Table MG-2<sup>11</sup>**

<b>Litigation Matter</b>	<b>Firm</b>	<b>Amount</b>
Texas Open Meetings Act (TOMA)	Enoch Kever PLLC	\$37,164.18
Ultra Vires <sup>12</sup>	Lloyd Gosselink Rochelle & Townsend, P.C.	\$174,778.78
Public Information Act Request	G3 Public Relations & Applications, Inc.	\$1,664
<b>Total</b>		<b>\$213,606.96</b>

9 **Q. Were all of the outside legal expenses occurred in connection with litigation?**

10 A. Not directly. In response to discovery, Windermere estimated that about \$44,682 in  
11 legal fees were incurred to prepare responses to requests under the Public Information  
12 Act.<sup>13</sup> A review of these requests indicates that many of them were, in some way,  
13 connected to the ongoing litigation.<sup>14</sup>

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<sup>9</sup> Direct Testimony of Mike Nelson at 16 (Mar. 10, 2021).

<sup>10</sup> *Id.*, Attachment MN-1 at 39-131.

<sup>11</sup> *Id.*

<sup>12</sup> *Rene Ffrench, et al v. Friendship Homes & Hangars, LLC, et al.*, No. 48292 (33rd Dist. Ct., Burnet County, Tex. 2018, pending)

<sup>13</sup> Windermere Oaks Water Supply Corporation's Response to Commission Staff's Second Request for Information at Staff 2-3 (Feb. 8, 2021) (Attachment MG-8).

<sup>14</sup> *Id.* at Voluminous Attachment Staff 2-5 (Attachment MG-9).

1 **Q. Why is Windermere only able to provide an estimate of the costs incurred to**  
2 **respond to Public Information Act requests?**

3 A. According to the discovery response, the law firm that assisted with preparing these  
4 responses did not bill in a way that allows for a specific calculation of how much time was  
5 dedicated to tasks related to Public Information Act requests.<sup>15</sup>

6 **A. Texas Open Meetings Act**

7 **Q. Please describe the litigation matter that you label in Table MG-1 above as TOMA.**

8 A. The first matter, *TOMA Integrity, v. WOWSC*, Cause No. 47531 in the 33<sup>rd</sup> District Court  
9 of Burnet County, Texas, involves two issues described by ratepayer witness Kathryn E.  
10 Allen as questions of whether the Windermere Board of Directors violated the Texas Open  
11 Meetings Act and whether the court should void the approval and authorization for a real  
12 estate transaction between Windermere and then-director Donna Martin and her entity  
13 Friendship Homes & Hangars.<sup>16</sup> The trial court's final judgment confirmed the TOMA  
14 violations but did not void the approval or authorization of the real estate transaction.<sup>17</sup>  
15 The trial court's judgment was appealed, and on June 21, 2019, the court of appeals held  
16 that the declaratory relief sought, a declaration that the Board's past actions were void,  
17 was not available under TOMA.<sup>18</sup> The appellate court concluded that a decision that  
18 merely addressed past violations would have "no practical effect on the parties."<sup>19</sup> The  
19 Supreme Court declined to review the case, and it was concluded on February 20, 2020.<sup>20</sup>

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<sup>15</sup> Attachment MG-8

<sup>16</sup> Direct Testimony of Kathryn E. Allen at 3-4 (Apr. 7, 2021). For balance, Staff is also filing Windermere's response to Staff 2-1(iv), which asked for a description of each case for which related legal expenses were included in the revenue requirement used to set the Appealed Rates. However, these responses provide much less detail than Ms. Allen's testimony. Windermere Oaks Water Supply Corporation's Response to Commission Staff's Second Request for Information at Staff 2-3 (Feb. 8, 2021) (Attachment MG-10).

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

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1           **B.      Ultra Vires**

2   **Q.      Please describe the litigation matter that you label in Table MG-1 above as Ultra**  
3   **Vires .**

4   A.    The second matter, *Rene Ffrench, John Richard Dial, Stuart Bruce Sorgen, as*  
5         *Representatives for Windermere Oaks Water Supply Corporation v. Friendship Homes &*  
6         *Hangars, LLC, WOWSC, and its Directors*, arises from the real estate transaction  
7         mentioned above and is described in the direct testimony of Ms. Allen as resulting from  
8         alleged fiduciary impropriety.<sup>21</sup> The litigation centers around a disposition of real estate,  
9         potentially valued at more than \$700,000, to a sitting Windermere director for only  
10        \$200,000. Discovery in this case is ongoing and the case is set for trial in August 2021.<sup>22</sup>

11           **C.      PIA Request**

12   **Q.      Please describe the litigation matter that you label in Table MG-1 above as PIA**  
13   **Request.**

14   A.    The third matter, *Windermere Oaks Water Supply Corporation v. The Honorable Ken*  
15         *Paxton, Attorney General of Texas*, is a suit that Windermere filed against the Texas  
16         Attorney General (AG) appealing the AG's decision that legal invoices requested by  
17         Danny Flunker were not exempted from disclosure under the Public Information Act.<sup>23</sup>  
18         At the conclusion of the TOMA matter described above, Mr. Flunker submitted a request  
19         under the Public Information Act for legal invoices for the period of time covered by the  
20         TOMA litigation.<sup>24</sup> Windermere sought an AG Opinion that it was not required to  
21         disclose the invoices.<sup>25</sup> Recently, Windermere withdrew its objections to disclosure and

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<sup>21</sup> *Id.* at 8.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *Id.* at 11.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*



1 published the invoices on its website.<sup>26</sup> As a result, Windermere has filed a Notice of  
2 Non-Suit in the case.<sup>27</sup>

3 **Q. Did you perform an independent review of all of the invoices provided to support**  
4 **the outside legal expenses?**

5 A. Yes.

6 **Q. What is your primary recommendation regarding Windermere's inclusion of**  
7 **outside legal expenses in its appealed revenue requirement?**

8 A. As my primary recommendation, I propose removing the entire \$171,337 for outside legal  
9 expenses from the revenue requirement used to set Windermere's Appealed Rates. The  
10 expenses are associated with multiple civil matters that originate with a decision to enter  
11 into a real estate transaction with a sitting Windermere Board member. While I do not  
12 have an opinion one way or another as to whether the transaction was appropriate, I  
13 understand why some might have concerns that the transaction was not conducted at arm's  
14 length. Given the plausibility of these concerns, Windermere has failed to show that the  
15 legal expenses incurred to litigate these matters are just and reasonable expenses that may  
16 be recovered through rates. Nor has Windermere shown how these expenses result in  
17 benefits to its ratepayers such as lowered rates or improved service. Further, the outcome  
18 of the Ultra Vires matter is not yet known, so a decision on what amount, if any, should  
19 be recovered in rates, is premature.

20 **Q. Are there additional reasons why you recommend excluding these outside legal**  
21 **expenses from Windermere's revenue requirement?**

22 A. Yes. The outside legal expenses represent a cumulative amount incurred outside of a  
23 single test year instead of an annual, recurring amount. The outside legal expenses are  
24 extraordinary, unusual, and non-recurring and do not represent a normal, ongoing cost of

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<sup>26</sup> *Id.* at 12.

<sup>27</sup> *Id.*

1 providing water and wastewater utility services. Additionally, inclusion of the outside  
2 legal expenses places an unreasonable burden on Windermere's ratepayers, that on a per  
3 connection basis equals approximately \$332.05 (\$171,337 divided by the sum of 271  
4 water accounts and 245 wastewater accounts).<sup>28</sup> Because some ratepayers subscribe to  
5 both water and wastewater service, the amount exceeds \$664 per year for those customers.  
6 Finally, inclusion of the outside legal expenses sends a signal to utilities that could  
7 encourage potentially unnecessary litigation without a proven benefit to ratepayers.

8 **Q. Based on the information that you reviewed, has Windermere shown that the outside**  
9 **legal expenses and associated managerial decisions to engage in litigation were**  
10 **reasonable and necessary expenses of providing water and wastewater utility**  
11 **services to its customers?**

12 A. No. Based on the information that I reviewed in this proceeding, I am unable to express  
13 an opinion as to the prudence of Windermere's managerial decisions to engage in  
14 litigation and incur \$171,337 in outside legal expenses. While I understand that  
15 Windermere could not just ignore the TOMA and Ultra Vires suits, Windermere did not  
16 provide information as to why litigating these matters was a necessary choice as opposed  
17 to other options available at the time such as mediation.

18 **Q. Do you believe that Commission precedent supports your recommendation?**

19 A. I believe that the Commission's decision in Docket No. 35717 relating to litigation  
20 expenses of an electric utility is applicable. The Commission found as follows: "[i]n  
21 computing rates, liability insurance for self-insured utilities does not include liability  
22 coverage for intentional torts or for employee misconduct such as discrimination."<sup>29</sup> In  
23 that proceeding, the Commission recognized that a utility is permitted to self-insure

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<sup>28</sup> Direct Testimony of Joe Gimenez, III at 9 (Mar. 10, 2021).

<sup>29</sup> *Application of Oncor Electric Deliver Company, LLC for Authority to Change Rates*, Docket No. 35717, Order on Rehearing at Finding of Fact No. 99 (Nov. 30, 2009).

1        against “potential liability or catastrophic property loss, including windstorm, fire, and  
2        explosion losses, that could not have been reasonably anticipated and included under  
3        operating and maintenance expenses.”<sup>30</sup> The Commission approved that utility’s self-  
4        insurance plan because it found that the coverage is in the public interest; and the plan,  
5        considering all of its costs, was a lower cost alternative to purchasing commercial  
6        insurance; and ratepayers received the benefits of the savings.<sup>31</sup> However, the  
7        Commission did not allow recovery of self-insurance funding for expenses related to  
8        intentional torts or for employee misconduct. Akin to the utility’s request in Docket No.  
9        35717, Windermere requests annual recovery of outside legal expenses to defend lawsuits  
10       related to TOMA violations, required disclosures under the PIA, and alleged ultra vires  
11       acts linked to board member fiduciary matters that even Windermere’s insurance company  
12       has refused to reimburse.<sup>32</sup> Much like the Commission’s decision to deny recovery of  
13       self-insurance funding for expenses incurred as a result of intentional torts or employee  
14       misconduct, I believe my recommendation to disallow Windermere’s outside legal  
15       expenses protects its ratepayers from board member behavior that is unreasonable and  
16       contrary to public policy.

17    **Q.    Please explain what you mean when you say that Windermere’s insurance provider**  
18       **has refused reimbursement for a claim related to the litigation.**

19    A.    As noted in Windermere’s response to RFI Staff 2-7(ii), Allied World Specialty Insurance  
20       Company declined to provide coverage for legal expenses incurred by Windermere related  
21       to *Rene Ffrench, et al. v. Friendship Homes & Hangars, LLC, et al.*<sup>33</sup> Allied World  
22       claimed multiple exceptions to excuse its duty to provide coverage. Allied World stated

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<sup>30</sup> *Id.*, Order on Rehearing at Conclusion of Law No. 17.

<sup>31</sup> *Id.*

<sup>32</sup> Windermere Oaks Water Supply Corporation’s Response to Commission Staff’s Second Request for Information at Staff 2-7 (Feb. 8, 2021) (Attachment MG-11); *id.* at Attachment Staff 2-7(ii).

<sup>33</sup> *Id.* at Attachment Staff 2-7(ii) at 1.

1           that it was not required to provide coverage because the expenses were due to “the insured  
2           gaining any profit, advantage, or remuneration to which the insured is not legally  
3           entitled.”<sup>34</sup> Amongst other exclusions, Allied World also raised the Violation of Law  
4           exclusion, claiming that it had no duty to provide coverage for damages, defense expenses,  
5           costs, or loss arising from the insured’s willful violation of any federal, state, or local law,  
6           rule, or regulation.<sup>35</sup> Windermere challenges this denial of coverage.<sup>36</sup> The dispute  
7           between Windermere and Allied World is currently unresolved.<sup>37</sup>

8   **Q.   Why do you recommend disallowing the full \$171,337 if some portion of that is for**  
9   **expenses incurred to respond to Public Information Act requests?**

10  A.   As stated earlier in my testimony, a review of these requests indicates that many of them  
11       were in some way connected to the ongoing litigation. However, it is my understanding  
12       that Windermere is obligated to respond to Public Information Act requests whether they  
13       are connected to litigation or not. So, it would be reasonable for the Commission to find  
14       that the portion of this amount that is attributable to Public Information Act responses was  
15       a reasonable and necessary expense that is recoverable in rates. In order to make this  
16       finding, the Commission would need an amount that was known to the Windermere Board  
17       at the time it made the decision to increase the rates. Windermere’s response to Staff 2-3  
18       demonstrates that it did not know the specific amount of legal expenses incurred to  
19       respond to Public Information Act requests at the time the Board voted to increase rates.  
20       Therefore, I recommend disallowing the full \$171,337.

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<sup>34</sup> *Id.* at 9.

<sup>35</sup> *Id.* at 13.

<sup>36</sup> *Id.* at 1

<sup>37</sup> *Id.*

1   **Q.     If the Commission disagrees with your primary recommendation, do you propose an**  
2       **alternate recommendation?**

3   A.    Yes. I recognize that TWC § 13.043(j) requires that the Commission use a methodology  
4       that preserves the financial integrity of the retail public utility. If Windermere provides  
5       sufficient evidence in its rebuttal testimony to demonstrate that recovery of the outside  
6       legal expenses are necessary to preserve its financial integrity, then I recommend that the  
7       Commission consider that information.

8   **Q.     Did Windermere provide evidence in its direct case that demonstrates recovery of**  
9       **the outside legal expenses is necessary to preserve its financial integrity?**

10  A.    No. As discussed in the direct testimony of Staff witness Spencer English, Windermere  
11       has access to funds that could be used as a reserve fund for future capital expenditures and  
12       it can change its rates at any time because it is only subject to the Commission's appellate  
13       jurisdiction. Further, Windermere is pre-approved for additional debt of up to \$300,000  
14       from CoBank.<sup>38</sup>

15  **Q.     If the Commission decides to include Windermere's outside legal expenses in its**  
16       **rates, based on the preservation of financial integrity, can you describe your**  
17       **recommended method of recovery of the expenses?**

18  A.    Yes. If the Commission decides to allow recovery of the outside legal expenses, then I  
19       recommend a four-year amortization period. The expenses began to accrue in 2016 and  
20       Windermere implemented its appealed rates in March 2020. Because the expenses at issue  
21       accumulated over four years, I recommend that the Commission spread a potential  
22       recovery over the same period of time, four years.

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<sup>38</sup> Gimenez Direct at 21.

1 **Q. Please explain why you do not recommend a surcharge to recover the outside legal**  
2 **expenses.**

3 A. A surcharge would be the most appropriate way to recover the outside legal expenses  
4 incurred because the surcharge would terminate once the full amount is recovered.  
5 However, Windermere's tariff does not expressly authorize the Board to impose a  
6 surcharge on its ratepayers.<sup>39</sup> The tariff does authorize Windermere to implement a year-  
7 end true-up.<sup>40</sup> So, it is unclear whether Windermere is permitted to surcharge customers.  
8 If Windermere cannot implement a surcharge, the four-year amortization is a reasonable  
9 method of recovery of the outside legal expenses because it smooths the financial effect  
10 on individual ratepayers, whereas, a year-end true-up could impose an unexpected burden  
11 of \$332 per connection on Windermere's customers.

12 **VII. RATE CASE EXPENSES**

13 **Q. What is the total amount of rate-case expenses requested by Windermere at the time**  
14 **of your testimony?**

15 A. Windermere's requested rate-case expenses for the period May 1, 2020, through February  
16 28, 2021 are \$148,747.12.<sup>41</sup>

17 **Q. Does the Texas Water Code address recovery of rate-case expenses for a rate case**  
18 **filed under TWC § 13.043(e)?**

19 A. Yes, TWC § 13.043(e) allows the Commission to consider "evidence of reasonable  
20 expenses incurred by the retail public utility in the appeal proceedings."

21 **Q. Did you perform an independent review of all of the invoices provided to support the**  
22 **requested rate-case expenses?**

23 A. Yes.

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<sup>39</sup> *Id.*, Attachment JG-1.

<sup>40</sup> *Id.*, Attachment JG-1 at 43-44.

<sup>41</sup> Direct Testimony of Jamie L. Mauldin at 8 (Mar. 10, 2021).

1   **Q.     What is your recommendation regarding the recovery of rate-case expenses?**

2   A.     I recommend that the Commission allow recovery of rate-case expenses in the amount of  
3         \$148,747.12.

4   **Q.     If the Commission allows recovery of rate-case expenses, how should they be**  
5         **recovered?**

6   A.     If Windermere is permitted to impose a surcharge, I recommend that Windermere recover  
7         these rate-case expenses through a monthly surcharge to all of its customers over a five-  
8         year period. I recommend that the monthly amount equal the total rate-case expenses  
9         divided by the current number of connections, divided by five years, divided by twelve  
10        months. I recommend that the Commission limit recovery to the earlier of 60 months or  
11        such time that Windermere recovers the full amount of allowed rate-case expenses. For  
12        the expenses incurred through February 28, 2021, the monthly surcharge per water  
13        connection and per wastewater connection equals \$4.80 (\$148,747.12 divided by the sum  
14        of 271 water accounts and 245 wastewater accounts<sup>42</sup> divided by 60 months).

15  **Q.     What is your recommendation related to the recovery of Windermere's rate-case**  
16         **expenses if it cannot impose a surcharge?**

17  A.     My secondary recommendation is that Windermere obtain recovery of its rate-case  
18         expenses through the true-up mechanism as allowed under its tariff. A one-time true up  
19         mechanism equals \$288.27 (\$148,747.12 divided by the sum of 271 water accounts and  
20         245 wastewater accounts<sup>43</sup>) per each water and each wastewater connection.

21         Another alternative is that Windermere recover the rate-case expenses using a five-year  
22         amortization period in rates. This alternative produces an annual rate-case expense  
23         allowance of \$29,749.42 (\$148,747.12 divided by five).

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<sup>42</sup> Gimenez Direct at 9.

<sup>43</sup> *Id.*

1   **Q.     What is your recommendation related to the rate-case expenses Windermere incurs**  
2       **subsequent to February 28, 2021?**

3   A.    I recommend that the Administrative Law Judge leave the record open and allow  
4       Windermere to update its rate-case expenses after the hearing and closer to the time a final  
5       order is issued to limit the amount of trailing rate-case expenses resulting from this  
6       proceeding. For the expenses incurred after the close of the record, I recommend that  
7       Windermere request recovery of the trailing expenses in a compliance proceeding where  
8       its residual rate-case expenses can be reviewed. Windermere must provide supporting  
9       documentation for the expenses at that time. Because Windermere is a non-investor  
10       owned utility, it will not have the opportunity to recover the trailing expenses unless its  
11       ratepayers present another appeal to the Commission. A compliance proceeding provides  
12       the opportunity for Windermere to recover those expenses incurred subsequent to the  
13       close of the record.

14   **VIII. REFUNDS AND SURCHARGES**

15   **Q.     What is your recommendation regarding the over-recovery Windermere will have**  
16       **collected if the rates as recommended by Mr. Mendoza are approved?**

17   A.    My primary recommendation is that Windermere refund the difference between the  
18       Appealed Rates and the rates recommended by Mr. Mndoza for the period starting on the  
19       effective date of March 23, 2020 and the first billing on or about September 1, 2021, if  
20       the Commission approves a final rate in this proceeding by that date. I recommend that  
21       Windermere provide the refund over the same number of months it was collected, or  
22       sooner. If the Commission approves Mr. Mendoza's recommended rates, the calculation  
23       of the monthly refunds and surcharges appear in Table MG-3. If the Commission  
24       approves different rates, I recommend updating Table MG-3 accordingly.



Table MG-3

A	B	C	D= C-B
Meter Size	Windermere Implemented Water and Sewer Rate	Staff Recommended Water and Sewer Rate	Monthly (Refund) or Surcharge
¾"	\$156.80	\$79.79	(\$77.01)

1   **Q.**    To the extent that Windermere's financial integrity is impaired by a potential refund  
2           described above, do you offer an alternate recommendation?

3   **A.**    Yes. If the Commission determines that a refund of the difference between Windermere's  
4           Appealed Rates and the final Commission-approved rate impairs Windermere's financial  
5           integrity, I recommend that the Commission allow Windermere to forego a refund as it is  
6           not required under Commission rules.

7   **Q.**    Does this conclude your direct testimony?

8   **A.**    Yes.

9

Attachment MG-1

Page 1 of 1

---

**Maxine Gilford**

---

**Professional Experience**

- **Public Utility Commission of Texas**  
Financial Analyst  
Rate Regulation Division  
May 2019 - Present
- **Texas Commission on Environmental Quality**  
Financial Analyst  
Water Quality Division  
October 2018 – May 2019
- **Texas Water Development Board**  
Financial Analyst  
Water Development Division  
April 1998 – August 2015
- **Texas Department of Commerce/Economic Development**  
Financial Analyst  
November 1995 – April 1998
- **Texas Department of Banking**  
Commissioned Bank Examiner  
December 1987 – November 1995

**Education**

- **University of Texas, Austin, Texas**  
Bachelor of Business Administration  
Major – Finance  
May 1986
- **National Association of Regulated Utility Commissioners' Rate School (NARUC)**  
October 2019

Attachment MG-2  
Page 1 of 1

**Attachment MG - 2 - List of Previous Testimony**

<b>Docket</b>	<b>Case</b>
PUC 50944 SOAH 473-20-4709.WS	Application of Monarch Utilities I, L.P. for Authority to Change Rates
PUC 50557 SOAH 473-21-0477.WS	Application of Corix Utilities (Texas), Inc. for Authority to Change Rates

Attachment MG-3

Page 1 of 1

**PUBLIC UTILITY COMMISSION OF TEXAS**  
**Windermere Oaks Water Supply Corporation**  
**SOAH Docket No. 473-20-4071.WS**  
**PUC Docket No. 50788**  
**Revenue Requirement-Detail**

	Windermere Oaks Water Supply Corporation Total Revenue Requirement	Staff Adjustment	Staff-Adjusted Total Revenue Requirement	60% Water Revenue Requirement	40% Sewer Revenue Requirement
<b>OPERATIONS &amp; MAINTENANCE COSTS</b>					
Contract Labor	\$ 117,865		\$ 117,865	\$ 70,719	\$ 47,146
Chemicals and Treatment	\$ 12,035		\$ 12,035	\$ 7,221	\$ 4,814
Utilities	\$ 20,922		\$ 20,922	\$ 12,553	\$ 8,369
Repairs and Maintenance	\$ 71,060		\$ 71,060	\$ 42,636	\$ 28,424
Office Expenses - Billing	\$ 15,679		\$ 15,679	\$ 9,407	\$ 6,272
Accounting and Legal	\$ 171,337	\$ (171,337)	\$ -	\$ -	\$ -
Office Supplies	\$ 4,707		\$ 4,707	\$ 2,824	\$ 1,883
Telephone	\$ 6,549		\$ 6,549	\$ 3,929	\$ 2,620
Travel and Entertainment	\$ 1,130		\$ 1,130	\$ 678	\$ 452
Equipment Rental	\$ 250		\$ 250	\$ 150	\$ 100
Insurance - WC and Liability	\$ 14,160		\$ 14,160	\$ 8,496	\$ 5,664
License and Dues	\$ 178		\$ 178	\$ 107	\$ 71
Postage and Freight	\$ 2,710		\$ 2,710	\$ 1,626	\$ 1,084
Sampling	\$ 8,459		\$ 8,459	\$ 5,075	\$ 3,384
Depreciation	\$ 56,273		\$ 56,273	\$ 33,764	\$ 22,509
Materials and Supplies	\$ 6,730		\$ 6,730	\$ 4,038	\$ 2,692
Miscellaneous	\$ 1,250		\$ 1,250	\$ 750	\$ 500
Purchased Water	\$ 8,490		\$ 8,490	\$ 5,094	\$ 3,396
Slug Removal	\$ 2,363		\$ 2,363	\$ 1,418	\$ 945
Bookkeeping	\$ 4,163		\$ 4,163	\$ 2,498	\$ 1,665
<b>SUBTOTAL - OPERATIONS &amp; MAINTENANCE COSTS</b>	<b>\$ 526,310</b>	<b>\$ (171,337)</b>	<b>\$ 354,973</b>	<b>\$ 212,984</b>	<b>\$ 141,989</b>
Long Term Debt	49,882		49,882	\$ 29,929	\$ 19,953
<b>NET REVENUE REQUIREMENT</b>	<b>\$ 576,192</b>	<b>\$ (171,337)</b>	<b>\$ 404,855</b>	<b>\$ 242,913</b>	<b>\$ 161,942</b>

**PUBLIC UTILITY COMMISSION OF TEXAS**  
**Windermere Oaks Water Supply Corporation**  
**SOAH Docket No. 473-20-4071.WS**  
**PUC Docket No. 50788**  
**Revenue Requirement-Detail**

Attachment MG-3  
Page 1 of 1

	Windermere Oaks Water Supply Corporation Total Revenue Requirement	Staff Adjustment	Staff-Adjusted Total Revenue Requirement	60% Water Revenue Requirement	40% Sewer Revenue Requirement
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Postage and Freight	\$ 2,710		\$ 2,710	\$ 1,626	\$ 1,084
Sampling	\$ 8,459		\$ 8,459	\$ 5,075	\$ 3,384
Depreciation	\$ 56,273		\$ 56,273	\$ 33,764	\$ 22,509
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Long Term Debt	49,882		49,882	\$ 29,929	\$ 19,953
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**SOAH DOCKET NO. 473-20-4071.WS  
PUC DOCKET NO. 50788**

Attachment MG-4

Page 1 of 1

**WOWSC'S RESPONSE TO STAFF'S FIRST RFI**

**Staff 1-5** Please identify the revenue requirement that was used to calculate the water rates that are the subject of this appeal.

**RESPONSE:** The revenue requirement used to calculate the water rates totals \$576,192. See Attachment Staff 1-1.

Prepared by: Mike Nelson

Sponsored by: Mike Nelson

**SOAH DOCKET NO. 473-20-4071.WS  
PUC DOCKET NO. 50788**

**WOWSC'S RESPONSE TO STAFF'S FIRST RFI**

**Staff 1-16** For any expenses that are not exclusively incurred to provide either water or sewer service, please explain how Windermere allocated these expenses between the revenue requirement used to calculate the appealed water rates and the revenue requirement used to calculate the appealed sewer rates.

**RESPONSE:** See Attachment Staff 1-1. TRWA Employee James Smith's analysis supports a WOWSC rate increase of \$65.73 per month. In Mr. Smith's analysis, he only applied an increase to water services and not to both water and waste water services. The analysis shows Water min charge increase from \$50.95 to \$116.68.

$$\$50.95 + \$65.73 = \$116.68$$

Approximately 60% of WOWSC's service revenue is for water and the other ~40% of service revenue is for waste water. Partitioning the rate increase:

1.  $\$65.73 \times 0.60 = \$39.44$
2.  $\$65.73 \times 0.40 = \$26.29$

The Rate analysis supports new Water min charge:  $\$50.95 + \$39.44 = \$90.39$  and new Waste Water min charge:  $\$40.12 + \$26.29 = \$66.41$

The Rate analysis supports new total min charge:  $\$90.39 + \$66.41 = \$156.80$ .

Cost increases to be spread evenly across all members and are not based on water usage.

Mr. Smith's suggested minimum bill of \$174.59 is based on TRWA's recommendation to use updated depreciation rates. WOWSC did not update the depreciation rates and determined that a \$174.59 minimum bill created too much of a rate increase and adopted a \$156.80 minimum bill.

Prepared by: Mike Nelson  
Sponsored by: Mike Nelson

Attachment MG-6

Page 1 of 1

**SOAH DOCKET NO. 473-20-4071.WS**

**PUC DOCKET NO. 50788**

**WOWSC'S RESPONSE TO STAFF'S FIRST RFI**

**Staff 1-3**      Please identify the 12-month period used to determine the water and sewer revenue requirements that were used to calculate rates that are the subject of this appeal.

**RESPONSE:** January 1, 2019 to December 31, 2019.

Prepared by: Joe Gimenez

Sponsored by: Joe Gimenez



Attachment MG-7

Page 1 of 1

**SOAH DOCKET NO. 473-20-4071.WS  
PUC DOCKET NO. 50788**

**WOWSC'S RESPONSE TO STAFF'S FIRST RFI**

**Staff 1-2** Please state the methodology Windermere used to establish the water and sewer revenue requirements that were used to calculate the rates that are the subject of this appeal. In your response, please specify whether Windermere used the utility method or cash needs method, if applicable.

**RESPONSE:** TRWA employee James Smith used TRWA's rate sheet to calculate WOWSC's water and sewer revenue requirements. TRWA's rate sheet uses the cash needs basis methodology.

Prepared by: Joe Gimenez  
Sponsored by: Joe Gimenez

Attachment MG-8

Page 1 of 1

SOAH DOCKET NO. 473-20-4071.WS

PUC DOCKET NO. 50788

**WOWSC'S RESPONSE TO STAFF'S SECOND RFI**

**Staff 2-3** Reference the \$169,000 in legal expenses included in the revenue requirement used to set the rates that are the subject of this appeal. Please identify what portion of this amount, if any, is for legal expenses incurred to respond to Public Information Act Requests.

**RESPONSE:**

Approximately \$44,682. Lloyd Gosselink Rochelle & Townsend, P.C. did not distinguish between different matters when invoicing the WOWSC if the work was performed by the same person on the same day. While some entries were solely for work related to the PIA requests, others included work on separate matters, including assistance with member challenges to board actions on interpretations of bylaws and the articles of incorporation, a member removal petition, and compliance with Open Meetings Act law, including a new law of the 2019 Texas Legislature relating to member comments. Therefore, it is not possible to discern the exact time spent on which activity. Accordingly, this figure is an estimate as the billing practice does not allow for a specific calculation.

Prepared by: Joe Gimenez; Mike Nelson

Sponsored by: Joe Gimenez; Mike Nelson

SOAH DOCKET NO. 473-20-4071.WS

PUC DOCKET NO. 50788

**WOWSC'S RESPONSE TO STAFF'S SECOND RFI**

**Staff 2-5** For each Public Information Act Request for which legal counsel was sought, please provide a description of the request, along with a brief explanation of why Windermere sought counsel regarding its response to the request.

**RESPONSE:**

WOWSC has provided copies of each applicable PIA request, along with comments explaining the reason for seeking legal counsel, in voluminous Attachment Staff 2-5, being provided in electronic file-format on CD.

The WOWSC is a non-profit corporation and the Board of Directors are all volunteers. The volunteer board members are not required by law or the WOWSC's bylaws to have background and training on the Public Information Act. Prior to 2019, WOWSC had traditionally received only a few PIA requests per year (approximately 3-4) and these were just handled by various board members with some assistance from legal counsel. The WOWSC did not have a Public Information Officer at this time as it was not needed to handle the relatively small number of requests. However, in 2019, the WOWSC saw an exponential increase in PIA requests, going from an average of 3-4 per year up to a total of 46 requests in 2019. It is important to emphasize that the vast majority of these requests were from people involved in the TOMA lawsuit, described above.

Notably, on March 19, 2019, the WOWSC received its first PIA request from Rene Ffrench. Mr. French was a plaintiff in the TOMA lawsuit, which at that time was in the appeals process at Mr. Ffrench's and the other plaintiff's request. Not only was Mr. Ffrench involved in the TOMA litigation, but also he and the other requestors behind a majority of the 2019 requests were involved in a separate litigation pertaining to the same land sale under dispute in the TOMA lawsuit, which the WOWSC would ultimately be brought into in May 2019 (the Double F Hangar lawsuit). The WOWSC was therefore concerned that many of these requests were attempts to get around the formal discovery process in that case. Furthermore, the requestors had clearly demonstrated a penchant for litigation, and the WOWSC was afraid the requestors would aggressively pursue any civil and criminal penalties available if the WOWSC did not respond in the precise time and manner required by the Public Information Act. Accordingly, the WOWSC frequently sought the help of legal counsel to best ensure compliance with the requirements of each request and the hope of avoiding further lawsuits and legal penalties.

Prepared by: Joe Gimenez

Sponsored by: Joe Gimenez

Attachment MG-9  
Voluminous  
Page 1 of 113

3/23/2019

Gmail - Record Request

Attachment Staff 2-5  
Page 1 of 113



Mister Flunker &lt;dflunker@gmail.com&gt;

---

**Record Request**

2 messages

---

**Mister Flunker** <dflunker@gmail.com>

Sun, May 20, 2018 at 1:40 PM

To: David A Bertino Jr &lt;dbertinojr@me.com&gt;

Cc: George Burriss &lt;watermgmt@yahoo.com&gt;

David/George,

I am requesting a copy of the recent letter sent to Mr Romo from Joe Gimenez. You dont have to waste any WOWSC money, you can simply scan it and send it to me via email Thank you both for your time and effort.

Sincerely,

Danny Flunker

---

**David Bertino** <dbertinojr@me.com>

Sun, May 20, 2018 at 4:18 PM

To: Mister Flunker &lt;dflunker@gmail.com&gt;

Cc: George Burriss &lt;watermgmt@yahoo.com&gt;

Danny,

I am not aware of a letter that was sent. But if there is one. The water board is not trying to hide anything. I will look into it in the next few weeks and get back with you

Thanks

David Bertino

[Quoted text hidden]

Attachment MG-9  
Voluminous  
Page 2 of 113

Attachment Staff 2-5  
Page 2 of 113

From: Mister Flunker <dfunker@gmail.com>

Subject: Re: Public Information Request

Date: December 31, 2018 at 2:41:26 PM CST

To: David Bertino <dbertinojr@me.com>

Cc: Dorothy Taylor <dtaylor27@me.com>

David,

The records I am looking for may be in Les Romos files, however they are in the WOWSC files as well. You, as the president, were the recipient of the email chain between Les Romo, Dana Martin and the board and since Ms Martin was a part of this email chain and not on the board, attorney client privilege can not be invoked. The letter from Joe Gimenez to Les Romo was also sent to you via certified mail, so again this is in the WOWSC files or should be. I am attaching my request for that letter dated May 20th of 2018 of which my request went unanswered for a full seven months (see attached). I appreciate your time and effort.

Regards,

Danny

On Sun, Dec 30, 2018 at 3:15 PM David Bertino <dbertinojr@me.com> wrote:

Danny,

We have received your TPIA request and will respond as soon as possible. It is my understanding that Lloyd Gosselink requested all of Les Romo's files when they were engaged. I am coordinating with Lloyd Gosselink to secure and then review those files for information responsive to your request. Please expect our follow-up response within the next several days and within the deadlines required by the TPIA.

Sent from my iPhone

On Dec 27, 2018, at 10:55 AM, Mister Flunker <dfunker@gmail.com> wrote:

David and Dorothy,

I am submitting a public information request per my rights under the Texas Public Information Act to obtain an electronic copy of the email chain between Les Romo, Dana Martin and the WOWSC board dated 7/23/2018 (see attachment for reference). I am also requesting a copy of the letter Joe Gimenez sent to Les Romo in May of 2018. Texas Local Government Code Section 552.228(b) provides:

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Voluminous  
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Attachment Staff 2-5  
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If public information exists in an electronic or magnetic medium, the requester may request a copy in an electronic medium, such as on diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

- (1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;
- (2) the governmental body is not required to purchase any software or hardware to accommodate the request; and
- (3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.

If a governmental body is unable to provide the information in the requested medium for any of the reasons described by section 552.228(b), the governmental body shall provide the information in another medium that is acceptable to the requester. A governmental body is not required to use material provided by a requester, such as a diskette, but rather may use its own supplies to comply with a request.

If an email copy cannot be obtained, I will accept a hard copy and I will submit payment for this service.

Also, Section 552.221 of the Local Government Code states that "The officer for public information must "promptly" produce public information in response to an open records request. "Promptly" means that a governmental body may take a reasonable amount of time to produce the information but may not delay. It is a common misconception that a governmental body may wait ten business days before releasing the information. In fact, as discussed above, the requirement is to produce information "promptly." What constitutes a reasonable amount of time depends on the facts in each case. The volume of information requested is highly relevant to what constitutes a reasonable period. I do not suspect obtaining these documents should be cumbersome to the public information officer.

Please let me know if you have any questions on my request and when I can anticipate this information.

Regards,

Danny

Attachment MG-9  
Voluminous  
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Attachment Staff 2-5  
Page 4 of 113



joe.gimenez <1129jjg@gmail.com>

---

**Fwd: Open Records Request - email from 2018**

1 message

---

**Dorothy Taylor** <dtaylor27@me.com>  
To: Joe Gimenez <1129jjg@gmail.com>

Wed, Jul 24, 2019 at 1:46 PM

Begin forwarded message:

----- Original message -----

From: patti flunker <patriciaflunker@yahoo.com>  
Date: 3/20/18 3:16 PM (GMT-06:00)  
To: Dorothy Taylor <dorothy@tstar.net>  
Cc: George Burriss <watermgmt@yahoo.com>, Jerry Ingham  
<jyingham80@gmail.com>, Bill Billingsley Jr <lcbaviation@hotmail.com>, Bill  
Stein <wp\_stein@yahoo.com>, Jeff Hagar <jeff.hagar@gmail.com>  
Subject: Re: Open Records Request

Dorothy,

Thank you for your response to my request. Please let me know what the cost will be and I will promptly get this payment to the corporation.

I would be remiss not to debunk your misleading statements in your email. The email you are referring to that I sent out back in 2017 was related to the Windermere Property Owners Association sharing confidential information not the WSC. The POA is not subject to the Texas Public Information Act, and thus there is more confidentiality with member personal information as opposed to the WSC. Please remember these are two completely different entities subject to different laws. The WSC is considered a "government entity" and as such is subject to the Texas Open Meetings Act and the Texas Public Information Act.

I was led to believe that George Burriss was the PIA Officer, hence why the originally request email was sent to him. Moving forward I will make sure I address any additional open records request to you, the Certified Public Information Officer for the WSC.

I am concerned as a member of the WSC that the board is spending unwarranted money on legal fees to get an opinion on something that the Texas Attorney offers free advice on such as PIA requests. As you know from taking the required PIA training, towards the end of the video the presenter states "we offer free legal advice for any questions related to PIA requests". A simple call to the Texas Attorney – Open Government Hotline at 512-476-6736 would have been free.

Attachment MG-9  
Voluminous  
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Attachment Staff 2-5  
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Finally, my open records request was made as a WOPOA member, it came from my personal email, not my work email address. Maybe George or you should have clarified this with me prior to the attorney calling TRWA. Nevertheless, because you and or George negligently miscommunicated to the attorney that I was making this request as TRWA staff member does not excuse this violation of the PIA. I guess you would probably considered this an oversight just like you stated to the members in a meeting last year that it was an oversight that the board forgot to list the sale of the airport property on the agenda.

Sincerely,  
Patti Flunker

---

**From:** Dorothy Taylor <dorothy@tstar.net>  
**To:** Patti Flunker <patriciaflunker@yahoo.com>  
**Cc:** George Burriss <watermgmt@yahoo.com>; Jerry Ingham <jyingham80@gmail.com>; Bill Billingsley Jr <lcbavation@hotmail.com>; Bill Stein <wp\_stein@yahoo.com>; Jeff Hagar <jeff.hagar@gmail.com>  
**Sent:** Monday, March 19, 2018 8:06 PM  
**Subject:** Re: Open Records Request

Patti,

As Board President I am the officer of Public Information and I will get you the information that you requested.

Given your concern regarding "Privacy" issues in your emails back in December 2017 regarding release of information, I sought legal advice before considering the release of the list of WOWSC members and their addresses.

I had reached out to TRWA regarding some WOWSC election and ballot questions, since you are not allowed to consult with us, I was told that I would need to have our attorney contact your supervisor. If the attorney inquired about the request, it was probably to ask why a TRWA employee was asking for information about a TRWA member.

I will be able to get that information in the mail to you in the next several days.

Thanks  
Dorothy

On Mar 18, 2018, at 4:53 PM, patti flunker <patriciaflunker@yahoo.com> wrote:

One week ago I made an open records request as a "wowsc member". As of today I have not received any communication back related to the



Attachment MG-9  
Voluminous  
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Attachment Staff 2-5  
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request below. Please advise me on when this information will be ready and what the cost will be. This is not a burdensome request. Also, just incase you are unfamiliar with the Texas Public Information Act (which you can download your own copy at [https://texasattorneygeneral.gov/files/og/PIA\\_handbook\\_2018.pdf](https://texasattorneygeneral.gov/files/og/PIA_handbook_2018.pdf) ) you are prohibited from asking me why I am making this request. That includes having your current attorney call my sperviosr at TRWA to inquire on why as a WOWSC Member I am making this request, surely I would expect an attorney would know this is a violation of the Public Information Act.

Please let me know when I can expect to obtain this information and the amount I will owe to the system. Thank you for your time.

Patti Flunker, WOWSC Member

On Sunday, March 11, 2018, 6:47 05 PM CDT, patti flunker <patriciaflunker@yahoo.com> wrote

George,

Attachment MG-9  
Voluminous  
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Attachment Staff 2-5  
Page 7 of 113

I wanted to make an open records request of the WOWSC Members. The only information I am requesting is the members names and address, no other information is needed. This request is being made per the rights afforded to me by Texas Open Meetings Act, the WOWSC Tariff and Texas Utility Code. Thanks and hope all is well.

Sincerely,

Patti

Attachment MG-9  
Voluminous  
Page 8 of 113

Attachment Staff 2-5  
Page 8 of 113

## Public Information Request 19 March 2019

From: Rene Ffrench (lrffrench@gmail.com)

To: JGimenezIII@yahoo.com, u2torche@yahoo.com, brownsandniners@aol.com; dbertinojr@me.com;  
normanrmorse@gmail.com

Cc: Bill@aleshirelaw.com

Date: Tuesday, March 19, 2019, 10:24 AM CDT

To the Board of Directors of WOWSC,

With this email I am submitting a public information request per my rights under the Texas Public Information Act (TPIA) to obtain the following information items:

1. A copy of the current WOWSC election process procedure,
2. A copy of all pages of the Key Control Roster maintained to track possession of WOWSC office keys that identified each and every person who possessed had access to WOWSC office keys where the blank and/or completed and/or rejected WOWSC March 9 election ballots and any election records or documents were kept. The roster period of interest will begin with the last date of lock/key changes to the WOWSC offices until re-keying or changing of the locks occurred, or if re-keying has not yet occurred, to the date of this PIA request.
3. If no Key Control Roster exists, then a list of the same information of key holders or individuals with access to the keys for the period described in item one (1) is requested.
4. A copy of all pages of the Key Control Roster maintained to track possession of WOWSC bill drop off box(es) were ballots could have been submitted for the March 9 election for the Key Roster period from the last date of lock/key changes to the WOWSC bill drop box until the date of this PIA request.
5. If no Key Control Roster exists, then a list of the same information of key holders or individuals with access to the keys for the period described in item four (4) is requested.
6. Copies of any professional or legal opinions received in any written or electronic media since July 2016 concerning organizing elections, election procedures, office security, document protection, election candidate nomination documents, election candidate qualifications, and/or member privacy or data security.

NOTE. In the event that the exact information in any of the listed PIA requested items is not available, then the closest information available to the requested items shall be provided. The answers to these requests can be sent individually when prepared.

Furthermore, each item listed shall be considered a separate PIA request and in the event that any PIA requested item cannot be provided because of an illegal or proprietary reason, then the Referenced Reason for non-production of that item is to be clearly stated, and all the other requested items listed in this PIA request are still to be produced.

For your information, Section 552.221 of the Local Government Code states that "The officer for public information must "promptly" produce public information in response to an open records request. "Promptly" means that a governmental body may take a reasonable amount of time to produce the information but may not delay. It is a common misconception that a governmental body may wait ten business days before releasing the information. In fact, as discussed above, the requirement is to produce information "promptly." What constitutes a reasonable amount of time depends on the facts in each case. The volume of information requested is highly relevant to what constitutes a reasonable period. I do not suspect obtaining these documents should be cumbersome to the public information officer.

Please let me know if you have any questions concerning my request and when I can anticipate this information.  
Thank You.

Regards,

L. Rene' Ffrench

[LRFFRENCH@GMAIL.COM](mailto:LRFFRENCH@GMAIL.COM)

+1-512-547-7164

Attachment MG-9  
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^\_PIA^\_ Request March 21, 2019

From: Mister Flunker (dflunker@gmail.com)  
To: jgimeneziii@yahoo.com  
Cc: u2torche@yahoo.com, brownsandniners@aol.com; dbertinojr@me.com; normanrmorse@gmail.com, lrfrench@gmail.com  
Date: Thursday, March 21, 2019, 05:55 PM CDT

All,

Not sure who the PIA officer is so I am sending this to the entire board.

Pursuant to the **Public** Information Act, I am respectfully requesting a copy of the auditors official report (any and all related documents) that was presented to the board at the March 9th annual meeting

I am also requesting the minutes from the 2018 Annual Members meeting.

If an email copy cannot be obtained, I will accept a hard copy.

Section 552.221 of the Local Government Code states that "The officer for public information must "promptly" produce public information in response to an open records request. "Promptly" means that a governmental body may take a reasonable amount of time to produce the information but may not delay. It is a common misconception that a governmental body may wait ten business days before releasing the information. In fact, as discussed above, the requirement is to produce information "promptly." What constitutes a reasonable amount of time depends on the facts in each case. The volume of information requested is highly relevant to what constitutes a reasonable period. Obtaining this documents should NOT be cumbersome to the public information officer.

**As the Texas Constitution states, "All political power is inherent in the people," and that means a free government should work for the people, not the other way around.**

[https://www.texasattorneygeneral.gov/sites/default/files/2018-06/PIA\\_handbook\\_2018\\_0.pdf](https://www.texasattorneygeneral.gov/sites/default/files/2018-06/PIA_handbook_2018_0.pdf)

Please let me know if you have any questions concerning my request and when I can anticipate this information.

Warm Regards,

Danny Flunker

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## Public Information Request March 21, 2019

From J R (Dick) Dial (jrdial@hal-pc.org)  
To jgimeneziii@yahoo.com  
Cc brownsandniners@aol.com; dbertinojr@me.com, u2torche@yahoo.com, normanrmorse@gmail.com, lrffrench@gmail.com  
Date Thursday, March 21, 2019, 03:40 PM CDT

**Pursuant to the Public Information Act I am respectfully requesting a copy of the canceled check for the 2015 Hinton appraisal, the contract between the WOWSC and Jimmy Hinton to do the appraisal, the agenda where this action item was placed and a copy of the minutes showing that this action took place and how the board voted.**

For your information, Section 552.221 of the Local Government Code states that "The officer for public information must "promptly" produce public information in response to an open records request. "Promptly" means that a governmental body may take a reasonable amount of time to produce the information but may not delay. It is a common misconception that a governmental body may wait ten business days before releasing the information. In fact, as discussed above, the requirement is to produce information "promptly." What constitutes a reasonable amount of time depends on the facts in each case. The volume of information requested is highly relevant to what constitutes a reasonable period. I do not suspect obtaining these documents should be cumbersome to the public information officer.

Please let me know if you have any questions concerning my request and when I can anticipate this information.

Regards,

J R (Dick) Dial



Virus-free. [www.avast.com](http://www.avast.com)

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RE: Public Information Request March 21, 2019

From J R (Dick) Dial (jrdial@hal-pc.org)  
To jgimeneziii@yahoo.com  
Cc: brownsandniners@aol.com, dbertinojr@me.com, normanrmorse@gmail.com, u2torche@yahoo.com;  
mgershon@lglawfirm.com, lrffrench@gmail.com  
Date Tuesday, April 2, 2019, 05:22 PM CDT

Mr. Gimenez,

I requested three items and not all of the minutes from 2015 and 2016, so I will list the items to try and clarify my request so it will be easier to understand. You may want to consult with Dana Martin as she answered the question I asked at the annual meeting as to who ordered the Hinton Appraisal and who paid for it? Her answer was "the board ordered it and the board paid for it."

**LIST OF ITEMS I AM REQUESTING**

1. A COPY OF THE CANCELLED CHECK FOR THE 2015 HINTON APPRAISAL. (If this has been lost the bank will be able to provide a copy.)
2. A COPY OF THE CONTRACT BETWEEN THE WOWSC AND JIMMY HINTON TO PROVIDE THE APPRAISAL.
3. A COPY OF THE AGENDA SHOWING THIS ACTION ITEM AND THE MINUTES SHOWING THE ACTION TO HAVE THE HINTON APPRAISAL DONE AND HOW THE BOARD VOTED. (I do not need or want minutes that do not concern my request.)

Regards,

J. R. (Dick) Dial

From: Joe Gimenez [mailto:jgimeneziii@yahoo.com]  
Sent: Tuesday, April 02, 2019 12:25 PM  
To: J. R. (Dick) Dial  
Cc: Hannah Ging  
Subject: Re: Public Information Request March 21, 2019

Mr Dial,

You may review the following minutes for the time period possibly including the actions at the following links:

- [2016-11-19 WOWSC Approved Minutes \( PDF / 288 KB \)](#)
- [2016-10-15 WOWSC Approved Board Minutes \( PDF / 325 KB \)](#)

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- [2016-8-17 WOWSC Approved Board Minutes](#) ( PDF / 146 KB )
- [6-25-2016 Approved Minutes](#) ( PDF / 138 KB )
- [2016-04-30 Annual Mtg minutes approved 4.22.17](#) ( PDF / 347 KB )
- [4-25-2016 Approved Minutes](#) ( PDF / 129 KB )
- [2016-04-20 WOWSC Minutes approved](#) ( PDF / 235 KB )
- [3-28-2016 Approved Minutes](#) ( PDF / 246 KB )
- [1-25-2016 Minutes](#) ( PDF / 173 KB )
- [2-22-2016 Approved Minutes](#) ( PDF / 67 KB )
- [2015-12-19 WOWSC Minutes Ap](#) ( PDF / 169 KB )
- [2015-12-07 WOWSC Minutes Ap](#) ( PDF / 1,751 KB )
- [2015-10-31 WOWSC Minutes Ap](#) ( PDF / 197 KB )
- [2015-10-01 WOWSC Minutes Ap](#) ( PDF / 168 KB )
- [2015-07-16 WOWSC Minutes Ap](#) ( PDF / 3,228 KB )
- [2015-05-13 Draft of WOWSC Minutes](#) ( PDF / 107 KB )
- [2015-04-06 Draft WOWSC Minutes](#) ( PDF / 38 KB )
- [2015-03-16 WOWSC Minutes Ap](#) ( PDF / 137 KB )
- [2015-02-02 WOWSC Minutes Ap](#) ( PDF / 38 KB )
- [2015-01-17 WOWSC Minutes approved](#) ( PDF / 152 KB )

On Thu, Mar 21, 2019 at 3:40 PM J. R. (Dick) Dial <[jrdial@hal-pc.org](mailto:jrdial@hal-pc.org)> wrote:

**Pursuant to the Public Information Act I am respectfully requesting a copy of the canceled check for the 2015 Hinton appraisal, the contract between the WOWSC and Jimmy Hinton to do the appraisal, the agenda where this action item was placed and a copy of the minutes showing that this action took place and how the board voted.**

For your information, Section 552.221 of the Local Government Code states that "The officer for public information must "promptly" produce public information in response to an open records request. "Promptly" means that a governmental body may take a reasonable amount of time to produce the information but may not delay. It is a common misconception that a governmental body may wait ten business days before releasing the information. In fact, as discussed above, the requirement is to produce information "promptly." What constitutes a reasonable amount of time depends on the facts in each case. The volume of information requested is highly relevant to what constitutes a reasonable period. I do not suspect obtaining these documents should be cumbersome to the public information officer.

Please let me know if you have any questions concerning my request and when I can anticipate this information.

Regards,

J R (Dick) Dial

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RE: Public Information Request March 21, 2019

From: J. R. (Dick) Dial (jrdial@hal-pc.org)  
To: JGimenezIII@yahoo.com  
Cc: mgershon@lglawfirm.com, lrffrench@gmail.com  
Date: Thursday, April 4, 2019, 09:18 AM CDT

**Mr. Gimenez III**

I would like to amend my PIA request to the following:

1. **Copy of check from WOWSC front and back #1012 to Jim J. Hinton II, dated 01/05/2016 in the amount of \$600.00**
2. **Copy of the contract between the WOWSC and Jim Hinton II, to provide the appraisal on 10.85 acres Piper Lane.**
3. **I have obtained the minutes I need from the list you sent me but I would like copy of the agenda and action items for the WOWSC meeting that was held on 12/19/2015**

Regards,

Dick Dial

**From:** Joseph Gimenez III [mailto:JGimenezIII@yahoo.com]  
**Sent:** Wednesday, April 03, 2019 11:30 AM  
**To:** J. R. (Dick) Dial  
**Cc:** Mike Gershon; Rene Ffrench  
**Subject:** Re: Public Information Request March 21, 2019

Mr. Dial,

Thank you for clarifying your request so that it is easier to understand.

We are continuing to locate the records you request.

With regards to item 3, given the large number of documents that would be required for our review on your behalf, it may be that we would have to charge you \$15 per hour for someone's time to do that. This is allowed by state law when our review of a certain number of pages is required. I will check that threshold number with our attorney and give you the option of purchasing that if so.



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Warm regards,  
Joe Gimenez  
713.478.8034

On Tuesday, April 2, 2019, 5:22 56 PM CDT, J. R. (Dick) Dial <[jrdial@hal-pc.org](mailto:jrdial@hal-pc.org)> wrote

**Mr. Gimenez,**

I requested three items and not all of the minutes from 2015 and 2016, so I will list the items to try and clarify my request so it will be easier to understand. You may want to consult with Dana Martin as she answered the question I asked at the annual meeting as to who ordered the Hinton Appraisal and who paid for it? Her answer was "the board ordered it and the board paid for it."

**LIST OF ITEMS I AM REQUESTING**

1. A COPY OF THE CANCELLED CHECK FOR THE 2015 HINTON APPRAISAL. (If this has been lost the bank will be able to provide a copy.)
2. A COPY OF THE CONTRACT BETWEEN THE WOWSC AND JIMMY HINTON TO PROVIDE THE APPRAISAL.
3. A COPY OF THE AGENDA SHOWING THIS ACTION ITEM AND THE MINUTES SHOWING THE ACTION TO HAVE THE HINTON APPRAISAL DONE AND HOW THE BOARD VOTED. (I do not need or want minutes that do not concern my request.)

Regards,  
J. R. (Dick) Dial

**From:** Joe Gimenez [<mailto:jgimeneziii@yahoo.com>]  
**Sent:** Tuesday, April 02, 2019 12:25 PM  
**To:** J. R. (Dick) Dial  
**Cc:** Hannah Ging  
**Subject:** Re: Public Information Request March 21, 2019

Mr Dial,

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You may review the following minutes for the time period possibly including the actions at the following links:

- [2016-11-19 WOWSC Approved Minutes](#) ( PDF / 288 KB )
- [2016-10-15 WOWSC Approved Board Minutes](#) ( PDF / 325 KB )
- [2016-8-17 WOWSC Approved Board Minutes](#) ( PDF / 146 KB )
- [6-25-2016 Approved Minutes](#) ( PDF / 138 KB )
- [2016-04-30 Annual Mtg minutes approved 4.22.17](#) ( PDF / 347 KB )
- [4-25-2016 Approved Minutes](#) ( PDF / 129 KB )
- [2016-04-20 WOWSC Minutes approved](#) ( PDF / 235 KB )
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- [2-22-2016 Approved Minutes](#) ( PDF / 67 KB )
- [2015-12-19 WOWSC Minutes Ap](#) ( PDF / 169 KB )
- [2015-12-07 WOWSC Minutes Ap](#) ( PDF / 1,751 KB )
- [2015-10-31 WOWSC Minutes Ap](#) ( PDF / 197 KB )
- [2015-10-01 WOWSC Minutes Ap](#) ( PDF / 168 KB )
- [2015-07-16 WOWSC Minutes Ap](#) ( PDF / 3,228 KB )
- [2015-05-13 Draft of WOWSC Minutes](#) ( PDF / 107 KB )
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- [2015-03-16 WOWSC Minutes Ap](#) ( PDF / 137 KB )
- [2015-02-02 WOWSC Minutes Ap](#) ( PDF / 38 KB )
- [2015-01-17 WOWSC Minutes approved](#) ( PDF / 152 KB )

On Thu, Mar 21, 2019 at 3:40 PM J. R. (Dick) Dial <[jrdial@hal-pc.org](mailto:jrdial@hal-pc.org)> wrote:

**Pursuant to the Public Information Act I am respectfully requesting a copy of the canceled check for the 2015 Hinton appraisal, the contract between the WOWSC and Jimmy Hinton to do the appraisal, the agenda where this action item was placed and a copy of the minutes showing that this action took place and how the board voted.**

For your information, Section 552.221 of the Local Government Code states that "The officer for public information must "promptly" produce public information in response to an open records request. "Promptly" means that a governmental body may take a reasonable amount of time to produce the information but may not delay. It is a common misconception that a governmental body may wait ten business days before releasing the information. In fact, as discussed above, the requirement is to produce information "promptly." What constitutes a reasonable amount of time depends on the facts in each case. The volume of information requested is highly relevant to what constitutes a reasonable period. I do not suspect obtaining these documents should be cumbersome to the public information officer.

Please let me know if you have any questions concerning my request and when I can anticipate this information.

Regards,

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J R (Dick) Dial



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## Texas Public Information Act Request - April 4, 2019

From Rene Ffrench (lrffrench@gmail.com)  
To JGimenezIII@yahoo.com, u2torche@yahoo.com, brownsandniners@aol.com, dbertinojr@me.com,  
normanrmorse@gmail.com  
Cc Bill@aleshirelaw.com  
Date Friday, April 5, 2019, 06:09 AM CDT

To the Board of Directors of WOWSC,

With this email I am submitting a public information request per my rights under the Texas Public Information Act (TPIA) to obtain the following information items.

1. A copy of the current Directors and Officers liability insurance policy detailing the coverage and conditions and the policy coverage period.
2. A copy of all pages of the real estate sale contract (potentially TREC) that was used by the WOWSC as seller of the approximately 4 acres of airport land near Piper Lane in Spicewood Texas around 11 March 2016. Include with those pages any and all agreements to any first right of refusal to buy other WOWSC property. In the event that WOWSC files cannot be located for these documents, they should be available from Service Title Company in or around Marble Falls, Texas.

### NOTE:

Since documents are still not provided from the PIA request sent to the WOWSC on 19 March 2019 that concern the recent election, the 30 day deadline to challenge elements of the election that is mentioned in your Election Procedures that were not followed and were never officially activated, released, or posted, does not apply.

Please let me know if you have any questions concerning my request and the included Note and when I can anticipate your response. Thank You.

Regards,

L. Rene' Ffrench

[LRFFRENCH@GMAIL.COM](mailto:LRFFRENCH@GMAIL.COM)

+1-512-547-7164

Attachment MG-9  
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^\_PIA^\_ Request 4/4/19

From Mister Flunker (dflunker@gmail.com)  
To 1129jg@gmail.com  
Cc brownsandniners@aol.com, normanrmorse@gmail.com, dbertinojr@me.com; u2torche@yahoo.com, mgershon@lglawfirm.com, lrrfrench@gmail.com  
Date Thursday, April 4, 2019, 06:50 PM CDT

All,

Pursuant to the **Public Information Act**, I am respectfully requesting a copy of any communication between Molly Mitchell, Clay Johnson, Five J Holdings LLC, Bill Earnest, Dana Martin and WOWSC regarding the taxiway easement on what is now part of the 3.886 acres. I am sure Bill Earnest can point you in the right direction since he facilitated the purchase of the taxiway easement for \$25,000 back in 2013 from Spence Mann when he sat on the WOWSC board (purchase had the explicit purpose of selling WOWSC land as airport property). The dates of this communication would be between July 2012 and July 2013.

On a side note, I noticed in a communication between Mike Gershon and David Bertino that Mike said he was sorry that David was getting so many PIA requests. Please note, there had never been a contested election in WOWSC history prior to Dana Martin and Bob Mebane running to save the system in 2015 kicking Dorothy Taylor and Scott Penner to the curb (you remember that Bill), in fact they had to beg people to run. Furthermore, I would venture a guess that there had never been a PIA request prior to that point. Heck, when Marvin Lewis asked for the financials Les Romo told him to do a PIA request for that information.

I understand that there may be charges, please calculate.

[https://www.texasattorneygeneral.gov/sites/default/files/2018-06/PIA\\_handbook\\_2018\\_0.pdf](https://www.texasattorneygeneral.gov/sites/default/files/2018-06/PIA_handbook_2018_0.pdf)

My apologies for wanting information, I believe in open and transparent government, something we were sorely lacking prior to 2017.

Warmest regards,

Danny

--

**As the Texas Constitution states, "All political power is inherent in the people," and that means a free government should work for the people, not the other way around.**

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RE: Rene Ffrench Public Information Request 19 March 2019 #6

From: Mister Flunker (dflunker@gmail.com)  
To: 1129jig@gmail.com  
Cc: normanrmorse@gmail.com, brownsandniners@aol.com; dbertinojr@me.com; u2torche@yahoo.com, mgershon@lglawfirm.com; lrffrench@gmail.com  
Date: Thursday, April 11, 2019, 09:05 AM CDT

All,

On March 19th, 2019 Rene Ffrench did a PIA request. This communication is in regards to #6 of his request.

**6. Copies of any professional or legal opinions received in any written or electronic media since July 2016 concerning organizing elections, election procedures, office security, document protection, election candidate nomination documents, election candidate qualifications, and/or member privacy or data security.**

On January 28th I went to the WOWSC open board meeting and presented a packet of information to the board (see attached). I questioned Bill Earnests ability to run because of his deed being in Mooney Circle LLC and not his name, questioned whether or not he was a member and that Mooney Circle LLC was defunct via forfeited existence. At our 1pm meeting with George on March 9th I brought that up, explained it as it happened in the January meeting then asked George if he remembered, George told us yes and that Lori handled that. When will that information be given to Rene in regards to his PIA request?

Warmest regards,

Danny

--

As the Texas Constitution states, "All political power is inherent in the people," and that means a free government should work for the people, not the other way around.



Fore PDF  
37.9kB



art (1) PDF  
116.2kB



Deed to Airport Property.pdf  
185.3kB



BUSINESS ORGANIZATIONS INQUIRY - VIEW ENTITY Mooney Circle.pdf  
74.8kB



BUSINESS ORGANIZATIONS INQUIRY - VIEW ENTITY Mo.pdf  
77kB

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^\_PIA^\_5/12/19

From stuart (ssorgen@msn.com)

To JGimenezIII@yahoo.com, u2torche@yahoo.com, brownsandniners@aol.com, dbertinojr@me.com;  
normanrmorse@gmail.com, mgershon@lglawfirm.com

Date Sunday, May 12, 2019, 05:50 PM CDT

Joe,

Please accept this as my PIA request.

Rene Ffrench previously asked for (# 6 see below) and the board subsequently voted to give certain legal opinions to him so **I am making that request once again** based on information I found on the Burnet CAD website (see attached.) I have since found, while looking up the addresses for the 2015 board members, that in fact Mr Earnest changed his deed which is dated March 1st and was recorded on March 4th, five days before the annual meeting. I am also requesting all legal invoices from Les Romo & Loyd Gosselink, and any and all information pertaining to the WOWSC whistle blower policy.

I know from a conversation with a past board member, that the board asked for a legal opinion concerning the question of Title and Water Account linkage of Bill Earnest as his eligibility to be a candidate for election to this board. The trigger for this information came from Danny Flunker's questions (see attached) at the 1/28/19 open board meeting.

***6. Copies of any professional or legal opinions received in any written or electronic media since July 2016 concerning organizing elections, election procedures, office security, document protection, election candidate nomination documents, election candidate qualifications, and/or member privacy or data security.***

Regards,

Bruce



January282019MeetingInfo.pdf  
84.9kB



MooneyToEarnestDeed.pdf  
90kB



Deed to Airport Property (1).pdf  
185.3kB



Fore (1).PDF  
37.9kB



art (1) (1).PDF  
116.2kB



BUSINESS ORGANIZATIONS INQUIRY - VIEW ENTITY Mooney Circle (1).pdf

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74.8kB



BUSINESS ORGANIZATIONS INQUIRY - VIEW ENTITY Mo (1).pdf  
77kB



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^\_PIA^\_ Request 5/17/19

From: Mister Flunker (dflunker@gmail.com)

To: 1129jg@gmail.com

Cc: normanmorse@gmail.com, brownsandniners@aol.com, dbertinojr@me.com, mgershon@lglawfirm.com,  
u2torche@yahoo.com

Date: Friday, May 17, 2019, 05:10 PM CDT

Joe,

Pursuant to the **Public** Information Act, I would like to request any and all correspondence from the D&O insurance provider regarding the TOMA Integrity suit.

Warmest regards,

Danny

--

**As the Texas Constitution states, "All political power is inherent in the people," and that means a free government should work for the people, not the other way around.**

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^\_PIA^\_ 5/28/19

From Mister Flunker (dflunker@gmail.com)  
To 1129jjg@gmail.com  
Cc normanrmorse@gmail.com, brownsandniners@aol.com, dbertinojr@me.com, u2torche@yahoo.com,  
mgershon@lglawfirm.com, hging@lglawfirm.com  
Date Tuesday, May 28, 2019, 05:36 PM CDT

Joe

I am requesting per the PIA, copies of all legal invoices from 3/7/18 to today's date, that is all invoices of all work done by Les Romo and Lloyd Goosling for WOWSC.

Do you understand this request?

Danny

--

**As the Texas Constitution states, "All political power is inherent in the people," and that means a free government should work for the people, not the other way around.**

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^\_PIA^\_ Request 6/5/19

From: Mister Flunker (dflunker@gmail.com)  
To: 1129jg@gmail.com  
Cc: brownsandniners@aol.com; dbertinojr@me.com; normanrmorse@gmail.com; u2torche@yahoo.com; mgershon@lglawfirm.com; hging@lglawfirm.com  
Date: Wednesday, June 5, 2019, 10:38 AM CDT

Mr. Gimenez,

Pursuant to the **Public** Information Act, I am respectfully requesting any and all correspondence with (both to and from WOWSC or its agents to Insurer) the D&O insurance provider regarding the petition to remove Dana Martin, TOMA Integrity suit, etc. I am listing points of reference from the letter dated January 30th 2018, given to me per PIA Request dated 5/17/19, so as to better help target time frames of correspondence with the insurance carriers.

"This matter was originally submitted to us on January 24, 2017."

"The matter was disclaimed under both coverage parts in a letter to you dated March 22, 2017."

Do you understand this request?

Thank you for your prompt attention to this matter.

Regards,

Mr. Flunker

--

As the Texas Constitution states, "All political power is inherent in the people," and that means a free government should work for the people, not the other way around.

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^\_PIA^\_ Request 6/10/19

From: Mister Flunker (dflunker@gmail.com)  
To: 1129jig@gmail.com  
Cc: normanrmorse@gmail.com, dbertinojr@me.com, brownsandniners@aol.com, u2torche@yahoo.com, mgershon@lglawfirm.com; hging@lglawfirm.com  
Date: Monday, June 10, 2019, 04:14 PM CDT

Joe,

I am respectfully requesting per the TPIA, the resignation letter/email from William Bill Stein, the approximate date of that would be 4/10/18.

Please simply honor my request per the TPIA. The Texas legislature has made this process simple and easy for both you and I, there is no need for you to make lemonade (whatever that means).

Regards,

Danny

[https://www.texasattorneygeneral.gov/sites/default/files/2018-06/PIA\\_handbook\\_2018\\_0.pdf](https://www.texasattorneygeneral.gov/sites/default/files/2018-06/PIA_handbook_2018_0.pdf)

<https://g3publicrelations.com>

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As the Texas Constitution states, "All political power is inherent in the people," and that means a free government should work for the people, not the other way around.