

EMERALD BAY MUNICIPAL UTILITY DISTRICT
FINAL AND APPROVED
MINUTES OF TOWN HALL MEETING
OCTOBER 14, 2009

The Board of Directors of the Emerald Bay Municipal Utility District participated in a town hall meeting on Wednesday, October 14, 2009, at 7:00 p.m. in the Emerald Bay Club, 208 South Bay Drive, Bullard, TX 75757. Present were Directors Bill Harris, Ray Hartley, Deena Johnson, Paul Randolph and Jo Sharp. The meeting was co-hosted by Emerald Bay Homeowners' Association President, J. B. Featherston, and MUD President, Bill Harris. The meeting was chaired by a moderator, Paul Webb. The HOA's attorney, Robert Dillard, and the District's attorney, Roger Borgelt of Potts & Reilly, were also present along with Orville Bevel of the Greater Lake Palestine Council. It was impossible to count the number of attendees--estimate 200 Emerald Bay residents.

HOA President, J. B. Featherston, opened the meeting and stated the purpose of the meeting was to provide information to the community on the options being considered to address the need to repair or rebuild the South Bay bridge. MUD has proposed to negotiate a contract with HOA whereby MUD will undertake the maintenance of roads owned by HOA, including repairing the bridge. Inge Grant (EB resident) presented the slide program (see attached) to answer some basic questions about the two organizations, the rules and regulations under which they operate, and methods of financing.

At end of slide presentation, Mr. Featherston noted the proposal to contract with MUD must be approved by the membership of the HOA in a secret ballot. Two-thirds of those voting or a simple majority of the membership will be required to authorize the proposal to contract. If the membership votes in favor of the proposal, the next step will be to draw up a contract. The attorneys for the HOA and MUD (in consultation with representatives of the two boards) will draft the contract. Both boards will have to approve the final contract before it goes into effect. Members will not be asked to vote on the contract. The contract must be in substantial accord with the MUD Resolution.

At 7:24 p.m., Paul Webb started discussion of questions sent in by HOA members.

Question 1-a: What advantages will HOA gain if they contract street maintenance and bridge construction to MUD? **1-b:** What are disadvantages to HOA if they contract street maintenance and bridge construction to MUD?

Answer (Dale Leath): I see Emerald Bay as one entity--not three separate entities or boards (Club, HOA and MUD). So all three boards provide services to us as members of this community. HOA owns the roads and has responsibility to maintain the roads. HOA has always contracted with outside contractors to repair potholes. The HOA elects a new member every year and four different people have been in charge of streets while Leath has been a resident. That's not continuity and that's not the way it should

be done. The HOA has no employees and no equipment. However, the MUD has equipment and employees to protect/maintain the streets and infrastructure on a regular basis. The HOA contracts for street repair on an annual basis (once a year) because it is very difficult to get a contractor to come out here. The only change in the process is that HOA will be contracting with the MUD, instead of an outside contractor, for the maintenance of our streets. This is an advantage to us to contract with ourselves to maintain our streets for as long as MUD can keep up with it.

Regarding the bridge, MUD will have to get an engineer and contractor to determine what needs to be done to bridge. This is the same thing that HOA will have to do. If we contract with MUD to maintain the streets, then HOA would be able to concentrate on security and architectural control.

Question 1-b: What are disadvantages to HOA if they contract street maintenance and bridge construction to MUD?

Featherston: Had asked Mr. Donalson to prepare to answer that question because he knew his position was different from Mr. Leath, but Donalson was ill.

Question 2 – What are advantages, if any, to MUD for contracting with HOA for streets?

Answer: Bill Harris read letter dated July 10, 2009 addressed to Featherston/HOA (copy attached). It is economically and technically better for the community. No sales taxes on materials, and insurance rates are 25 percent less than HOA insurance. Adding maintenance of roads would justify consolidation of tasks for water and sewer and give MUD some volume and revenue to make the operation of the MUD self-sufficient.

Ray Hartley commented on the fact that switching to the Texas Municipal League saved 60 percent on insurance costs.

Question 3 – Is it true the HOA bylaws require HOA to repair and maintain streets?

Answer/Featherston: True. The bylaws will have to be amended to allow HOA to contract with MUD. Paul Webb clarified that HOA will still exist. It will be contracting with MUD to maintain the roads and bridge.

Question 4 – If roads and bridges are fixed and maintained by HOA, the cost/budget cannot exceed \$10,000. However, if MUD builds the bridge and maintains the streets, their costs are relatively unrestrained.

Answer/Featherston: If the HOA budget for capital expenses is exceeded by \$10,000, we have to get approval from membership. If we budget it for the following year there is no restraint. We could have budgeted \$100,000 to fix that bridge, but we would have had to wait to January to do it. MUD has a different situation.

Harris: We have some flexibility with revenue bonds. An ad valorem tax cannot be levied against this District's residents without your approval. There is also a revenue bond, but you have to have revenue to do it—like the water. The State does not want water and sewer operating entities to have a lot of oversight as far as being able to act. The MUD is subject to nature. The water and sewer systems operate 24 hours a day, 7 days a week, 365 days a year. Therefore, MUD keeps a cash reserve. MUD will not encumber the District with any debt for roads or bridges without voter approval and that includes a revenue bond. There have been a lot of rumors that MUD can spend \$2,000,000 on the roads and bankrupt the community. That's not true. You would have to vote on any proposal or bond issue. As far as monthly maintenance fees, it would be no different from the fees you have now with HOA.

Question 5 – We should obtain a complete cost estimate from a reliable engineering and construction firm for the repair/replacement of the bridge. Has this been done and what is the approximate cost?

Answer/Featherston: Two years ago, HOA received actual cost estimates from Adams Engineering and Longview Bridge Company. At that time costs ranged from about \$400,000 for repairs to over \$600,000 for complete rebuilding of the bridge. We have been to those bridge contractors so many times for cost estimates that they won't talk to us anymore. We couldn't get bids until we had a bridge design and couldn't get bridge design until got core samples. Sorry we do not have a cost figure to give you. Before we ask you to approve a bridge contract, we will have the cost figures. It will have been designed and put out for competitive bids. The cost will be somewhere around \$500,000 more or less.

Question 6 – Would MUD expect HOA to turn over all assets to MUD?

Answer/Harris: You are not turning over any assets to MUD. You are only contracting with MUD via lease. The assets still belong to HOA. The HOA owns streets and that will not change. Our lawyers both agree you are not giving the streets to the MUD, you are just writing a contract whereby the MUD maintains them. As a result, we get synergy in our infrastructure.

Question 7 - Who has the authority to determine what monies should be transferred to MUD or what amount of monies will be collected from members to fund the MUD?

Answer/Featherston: That will be a decision for our HOA board. We don't know what our balance will be in the capital accounts at the end of the year. If results of 11/4/09 ballot are favorable to proposal (a 2/3 majority of those voting or a simple majority of the total membership), then the attorneys will draft a contract according to the terms set forth in the proposal. The contract should be approved at December HOA meeting. At that point we will know how much money we can allocate toward that \$200,000. During the course of those negotiations, we might get MUD to agree to take a lesser amount; i.e., \$180,000 or less. The \$200,000 sounded reasonable at the time and

if necessary HOA will come up with \$200,000. It will be a decision for the board of directors. Since we will be looking into the next year, the board can allocate any amount of funds that they feel is appropriate without having a membership vote on it.

Question 8 – What will be the procedure for members to get roads repaired once we are under contract with MUD?

Answer/Harris: Call the MUD.

Question 9: If MUD has project to repair the streets, will the cost and method of payment for that project be put to the membership for approval?

Answer/Harris: We cannot encumber you with a tax without your approval. There are three (3) ways to raise money. MUD can put up a bond proposal before the membership. If approved, MUD could levy a tax --you would know how much it would be—via ad valorem tax. Or MUD could issue a revenue bond. We reduce that revenue bond by a monthly fee to be billed on members' utility bills for a certain term. If MUD needs a large sum of money for bridge repair, a proposal will be made in package and given to members to vote on. With a revenue bond, everyone pays an even share or rate. With an ad valorem tax, members are assessed according to the value of their property.

Lastly, the HOA voted for new bridge only. MUD is **not** convinced that the bridge needs to be demolished and rebuilt. C. T. Brannon (civil engineers) will partner with Yvonne Newman, structural engineering firm. Newman is a certified TXDOT bridge inspector and it is his opinion that bridge could be repaired (get letter from Harris). Newman Engineering would capture bridge data in an engineering design and Brannon Corporation would bid out the project. This should be a minimal cost. If it is determined by Newman Engineering that the structure must be replaced, then MUD will proceed to that end. Harris believes that all options should be explored thoroughly before a decision is made on the bridge.

Question 10 – Paul Webb noted there was a comment that MUD had not held elections in several years. What is the plan to select/elect directors for the MUD board in the future?

Answer/Harris: Contrary to most people's belief, there was a MUD board election in 2008. Notice was posted on the bulletin boards and any member/resident of this District can file for a place on the ballot. Not one person signed up and Harris signed up 1 hour before the filing deadline. We are not like an HOA; we don't have a nominating committee. Hartley has run for election four times (twice opposed and twice unopposed); Harris has run for election two times (once opposed and once unopposed). If there is not a full slate of candidates to hold a competitive election, the election is cancelled and those who file are elected as unopposed candidates. This happens all the time. If you want to run for the MUD board, contact Deena Johnson.

Roger Borgelt emphasized that the MUD is a political subdivision and, as such, it must follow certain election laws. People are expected to file to run for election. Then

whether competitive or non-competitive, the offices are filled and it is considered an election. Because it is similar to many of our municipalities' nonpartisan elections, there is no such thing as a nominating committee. It is simply a matter of who files and whether it is contested.

Featherston(Question to Borgelt): Is it inappropriate for a political subdivision to solicit candidates?

Borgelt stated he had not seen that done. I don't know that it is necessarily illegal, but I have never seen a city council or MUD district actively solicit candidates.

Featherston: Smith County Commissioners don't appoint a nominating committee.

Question 11 – **What is the district for MUD and will it ever service residents outside the boundaries of Emerald Bay and/or can people outside the District serve as directors?**

Answer/Harris: You cannot (by state law) serve as a member of this MUD board unless you are a landowner and resident of this district. The District boundaries are coincident with the boundaries of the HOA (they are the same). The law does provide that MUD can provide services to people outside of the District, but they are not allowed to vote in District elections. There are 28 customers in Windcliff Harbor that pay to have their wastewater processed in our plant. We do not take responsibility for their lines or pumps. We only take responsibility when it crosses into District boundaries and we charge them the same fee charged to Emerald Bay residents. Windcliff Harbor customers do not pay taxes to the District—we cannot collect a tax (ad valorem tax) from outside the District. It can't be done. They pay a tax surcharge or tax equivalent that is direct billed to them. It is not deductible.

At 7:58 p.m., Paul Webb opened the floor to questions/statements from the audience. (Four minute limit per speaker with two minute extensions)

Kreiter(G.W.): In your examples (slide) you showed the \$2,500 initiation fees go to HOA and a certain percentage would go to the MUD. As the initiation fees amount can change over the years—suggested it be stated that initiation fees (no stated value) will go to HOA and then a stated portion or percentage of initiation fees would go to MUD.

Answer/Featherston: The resolution states the initiation fee is currently \$2,500. The HOA could raise or lower that fee. In the first proposal made by MUD some months ago, MUD stated it would decide what the initiation fee would be and they would keep it all. HOA did not like that proposal and therefore HOA will retain control of initiation fee which is currently \$2,500.

Saffold(Fred):: Commented that whether HOA or MUD does it, residents are paying for it. So one way or other, the money is coming out of our pockets. It's our MUD; it's our HOA. They are us and we are them.

Mote (Clyde): What can MUD do that HOA cannot do? They tried to tell us tonight, but I think HOA can handle it. Some people have said we should let MUD do it because they can do it cheaper. But I have heard figures recently that say that is not true and that HOA can do it just as cheap as MUD and maybe a little bit better. We don't want to forget that MUD is going to take a certain amount of money from every person who joins Emerald Bay. Hopefully, we will have some people join Emerald Bay soon. If they do, then part of initiation fee will go to MUD according to the proposed agreement. I don't believe that it is exactly the same as to whether the MUD or HOA does it, in regard to the cost of this project. We have a protection under the bylaws of Emerald Bay/HOA that if it is \$10,000 over budget, we have to have a vote of the membership. Let's not forget this is one protection that we have.

Now counties cannot spend public money on private streets as cited by many cases. Can MUD spend money on private streets and keep them private. MUD is an organization with nothing but public money in its possession. Taxes, water, sewer, and assessments are all public funds. That is reason that counties cannot use public money on private streets. Why are there no cases directly on MUD maintaining private streets? Is it because they have never done it before or never had a chance? Or is it that no HOA has ever permitted it to happen? I wonder why it has not happened? Careful reading of the appropriate laws, rules and regulations would indicate that MUD can only repair such streets and bridges as are required to permit them to do their job. The current situation is not one that would require MUD to take such action. I have checked every source that I can find and, after spending three days in the county law library, I could not find a single case (either pro or con) on the question of whether or not you can use public funds of our MUD on our streets and permit MUD to control and maintain such streets and still keep them private. Are you willing to take a chance on that?

There are several cases that say you cannot use public funds for private purposes and Hideway tells us do not lose your private streets and make public streets out of them. Some lawyers will tell you don't worry no one will take away your private streets until you agree to it—don't believe it. We can lose our private streets in more ways than one. We can lose our private streets by what is called implied consent. Not all easements are granted by written documents. Easements can also be granted by implied consent or by action or non-action. We can just do nothing and lose our private streets. This has been the law for some time. No one can assure you that MUD using public money to take over maintenance of our streets will or will not result in our losing our private streets and gate. MUD cannot make you such an assurance and neither can Mr. Dillard, Mr. Featherston, or Bill Harris. Even if they did, it would be tragic and too late to remedy the situation if a case so held. We would then have cars, trailers, and campers filled with people we don't know riding up and down our streets looking in our garages and checking to see if our doors are locked. They would be pulling boats and trailers to our Point to get a free boat launch or using the Point as a camping place. Give this some thought before your vote. I want to be clear about this--Don't be the first subdivision to lose your private streets.

Moderator Paul Webb gave opportunity for response from the HOA and/or MUD. We were told there were legal opinions written on the constitutionality of the MUD taking

over maintenance and repairs of streets, bridge and drainage. If anyone would like to summarize these opinions briefly.

Roger Borgelt stated the cases that were cited are not on point for what we are dealing with now. He gave a brief summary: 1) Under the water code the MUD has several statutory purposes, and this contract is being done under a legal statutory purpose of the MUD; (2) the constitutional test (as written into the Texas Constitution and reiterated in numerous amendments) in my opinion is public funds can be expended when the public receives adequate consideration in return and when the governmental body retains control over the use of the funds to ensure that the public purpose is achieved. The public (in this case) is the public of the MUD that is benefiting—NOT the public of Smith County or the public of State of Texas. So we definitely meet the constitutional test.

Dillard commented that rather than the MUD spending money on private property, the MUD is spending public money for a public purpose to maintain water, sewer, drainage and streets (all of which are purposes for which the MUD was organized and statutorily authorized to spend their money). It is not like the MUD is taking public funds and spending it on behalf of a private business. They are spending those funds to accomplish their specific public obligations and functions. The fact that it overlaps with the HOA's responsibility to maintain the property of the subdivision is incidental. Because it is a lease, it is like a governmental entity leasing private property to carry on its operations. They are certainly authorized in that case to spend money to maintain that private property to carry out their functions. Dillard noted there is a large sewer (effluent) line running under the bridge. How could there be any more public purpose than to maintain the integrity of that bridge so that it doesn't collapse and damage that sewer line.

Mr. Dillard made one other comment about the belief that somehow or other this contract to perform a public service, which is coincidentally of benefit to the HOA, will somehow transform or donate ownership of our streets to somebody. If it is to the public--to whom will it go--there is no city here and Smith County does not want them. It is not a dedication of streets for public use. So therefore, in my opinion, this whole idea will have no effect on the sanctity of your private streets, your guardhouse, or your security. It will be just like it is today.

Questions from the floor (continued):

Stafford, Jim: If HOA moves to build a new bridge at a cost of \$500,000-\$600,000, what are the HOA's financial options to raise funds?

Answer (Featherston): We have several options (1) cash on hand (over \$200,000 in capital and operating accounts); (2) borrow money from bank unsecured at commercial rates (noted MUD could borrow money at a lower rate); (3) assess members a lump sum amount to be paid within one year.

McDonald, Bob: If we approve this proposal to lease streets to MUD, who makes decision as to whether the bridge is repaired or replaced? Or is that to be determined in the contract between the parties?

Answer(Featherston): The proposal is that MUD would take complete responsibility to bring the bridge up to TXDOT standards. MUD can repair it if certified engineers certify a plan that can bring it up to standards. It's okay with HOA. The HOA did vote to build a new bridge based on best advice. If there is a better way to do it, then we don't want to throw money down the drain. If this proposal fails, then it will be back in the hands of the HOA and we will look at all options at that time.

Harris: If this proposal passes to MUD, we will get all the information from HOA to Yvonne Newman (licensed DOT bridge inspector/engineer) to establish whether to repair or rebuild the bridge. MUD will then relay the engineering report to the members. Newman has inspected the bridge twice and determined that 90% of problem is below water line. Newman would partner with C.T. Brannon Corporation and we would go out for public bids on it. That would probably solve some of the questions on this as to whether we are going to do this as some contractors are tired of talking to Emerald Bay on this project.

McDonald: I'm not sure that answers my question. The HOA board has already said that we will build a new bridge. If we approve this proposal and we lease the roads to MUD (accept their proposal), are we locked into the HOA board's decision or who will make the decision as to whether or not the bridge is repaired or replaced?

Answer/Featherston: The proposal would override the previous vote by the HOA board. The HOA board agreeing to this proposal would in effect be canceling their previous motion since we no longer would have the responsibility and it becomes a moot matter. So MUD will make the decision.

Harris: It is hard enough to get something done. Can you imagine 17 board members trying to make that decision.

McDonald: Personally, I would rather the MUD look at repair rather than replacement of the bridge. If the repair is \$350,000 and it will last for 50 years, why replace it. Or we stuck with what the HOA has already determined, or if we approve this proposal, does MUD have the option to repair the bridge rather than replace it?

Answer/Harris: The lease is turning over the operation of the streets to MUD. The HOA will be out of it at that point.

Rieder, Tom: First of all, I commend the members of both HOA and MUD board. As a member I genuinely feel you have the best interest of members at heart? However, I am not in favor of MUD fixing the streets and bridge though I believe they will do an exceptional job at a cost that would be favorable.

What I'm opposed to is that we take a political body (MUD) and turn it into a corporation with machinery, trucks, tools, employees, and a maintenance schedule. When we add all that together in conjunction with the reduced costs offered by MUD through bond issues, the costs will actually be higher. That's my primary concern.

Now in the present day we have an HOA board and MUD board that we are comfortable with—they are doing a good job. This is not how the MUD board will be

managed next year or next election, as Mr. Harris has said that he would gladly go at any time. Mr. Harris has a wealth of information about MUD and when he leaves he takes his experience with him. If MUD is a contractor to EB, the relationship is affected when those boards change. HOA has done a good job to date in patching potholes. You are not going to get a contractor at a reasonable price to come out and fix one or two potholes. But we could have favorable contractors to issue contracts of open ended value for 3, 4 or 5 year terms and have the contractor fix the roads on a as need basis. We need to explore this and other options instead of having tunnel vision with MUD.

I am concerned that we (the owners of MUD) are receiving revenue from the treatment of sewage from an outside concern. Who made that decision? Did we as members make that decision? Were we part of that decision-making process? Why is there a surplus in MUD and why is it not returned to members?

These are the questions that are important when we talk about relationships between political bodies and homeowners associations. I think we should leave those relationships that way they are, working the way they are, and take care of the maintenance of our streets and bridge through outside private contractors.

Answer/Bill Harris: Your point about the contractors is well taken. However, over the years, we have had poor results with some contractors/operators. We are in the water business now which means reading meters, fixing leaks (100 leaks since system went on line) and dealing with an old distribution system. The thought is to build an entity that can serve the community when members of this present board are gone. The only way to do this is for people to get involved. One way to accomplish this is through a financial advisory group (which does not have a MUD board member on it) to advise the MUD board on certain matters. We will do the same thing on the streets, sewer and water on the technical side. We need to get all facets of water and sewer systems documented, such as updating computer maps and getting GPS locations of sewer clean-outs. By taking over the maintenance of streets, the District can justify hiring some help.

Rieder, Tom: This is my concern--I can see us having a shed and lots of equipment. I personally don't like competing against private enterprise if there are contractors out there that do that for a living. I don't know why we would have to make that kind of capital investment.

Barkley, Jim: It is my understanding that within a couple of weeks we the membership will vote to approve or disapprove for the HOA board to enter into negotiations with the MUD to let them lease the streets. Once we make this vote, we the membership have no input, no oversight, or the ability to comment on what the terms of the contract will be? Is this correct JBF?

Answer/Featherston: Members will have no other input other than to talk to the board members. That's why you elect a board to handle these matters for the best interest of the members.

Barkley, Jim: So if anyone takes exception to any items on the proposal, such as the 25-year lease as opposed to five year lease, or if MUD board has a financial encumbrance on this project, that under no circumstances can we change it. Everyone in this room will be dead before this contract ends.

MUD can borrow money from banks or pass a bond, but no one talks about paying it back. There is no provision that states it will cost \$17 per family per month for the next 5 years to fix the bridge. They don't tell you how much it will cost to fix the bridge. They will tell you eventually how much it is going to cost to fix the roads.

Emerald Bay has three problems: (1) the greens, (2) the bridge and (3) the roads. At some point they will tell us it will cost \$15 per month for five years to fix the greens; \$17 a month to fix the bridge; and maybe \$40 per month to fix the roads.

My real opinion is that MUD is a very efficient organization. Our water runs, our toilets flush, and that water tower does a great job. My question is why can't MUD and the MUD board be good Emerald Bay HOA citizens and step forward and say "we will fix the bridge."

Myers, Bill: A resident for 24 years and this is the most divisive thing I have ever seen happen in Emerald Bay. I served 4 years on MUD board and EB Club board (president). I spent 40 years in water and wastewater business and I know what they are talking about. The MUD is qualified to do this project. MUD can do it faster, better and less expensively than HOA. When all this came up in February, I told everyone exactly what these capable attorneys have told us. So after months of bickering (mostly by the new members on the board), if these attorneys tell me it is okay to do this, then I am very much in favor of MUD. If you believe in it, stand up. Applause from audience.

Stegemoeller, Nan: I need reminder of what year George Holmes was on the HOA board over streets and got the first engineering inspection on bridge? That was five years ago. Has any repair work been done on the bridge since that time? The HOA has been in charge and nothing has been done in 5 years. We moved here 12 years ago and Bill Myers was president of the HOA Board. At that time Southern Utilities was the water company and they wanted to raise our rates to an exorbitant amount. Mr. Mote came forward in 2003 and said we can do our own water system. We can do it better than this company charging us a high rate and not listening to our needs. That was six years ago and we have a working water system that meets our needs today and into the future. So the proof is in the pudding. So who can do it in a timely fashion, keep the cost reasonable for us, and make it a safe structure. Those are the important questions and we have heard the answers tonight and in previous meetings so that we can make an informed decision.

Grant, Inge: Trust these people --- \$15,000 has been spent on lawyers to make sure it is legal. Hand it over to MUD—the job will be done!! They took over the water when it had to be done, and they took over the sprinkler system on the golf course when it had to be done. They will do a fine job (whoever is on the MUD board) of maintaining the streets and fixing the bridge.

Harris: In regard to comments about how much control the TCEQ (Texas Commission on Environmental Quality) would have over MUD as to what it does to streets? TCEQ has no control over MUD. First of all, the TCEQ did not create this MUD district. It was created by an Act of the 68th Legislature, Senate Bill 1404, unanimously by both the House and the Senate.

Secondly, Southern Utilities' base water rate is now higher than yours. If you calculate it out, the MUD's base water rate is \$25 per month and includes 2,000 gallons at \$2.25 per gallon. If you back that out, your effective base rate is \$20.50. Southern's new rate is \$20.62 or 12 cents higher than EBMUD. That doesn't mean we won't change the rate. When we started the water system in 2006, our base rate was \$25 and Southern was \$14. They have had two rate increases since 2006. We have built up this cash and we have been asked why we have not fixed the pressure on the west end of the subdivision. If you fix the pressure then water usage goes up. That means we have a problem with how much water we can produce. We now have bids back for the drilling of the third water well and we will have a town hall meeting to discuss this project.

There being no further business, the meeting was adjourned at 8:42 p.m.

Respectfully submitted,

Deena M. Johnson
Secretary

William F. Harris
President