**VARNER CREEK UTILITY DISTRICT**
**2028 Proposed Bond Issuance – Road Powers**

This document provides a summary of the petition process and discusses a few considerations related to the District's issuance of road bonds.

## Background

Varner Creek Utility District (the "District") plans to issue bonds to pay for the costs of constructing roads and other related public and infrastructure improvements within the District. The District must (1) acquire Road Powers by petition to the TCEQ, and (2) hold a bond election to issue bonds for those purposes.

The District is conservation and reclamation district created under the authority of Article XVI, Section 59, Texas Constitution, and has the powers authorized by the provisions applicable to all water districts and provisions applicable specifically to municipal utility districts, respectively, set forth under Chapters 49 and 54, Texas Water Code ("TWC"), as amended. The District is also subject to the oversight of the Texas Commission on Environmental Quality ("TCEQ"), which regulates, among other things, its creation, use of natural resources, and issuance of bonds. A district created and operating under the foregoing authorities does not automatically have what we refer to as "Road Powers:" the authority to design, construct, acquire, finance, issue bonds for, operate, maintain, and convey for operation and maintenance, a road or any improvement in aid of the road. Road Powers are granted under the authority of Article III, Section 52, Texas Constitution, and Section 54.234, TWC, further provides that a district may petition the TCEQ to acquire such Road Powers.

## Petition Process for Acquiring Road Powers

The TCEQ may take up to 180 days to complete its review of the petition, plus up to two weeks for the execution and issuance of the order approving the petition. The District will need to have the executed order of the TCEQ authorizing its Road Powers before it can call an election on the question of issuing bonds for projects requiring Road Powers. The District must submit an application for Road Powers to the TCEQ, including the following: written petition, board resolution, city consent, preliminary map, project cost analysis, and feasibility statement.

## Road Ownership

The District cannot use bond proceeds to exercise Road Powers with respect to roads owned by a homeowners' association ("HOA") and restricted from public access. The HOA's ownership of the roads and maintenance of a gate restricting public use of the roads allow a presumption that the roads are private property and makes the District's use of bonds proceeds for the construction, improvement and maintenance of those roads unconstitutional under Texas law.[1]

Even if the District acquires Road Powers under Section 54.234, TWC, certain provisions of the Texas Constitution, commonly referred to as "Gift Clauses,"[2] require that public money (i.e., the District's bond proceeds) be used only for public purposes. Article III, Section 52(a) of the Texas Constitution provides that the "Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." The Texas Supreme Court has further provided a test for determining whether a lending of credit or grant of public money by a political subdivision violates the forgoing Gift Clause according to three principles: (1) A grant of money to a private entity must not be gratuitous (i.e., public benefit); (2) its predominant objective must be to accomplish a legitimate public purpose (i.e., public purpose); and (3) the government must retain control over the funds to ensure that the public purpose is served (i.e., public control).[3]

The District's use of bond proceeds to finance improvements or construction of the HOA's roads would violate the above-mentioned Gift Clause because it would not provide public benefit, it would serve private purpose and would not allow the District to ensure a public purpose is served. The District's authority to issue its proposed bonds (i.e., lend its credit) is granted by the Legislature under Article XVI, Section 59 of the Texas Constitution, and upon acquisition of Road Powers, under Article III, Section 52 of the Texas Constitution. The Columbia Lakes Homeowners Association is an association which would benefit, to the exclusion of the public in appearance and practice, from the road improvements financed by the bond proceeds.[4] Further, by retaining ownership of the roads and maintaining a gate preventing the public from accessing the roads, the HOA would prevent a public purpose from being served by the use of the bond proceeds for the repair and construction of those roads. Thus, the District cannot spend bond proceeds to repair or construct roads owned by the HOA and maintained within a gated community.

Beyond the requirement that public money must be spent only for public purposes, Section 54.234, TWC, allows MUDs to exercise Road Powers only with respect to roads that

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[1] *See Ford v. Moren*, 592 S.W.2d 385 (Tex. Civ. App. 1979) (holding that subdivision streets owned and maintained by lot owners or their association are private property and do not constitute a dedication to a city, county, or the public generally unless there is a clear and unequivocal intention to dedicate to a political subdivision or the public).

[2] *See* Tex. Const. art. III, §§ 50, 51, 52(a); Id. art. XVI, § 6(a).

[3] *Borgelt v. Austin Firefighters Association, IAFF Local 975*, 692 S.W.3d 288, 301 (2024).

[4] *See Ford*, 592 S.W.2d at 392 (stating that designation of streets and alleys on a map or plat would not amount to a dedication of such ways to the public and further noting "there are many subdivisions in which the streets are owned and maintained by the owners of the subdivision such that the roads and streets are for the private use of the owners of the lots in the subdivision. There may be only one entrance to the subdivision and it may have a guard at the gate such that the roads and streets are not for general public use.")

will be (or have been) conveyed to "this state, a county, or a municipality" – consequently, roads intended to remain in HOA ownership and control fall outside the permissible scope of MUD road bond financing.

**Conveyance of Roads**

To convey the roads to the District, we will need to conduct a thorough review of the title to the roads and determine the most effective way to acquire ownership. Depending on the status of the title to the roads, the conveyance could be accomplished by a dedication from the HOA to the District. If the title is unclear, the District and the HOA may need to discuss the District acquiring the roads using its powers of eminent domain. Either way would require support from the HOA and the community members. As mentioned above, the District may apply for Road Powers prior to accomplishing the road conveyance.

**Consequences of Transferring Roads to a Public Entity**

- **Loss of Gate and Access Control:** Public roads must remain open and accessible to the general public 24/7. Private citizens and HOAs cannot legally erect gates, guard booths, or security checkpoints to restrict or log traffic on public streets.[5] A narrow exception exists for third-class roads and neighborhood roads under Section 251.010, Texas Transportation Code, which allows a gate meeting certain criteria to be erected across such roads when necessary, but only if the right of way for that road was obtained at no cost to the county. The exception does not apply to the Columbia Lakes HOA, however, because under Section 251.053, Texas Transportation Code, such road is an access route formally declared as a public road by a county commissioners court to provide a landlocked property owner with a connection to the county's public road system.
- **Limited Parking Enforcement:** Once roads are public, the local municipality or county holds exclusive jurisdiction over traffic and parking regulations under statutes like Section 311.001, Texas Transportation Code. An HOA cannot independently tow vehicles parked on a public street unless the county or city passes a specific ordinance permitting it.
- **No Private Obstructions:** The HOA loses the right to restrict commercial vehicles, trailers, or guest parking on the asphalt, as the public right-of-way is governed strictly by civil code and local law enforcement.
- **Shifting Financial Burdens:** While the HOA sacrifices control and exclusivity, the primary benefit is financial. The responsibility and massive costs of road

[5] *See Keenan v. Robin*, 709 S.W.3d 595, 602 (2024) (holding that the Keenans conclusively established that the streets were dedicated as public rights-of-way and stating that "once dedicated, the owner of the land reserves no rights that are incompatible with the full enjoyment of the public"); *See also Joseph v. City of Austin*, 101 S.W.2d 381, 385 (stating that "any structure that interferes with the public's present or future use of a dedicated street is a nuisance per se and subject to removal").

maintenance, repaving, and storm drainage repair shift entirely to the taxpayers and the district budget rather than the HOA's reserve funds.