



ORDINANCE NO. 3707

AN ORDINANCE OF THE CITY OF FARMERS BRANCH, TEXAS, AN ORDINANCE AMENDING AND RESTATING IN ITS ENTIRETY CHAPTER 34 “ENVIRONMENT” ARTICLE XII “MUNICIPAL SETTING DESIGNATIONS” OF THE CODE OF ORDINANCES OF THE CITY OF FARMERS BRANCH, TEXAS, REALATING TO THE APPLICATION FOR AND APPROVAL OF MUNICIPAL SETTING DESIGNATION ORDINANCES TO PROHIBIT USE OF GROUNDWATER IN AREAS DESIGNATED AS CONTAMINATED IN ACCORDANCE WITH STATE LAW; PROVIDING FOR A PENALTY OF FINE NOT TO EXCEED \$2,000; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A SAVINGS CLAUSE; PROVIDING A REPEALING CLAUSE; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, municipal setting designations is a process authorized by Chapter 361, Subchapter W of the Texas Health and Safety Code, the Texas Solid Waste Disposal Act (the “MSD Legislation”) authorizes the Texas Commission on Environmental Quality (“TCEQ”) to certify a Municipal Setting Designation (“MSD”) for property upon receipt and approval of a proper application to the TCEQ; and

WHEREAS, the Texas legislature, in enacting the MSD Legislation, found that an action by a municipality to restrict access to or the use of groundwater on property located with a municipality in support of or to facilitate a municipal setting designation advances a substantial and legitimate State interest; and

WHEREAS, the City Council previously enacted Article XII to Chapter 34 of the Code of Ordinances setting forth the process by which owners of property within the City may apply to the City and seek approval of an ordinance restricting the use of groundwater within a proposed MSD as required by the MSD Legislation; and

WHEREAS, City staff has reviewed the City’s current ordinances relating to designation of an MSD and recommends certain amendments be made throughout said Article XII; and

WHEREAS, having reviewed the proposed amendments and considered the reasons for same made by City staff, the City Council of the City of Farmers Branch, Texas, finds it to be in the public interest to adopt such amendments.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FARMERS BRANCH, TEXAS, THAT:

SECTION 1. Chapter 34 “Environment,” Article XII, entitled “Municipal Setting Designations” of the Code of Ordinances of the City of Farmers Branch is hereby amended and restated in its entirety read as follows:

ARTICLE XII. MUNICIPAL SETTING DESIGNATION (MSD)

Sec. 34-610. – Findings

The City Council of the City of Farmers Branch makes the following findings:

- (1) Due to limited quantity and low quality, there are some areas within the City and its extraterritorial jurisdiction where groundwater is not valuable as a source for potable water;
- (2) There may exist properties in the City and its extraterritorial jurisdiction are underlain with unused and unusable groundwater that have become contaminated by historical on-site or off-site sources;
- (3) The City does not utilize groundwater as a source for public drinking water;
- (4) Municipal setting designation ordinances enable a corrective process for groundwater that protects human health and the environment balanced with the economic welfare of the citizens of the City;
- (5) Where public drinking water is available, the use of groundwater as a potable water source in designated areas should be prohibited to protect public health and welfare when the quality of the groundwater presents an actual or potential threat to human health.
- (6) Municipal setting designation ordinances should be considered only after a process that allows for public notice and input; and
- (7) The use of municipal setting designation ordinances within the City and its extraterritorial jurisdiction will encourage the economic development of properties that have contaminated groundwater.

Sec. 34-611. - Definitions.

For the purposes of this article, the following terms, phrases, words, abbreviations and their derivations shall have the meaning given herein. Words not defined shall be given their common and ordinary meaning.

Administratively complete application means application contains all requires sections and signatures.

Affected community means those persons entitled to notice as defined in Section 613(b)(7).

Applicant means the owner of the land seeking an MSD.

Application means the application submitted to the City for a municipal setting designation ordinance.

Authorized representative means, for purposes of signing an application, if the applicant is a corporation, the president, secretary, treasurer, or a vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; if the applicant is a partnership or sole proprietorship, a general partner or proprietor, respectively; and if the applicant is a local government, the chief executive officer or the authorized designee.

Chemical or contaminant of concern means any contaminant that has the potential to adversely affect ecological or human receptors due to its concentration, distribution, and mode of toxicity.

Critical Protective Concentration Level means the lowest protective concentration level for a contaminant of concern within a source medium determined from all applicable human exposure pathways.

Designated City Official means the City Manager or such other City employee to whom the City Manager has delegated the City Manager's authority to act on behalf of the City in enforcing the provisions of this Article.

Designated Groundwater means groundwater that will be or is prohibited from use as potable water, or for all uses, by a municipal setting designation ordinance.

Designated Property means the property that will be or is subject to a municipal setting designation ordinance. The designated property may cover several platted lots or tracts of land.

Environmental Risk Assessment means the qualitative and quantitative evaluation performed in an effort to define the risk posed to human health and/or the environment by the presence or potential presence and/or use of pollutants.

Groundwater means water below the surface of the earth.

Ingestion Protective Concentration Level means the protective concentration level for human ingestion of contaminants of concern established by the TCEQ under the Texas Risk Reduction Program, determined as if there was no municipal setting designation.

Ingestion Protective Concentration Level Zone means the area where concentrations of contaminants of concern from sources on or migrating through the designated property are greater than the ingestion protection concentration level, determined as if there was no municipal setting designation.

Municipal Setting Designation (MSD) means a designation as provided by Chapter 361, Subchapter W of the Texas Health and Safety Code, as amended, which authorizes the executive director of the TCEQ to certify municipal setting designations in order to limit the scope of, or

eliminate the need for, investigations or response actions addressing contaminant impacts to groundwater which has been restricted from use by ordinance or restrictive covenant.

Municipal Setting Designation Ordinance or *MSD Ordinance* means an ordinance enacted by the city council pursuant to Section 34-617(e).

Non-Ingestion Protective Concentration Level means the protective concentration level for dermal contact or inhalation for contaminants of concern established by the TCEQ under the Texas Risk Reduction Program.

Non-Ingestion Protective Concentration Level Exceedance Zone means the area where concentrations of contaminants of concern from sources on or migrating from or through the designated property are greater than non-ingestion protection concentration levels in groundwater.

Potable water means water that is used for irrigating crops intended for human consumption, as well as water that is used for drinking, showering, bathing, or cooking purposes.

Protective Concentration Level means the non-site specific concentration of concern that TCEQ has determined can remain within the source medium and not result in a level that exceed the applicable human health risk-based exposure limit or ecological protective concentration level at the point of exposure for an exposure pathway.

Response Action means the control, decontamination, or removal from the environment of a contaminant or hazardous substance pursuant to Subchapter W, "Municipal Setting Designation," of Chapter 361, "Solid Waste Disposal Act" of the Texas Health and Safety Code.

TCEQ means the Texas Commission on Environmental Quality and its successor agency.

TCEQ Application means the application submitted to the TCEQ for certification of a municipal setting designation.

Technically Complete Application means an application that has been reviewed and determined to contain all of the information necessary to recommend an ordinance of support for MSD.

To the Extent Known means information known by an applicant or applicant's agent after review of all public and private records and other information sources available in the exercise of due diligence.

Sec. 34-612. - Use of Groundwater in MSD Areas Prohibited; Offenses.

- (a) A person commits an offense if the person intentionally, knowingly, or with criminal negligence uses groundwater in Designated Property as a potable water source.

- (b) A person commits an offense if the person intentionally, knowingly, or with criminal negligence uses groundwater in Designated Property for any purpose prohibited in a municipal setting designation ordinance.
- (c) A person commits an offense if the person fails to provide the Designated City Official with a copy of the municipal setting designation certificate issued by TCEQ pursuant to Texas Health and Safety Code § 361.807 within the time required by Section 34-619(b).
- (d) A person commits an offense if the person with a copy of the certificate of completion or other documentation issued by TCEQ showing that any site investigations and response actions required pursuant to Section 361.808 of the Texas Health and Safety Code, as amended, have been completed to the satisfaction of the TCEQ within the time period required.

Sec. 34-613. - Application for Approval of MSD.

- (a) Written applications for municipal setting designation ordinances shall be filed with the City's Department of Sustainability and Public Health with the number and format of copies, as determined by the Designated City Official.
- (b) An application for a municipal setting designation ordinance shall contain:
 - (1) The applicant's name and address, and the name, address, daytime telephone number, and email address of both the applicant's contact person and the licensed professional who prepared the application;
 - (2) A copy of the application submitted to the executive director of TCEQ for a MSD for the subject area;
 - (3) A statement as to whether a public drinking water supply system exists that satisfies the requirements of Texas Health and Safety Code Chapter 341 and that supplies or is capable of supplying drinking water to the area for which the MSD is sought, and property within one-half mile of the area for which the MSD is sought;
 - (4) A description of the groundwater sought to be restricted, including the identified chemicals of concern therein and the levels of contamination known to the applicant, and the identified vertical and horizontal extent of the contamination. If the applicant has not documented groundwater contamination offsite that originates from the area for which an MSD is sought, the application shall include a statement as to whether contamination more likely than not exceeds residential assessment levels offsite and the basis for that statement;

- (5) Identification of the point(s) of origin of the contamination, and identification of the person (s) responsible for the contamination, to the extent known;
- (6) A listing of:
 - a. All state-registered private water wells within five (5) miles from the boundary of the area for which the MSD is sought, including a notation of those wells that are used for potable water purposes, if known, and a statement as to whether the applicant has provided the owners of such wells with notice as required by Texas Health and Safety Code § 361.805;
 - b. Each retail public utility, as that term is defined in the Texas Water Code, that owns or operates a groundwater supply well located not more than five (5) miles from the area for which the MSD is sought, and a statement as to whether the applicant has provided the retail public utilities with notice as required by Texas Health and Safety Code § 361.805; and
 - c. Each municipality, other than the City, with a boundary located not more than one-half (1/2) mile from the area for which the MSD is sought; or that owns or operates a groundwater supply well located not more than five (5) miles from the area for which the MSD is sought, and a statement as to whether the applicant has provided the retail public utilities with notice as required by Texas Health and Safety Code § 361.805; and
 - d. All owners of real property lying within 200 feet of the boundaries of property for which the MSD is sought according to the most recently approved City tax roll.
- (7) A site map, drawn to scale, including a metes and bounds description of the boundary of the proposed Designated Property, the location of groundwater under the proposed Designated Property, and the extent of groundwater contamination to the limits that it has been defined. Such map shall include a statement by a professional land surveyor registered by the Texas Board of Professional Surveying attesting to the accuracy of the metes and bounds description;
- (8) The location of all soil sampling points and groundwater monitoring wells;
- (9) For each contaminant of concern found in the groundwater beneath the proposed Designated Property, to the extent known, provide a table displaying the following information:

- a. the level of contamination, the ingestion protective concentration level and non-ingestion protective concentration levels, all expressed as mg/L or mg/kg, depending on sampling medium; and
 - b. the critical protective concentration level as defined without the municipal setting designation, highlighting any exceedances; and
 - c. the critical protective concentration level as defined with the municipal setting designation, highlighting any exceedances; and
 - d. a digital file, in a format acceptable to the Environmental Health Manager, which summarizes this information.
- (10) A statement as to whether contamination on and off the proposed Designated Property will exceed a residential assessment level as defined in the Texas Risk Reduction Program, if known, and the basis for that statement;
- (11) A description of any environmental regulatory actions that have been taken within the five years prior to the date of filing of the application relating to the Designated Property, to the extent known;
- (12) A listing of all existing TCEQ and U.S. Environmental Protection Agency registrations, permits, and identification numbers that apply to the Designated Property;
- (13) A summary of any environmental site assessment reports filed with the TCEQ regarding any site investigation or response actions that are planned, ongoing, or completed related to the proposed Designated Property;
- (14) A statement as to whether the proposed Designated Property has been submitted to the Texas Voluntary Cleanup Program (Section 361.601 of the Texas Health and Safety Code) or similar state or federal program, and a description of the proposed Designated Property's status in the program; and
- (15) Any other information that the Designated City Official deems relevant to consideration of the application.
- (c) The application shall be signed by an authorized representative of the applicant and shall contain the following certification statement:

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in a manner designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons directly responsible for gathering the information,

the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

- (d) An application shall be accompanied by:
 - (1) An electronic file of the names and addresses of persons listed in Subsection (b)(6) above, in a format acceptable to the Designated City Official and compatible with City information systems;
 - (2) A set of printed mailing labels with the names and addresses of persons listed in subsection (b)(7) above, and the necessary postage or cost thereof;
 - (3) A nonrefundable application fee of Four Thousand Dollars (\$4,000.00); and
 - (4) Funds in the estimated amount of any additional costs to be incurred by the City in considering the application including, but not limited to, recording fees for the recording of the MSD Ordinance and costs for publication of hearing notices.
- (e) An applicant may withdraw an application only in writing by letter containing the original signature of the authorized representative delivered by hand delivery or certified mail, return receipt requested, to the Designated City Official. The application fee shall not be refunded for a withdrawn application; provided, however, the same applicant may resubmit an application without paying a new application fee if the prior application is withdrawn prior to the date the Designated City Official sends the public hearing notices required to be issued pursuant to Section 34-615.

Sec. 34-614. - Staff Review.

- (a) For purposes of the calculating times stated in this article, an application is deemed to have been received on the date that the application was actually received by the Designated City Official, as indicated by the file date stamped on the application by the Department of Sustainability and Public Health.
- (b) After initial review of the application, if the Designated City Official determines the application is administratively complete, the application for an MSD shall be forwarded for review and comment to the city departments whose property or operations may be affected by the application to determine whether the application is technically complete and whether any City property or other interests may be impacted by the proposed designation. City staff shall not conduct an environmental risk assessment of the application.

- (c) If the Designated City Official determines that a source of a contaminant of concern likely originated on the proposed Designated Property, and that the ingestion or non-ingestion protective concentration level exceedance zone for that contaminant of concern extends to the public right-of-way adjacent to the proposed Designated Property, the Designated City Official may recommend that the Municipal Setting Designation Ordinance include a condition that the public right-of-way adjacent to the proposed Designated Property be included in the TCEQ application for the MSD at no additional cost to the City.
- (d) If the Designated City Official determines the application is administratively incomplete or insufficient, the application will be returned to the applicant describing the deficiencies in writing. The applicant shall correct the deficiencies and resubmit the application not later than thirty (30) days after delivery of such deficiency letter to the applicant. If the applicant fails to submit a corrected application within the required time, the application shall be deemed to be withdrawn and the application fee forfeited. If following resubmittal to the City, the application is still incomplete or insufficient, the application will be returned to the applicant describing the deficiencies in writing. The applicant shall correct the deficiencies and resubmit the application not later than fifteen (15) days after delivery of such deficiency letter to the applicant. Any additional resubmittal will comply with the fifteen (15) day time period.
- (e) If the Designated City Official determines the application is administratively and technically complete, a public meeting and a public hearing will be scheduled. The public meeting must be held prior to the public hearing.
 - (1) A public meeting will be scheduled approximately ninety (90) days following the day the application was received; and
 - (2) A public hearing of the City Council will be scheduled approximately thirty (30) days following the public meeting.

Sec. 34-615. - Notice of Public Meeting.

- (a) Notice of the public meeting for an MSD application must include the date, time and location of the public meeting, the identity of the applicant, the location and legal description of the Designated Property, the purpose of the MSD, the type of contamination identified in the groundwater of the area for which the MSD is sought, and a statement that a copy of the application is available for public viewing in the City Secretary's Office. Notice will be made as follows:
 - (1) The Designated City Official will publish notice of a public meeting for a proposed MSD in the official newspaper of the City or in a newspaper of general circulation within the City, not less than fifteen (15) days before the public meeting;

- (2) The Applicant or Authorized Representative will provide written notice of a public meeting for a proposed MSD, not less than fifteen (15) days before the date of the public meeting by properly addressed and regular postage paid, in the United States mail. Notice will be mailed to:
 - a. The Designated City Official; and
 - b. Those on the list provided by the Applicant pursuant to Section 34-613(b)(6).
- (b) The Applicant is required to post at least one sign upon the proposed Designated Property for which an MSD has been requested. Posting shall be in the same manner as zoning amendments. The sign(s) must state that an MSD has been requested for the Designated Property and that additional information can be acquired by telephoning the number listed thereon or visiting the web site address listed thereon. The erection and/or the continued maintenance of any such sign shall not be deemed a condition precedent to the holding of any public meeting or public hearing or to any official action concerning the MSD application.

Sec. 34-616. - Public meeting.

- (a) The purpose of a public meeting is for the applicant to present information to the affected community about the MSD process in general, the application specific to the property for which the MSD is being sought, and to obtain input from the affected community prior to a formal action by the City Council.
- (b) The applicant or its representative must appear at the public meeting. If the applicant fails to appear at the public meeting either in person or by representative, the application shall be deemed withdrawn and the application fee forfeited.
- (c) The Designated City Official will conduct the meeting, giving the applicant or its representative the opportunity to present its reasons for requesting a MSD, and giving members of the affected community the opportunity to ask the applicant questions or make oral comments on the application.

Sec. 34-617. - City Council Public Hearing.

- (a) Prior to the public hearing, the Designated City Official will deliver to the City Council a copy of the application, and a written report summarizing the request for the MSD approval, any staff comments of concerns, and minutes of the public meeting.
- (b) The Applicant or the Authorized Representative must appear at the public hearing and present the request for an MSD Ordinance. If the applicant or Authorized Representative fails to appear at the public hearing, the application may, in the

discretion of the City Council, be deemed withdrawn and the application fee forfeited.

- (c) Persons wishing to speak either in favor of or against the application will be provided the opportunity in accordance with City Council procedures for public hearings.
- (d) Following the conclusion of the public hearing, the City Council may approve, conditionally approve, disapprove, or postpone action on the application to a future date.
- (e) If approving an application, the City Council shall:
 - (1) Approve a municipal setting designation ordinance prohibiting the use of designated groundwater from beneath the Designated Property and supporting the application to the TCEQ. The ordinance must include a metes and bounds description of the MSD area to which the ordinance applies; a listing of the contaminants; and a statement that the ordinance is necessary because the contaminant concentrations exceed TCEQ potable water standards; and
 - (2) Include in the ordinance other reasonable restrictions on the use of designated groundwater and including, but not limited to, specification of underground construction materials to be used in the MSD area.
- (f) City Council approval of an application shall not be deemed to waive the City's right to comment on an MSD application that has been filed with the Executive Director of the TCEQ.

Sec. 34-618. - Limitation on Reapplication.

If after public hearing the City Council disapproves an application, or if the applicant has withdrawn its application after public notice has been issued, no new MSD applications for the proposed Designated Property shall be accepted by the City or scheduled for a public hearing by the City Council within a period of twelve (12) months of the date of disapproval or withdrawal.

Sect. 34-619. - Additional Provisions, Enforcement, and Penalties.

- (a) Not later than thirty (30) days after adoption, the Designated City Official shall send a certified copy of the municipal setting designation ordinance to the applicant and the TCEQ.
- (b) The applicant shall provide the Designated City Official with a copy of the municipal setting designation certificate issued by the TCEQ pursuant to Section 361.807 of the Texas Health and Safety Code (with a copy of the certificate of completion or other documentation issued for the MSD area, showing that response actions, if required, have been completed) within 30 days after issuance of the certificate.
- (c) Not later than thirty (30) days after receipt of the copy of the municipal setting designation certificate issued by the TCEQ pursuant to Texas Health and Safety Code §361.807 and the necessary filing fee from the applicant, the Designated City Official shall file a certified copy of the municipal setting designation ordinance in the Official Public Records of Dallas County.

SECTION 2. All provisions of the ordinances of the City of Farmers Branch in conflict with the provisions of this ordinance be, and the same are hereby, repealed, and all other provisions of the ordinances of the City of Farmers Branch not in conflict with the provisions of this ordinance shall remain in full force and effect.

SECTION 3. Should any sentence, paragraph, subdivision, clause, phrase or section of this Ordinance be adjudged or held to be unconstitutional, illegal or invalid, the same shall not affect the validity of this Ordinance as a whole, or any part or provision thereof other than the part so decided to be invalid, illegal or unconstitutional, and shall not affect the validity of the Ordinance as a whole.

SECTION 4. An offense committed and an application submitted to the City in accordance with Section 34-613 of the Code of Ordinances before the effective date of this ordinance is governed by prior law and the provisions of the Code of Ordinances, as amended, in effect when the offense was committed or the application was submitted, as applicable, and the former law is continued in effect for this purpose.

SECTION 5. Any person, firm or corporation violating any of the provisions or terms of this Ordinance shall be punished by a fine not to exceed the sum of Two Thousand Dollars (\$2,000.00) for each offense; and each and every day such violation shall continue shall be deemed to constitute a separate offense.

SECTION 6. This ordinance shall take effect from and after its passage and the publication of the caption of said ordinance as the law and the City Charter in such cases provides.

**DULY PASSED BY THE CITY COUNCIL OF THE CITY OF FARMERS BRANCH,
TEXAS, ON THE 19TH DAY OF OCTOBER 2021.**

APPROVED:

Robert C. Dye, Mayor

ATTEST:

Amy Piukana, City Secretary

APPROVED AS TO FORM:

Peter G. Smith, City Attorney
(kbl:9/27/2021:124942)