LCRA HPR waterline contract issues:

There is no legally certain provision for enforcement of any measures found to be required to protect water quality. Enforcement of all provisions appears to depend on the willingness of Travis County—which is not a party to this contract—to vigorously enforce the provisions of the contract. Lacking ordinances and rules which specifically address many of the activities to be regulated, Travis County would be on questionable legal basis in pressing such enforcement. LCRA does not assume any oversight or enforcement responsibility for permanent water quality protection measures.

This contract, in fact, purports to impose upon Travis County the duty to abide by "rules" and processes set forth in this contract rather than by whatever rules Travis County may institute and/or the best judgment of the Travis County Commissioners Court.

In many places, the Landowner is obligated by the terms of the contract to impose and record "enforceable" provisions of various types, but in none of these instances is it stipulated who would enforce those provisions or who would pay for the enforcement, and there is no provision for any sanctions for non-compliance or any mechanism for correcting any defects. Under these conditions, the concept of "enforceable" is meaningless.

The "enforcement" accorded directly to LCRA is limited to stop-work orders if it is deemed that the "construction has deviated from the approved [construction phase water quality control] plan." LCRA is provided no authority to compel anything except that work stop until the deficiencies are corrected. There are no provisions to compel minimization of damage, and there are NO SANCTIONS for failing to comply or for any damage that may be caused.

LCRA will give away any services they provide to oversee the construction phase controls, and also for any review of plans for both construction phase controls and permanent measures. This effort will detract from the normal duties of the personnel executing that work—overseeing and enforcing the LCRA NPS ordinances, a job for which they are already stretched very thin. This amounts to a grant to the Landowners.

There is no surety provided to assure that any water quality measures found to be required would be properly constructed or maintained. There is fiscal surety for all aspects of the waterline construction and on-going maintenance in the form of letters of credit, performance bonds, payment bonds and maintenance bonds, and insurance requirements for any contractors. There is NO fiscal surety for any aspect of the water quality plan provided for in the contract. There is in fact no provision for the developer to pay for ANY sort of enforcement or correction effort. Also, LCRA will be paid by the Landowner for inspecting waterline installations on the project, but not for any inspections/observations related to water quality facilities.

There is no legal authority to impose the use of any certain water quality measures, or even for asserting that any given level of water quality protection be attained. Any representation that the Landowner would abide by "FWS Measures"—the document referred to in the contract as the regulatory tool for determining the measures to be required and the standards to be attained—is in effect nothing but a "gentleman's agreement" since there is NO compulsory language in that document and there is NO language in the contract that stipulates that any provisions in that document are to be considered compulsory. The FWS Measures document, as written, DOES NOT REQUIRE ANYTHING.

LCRA is simply given authority to review and comment on water quality control plans, not to stipulate standards and measures. It appears that the Landowner's engineer is accorded authority to be the final

arbiter of what it means to comply with FWS Measures. Certain submittals are “required” but there is no obligation to ensure that the provisions stipulated are meaningfully met. It’s all just “trust us”. LCRA has NO BASIS for expecting that it can or will “ensure no increase in stormwater pollutant loads and ensure preservation of the current form and function of the drainage network.” LCRA has NO BASIS for expecting that it can or will “retain the existing hydrology of the watershed and receiving streams.” Developer’s engineers in this area vehemently oppose the very idea that these outcomes are to be expected. You do the math.

Whatever provisions are made for water quality protection is an ad hoc process, totally subordinate to a contract to execute a specific water supply system, rather than an attempt to put in place the institutional antecedents necessary to assure protection of water quality. In fact, by proposing to provide for water quality protection solely through this ad hoc process, LCRA is rendering moot any attempts to put those antecedents in place over any area to which it chooses to extend a water supply through such a contract. The wisdom and propriety of attempting to make public policy one project at a time on an ad hoc basis through individual contracts rather than to properly and systematically set up those institutional antecedents should be called to question.

The developer is being provided highly favorable financing at rates well below those it could obtain in the marketplace. This is in effect a transfer of public money to a private citizen, for the purpose of enhancing the fiscal gain of that private citizen. It is called to question whether the activities being financed deliver, in the end, a public good that merits such a transfer. In this case, LCRA is boosterizing an urban density development in an area where there is no societal or economic imperative for such development, and where there is considerable question whether such development threatens water quality and other societal values, and where there is considerable question whether such development would externalize costs for social services like transportation capacity, school capacity, and police and fire protection to the general tax base, which represents another transfer of public money to enhance the fiscal gain of a private citizen.

LCRA is in effect allocating a water right to the property in question that exceeds LCRA's own calculations of the "carrying capacity" of its ultimate water supply system for this area by 3 times. I covered this point in detail in the letter I sent to Beal and each board member.

Even as it is being “overallocated” supplies of surface water, the Landowners retain the right to pump as much groundwater as they desire, even though a purported reason for piping in surface water was to preserve limited groundwater resources.

LCRA may waive any “default” at closing, meaning they may accept whatever is on or in the ground as acceptable regardless of its actual condition—which NO ONE is required by the terms of this contract to confirm. LCRA would have strong incentive to accept water quality measures in any condition, given that they have no obligation to confirm their status, in order to begin selling water to the customers at the earliest possible time.

The “force majeure” provisions indicate that if “storms” or “floods” cause “washouts” of any control facilities, the duty to abate water quality degradation is relieved. !!??

The so-called “Water Conservation Measures” don’t require anyone to do anything, except what a responsible licensed irrigator would do in any case. There is NO indication of who would check to assure that any of these “measures” were done—or under what authority they would enter onto private property to execute any such check, NO indication of who would pay for that, NO provisions for sanctions for non-compliance, and NO mechanism for requiring compliance if conditions on any lot are found not to comply. The “Suggested Guidelines” portion is absolute fluff, devoid of any contractual meaning.

Bottom line:

1. As a water quality protection tool, this contract is a farce.
2. As public policy, this contract is a disaster.
3. As a deal, this contract is a big grant of public resources to private citizens.