

**City of Fair Oaks Ranch Water Utility Town Hall
Questions and Answers
November 19, 2019**

When was the water utility created?

The water utility was created by Ralph E. Fair, Inc. (“Fair”), an entity created by Ralph E. Fair, Jr., when he began developing his family ranch. As each unit was developed, as needed, a ground water well was drilled to provide potable water to the unit. The wells were drilled and, the units were platted prior to the sale of any property to a third party. In addition, easements were executed to provide the right to the use of the well and well site, the right to service the wells, the right to access the wells and to secure the sanitary control easement surrounding each well. In some cases, the easements were created by the Restrictive Covenants of each unit. In other cases, specific easements (ingress-egress; use; service; sanitary control) were created and filed of record in the applicable county deed records. Additionally, in some cases, the well site and/or easements were shown on the plat of the unit. Each unit was done a bit differently.

How did the City of Fair Oaks Ranch acquire the water utility?

Fair conveyed the water utility to Glenpool Company, Inc. (“Glenpool”) in May 1978. After the City of Fair Oaks Ranch was incorporated, Glenpool sold the water utility to the City in December of 1997.

What assets did the City acquire when it purchased the water system?

Glenpool executed an agreement with the City conveying the water treatment facilities, the wells and all well equipment, main and distribution lines, storage facilities, customer list and account information; and all other personal property owned by it.

At the same time, the City purchased from a separate company, Elkhorn Company, Inc., all of the assets of the wastewater facility, including the treatment plant, main and distribution lines, lift stations, customer list and account information; and all other personal property owned by it.

The City obtained an owner’s title policy from Stewart Title Guaranty Company at the time of the purchase. The purchase price was \$4.1M. The policy insured title to the owned water and wastewater tracts and the easements for the water utility.

Why was the concern regarding the water utility easement and groundwater not identified when the City purchased?

As stated, the City obtained an owner’s policy of title insurance from Stewart Title Guaranty Company as described above, which did provide coverage for the well sites and the easements. At the time, the City was relying on the title commitment and the advice of counsel representing the City on the matter. Neither the current members of the council or current staff have any knowledge of discussions regarding this matter at that time.

How did the City learn of the issues regarding the water utility easements and water?

Initially, Dr. Vincent Calderola spoke to the City Manager after he purchased property in Fair Oaks Ranch on which was located a City well. He demanded payment of a royalty for production of his water. Subsequent to his visit, the City received a demand letter from his attorney, Edmond R. McCarthy, Jr. setting out the claims of the Calderolas against the City. The letter from Mr. McCarthy to the City was dated February 14, 2019.

Subsequently, the City has received a demand letter from Louis Rosenberg on behalf of his clients, Marshall and Renessa Denny. The date of the Denny demand letter was October 28, 2019, several weeks after the Denny's met with the City Manager and Special Counsel to discuss the well and easements on their property.

What are the claims against the City that have caused concern?

Any claims that the City's right to the water and the wells that are the fundamental component of the city's water supply are of critical importance to the City. The Calderolas and the Dennys have both laid claim to some or all of the component pieces connected with their property. They claim that the City does not have the right to an ingress-egress easement to the well site, a use easement for the well site, a service easement to maintain the well site, a required sanitary control easement, or the right to produce the groundwater from the wellsite.

What is an ingress-egress easement?

An ingress-egress easement allows the holder of the easement to have access across a tract owned by another party so that the easement holder can access property it owns or to which it has a legal right of use.

What is a use easement?

A use easement allows the holder of the easement to have the use of a specific tract of land owned by another party. The use that is allowed is generally specified in the easement, as well as any other conditions of the use.

What is a sanitary control easement?

A sanitary control easement is a tract of land, 150' in radius, around a public utility water well. The easement is required by the Texas Commission on Environmental Quality (TCEQ), the Texas State agency that oversees the ownership and management of public utilities. The purpose of the easement is to protect water quality. The terms of such an easement are attached in Exhibit A.

How many City wells are affected by this issue and how many homeowners have signed the documentation requested by the City to clarify the City's rights?

Of the 42 wells owned by the City, 37 wells are on private property. Three of the private property owners have signed the documentation.

How many tracts have sanitary control easements and how many homeowners have signed the documentation requested by the City to clarify the City's rights?

There are 107 lots with sanitary control easements, not including the well tracts. Seventeen homeowners have signed.

What has the City asked the affected owners of lots with wells to do?

The City believes every owner of a lot with a well on it knew, from various sources, before purchasing the lot of the existence of the City's wells and easements. The City has asked the lot owners to ratify or agree that the easements are validly owned by the City.

Additionally, after a significant groundwater case, *Edwards Aquifer Auth. v. Day*, decided by the Texas Supreme Court on January 15, 2010, it is settled law in Texas that, unless the groundwater has been legally severed from the land, the surface owner is the owner of the groundwater underneath the land.

Each well and the surface surrounding the well has been used by the water utility since it began production by Ralph E. Fair, Inc. The City claims ownership of each well site and the water produced from each well site. Because of the Day case, the City has asked the lot owners to convey any remaining interest they have in the groundwater to the City, again, to clarify the City's ownership rights.

What has the City asked the affected owners of lots with sanitary control easements to do?

The City also believes every owner of a lot with a sanitary control easement knew, from various sources, before purchasing the lot of the existence of the easement. The City has asked the lot owners to ratify or agree that the sanitary control easements are validly owned by the City.

Will the City's water utility system be shut down because of this issue?

While Mr. McCarthy, on behalf of the Calderolas, has contacted TCEQ and claimed that the City is faced with a public calamity, TCEQ will not let the health and safety of the citizens of Fair Oaks Ranch be adversely affected by this matter. The City's special counsel has spoken with TCEQ staff and received a response from TCEQ stating it will not interfere with land or title issues between the City and the affected lot owners. The City is fully cooperating with TCEQ.

Additionally, the City will file actions in court, if necessary, to ensure the continued operation of the City's utility system.

What are the City's options to solve the issue?

The City's first attempt to solve the problem was a letter to each lot owner on which a well is located explaining the situation to them and asking for their help and cooperation by the signing of a ratification of the easements on their property to the City for access to the well, use of the well site and the sanitary control easement. The City also asked the homeowners to voluntarily convey their claims to the groundwater, since the City has been continuously using it for decades and because the groundwater is of no real value to lot owners.

The City sent a similar letter to lots owners on which a portion of the sanitary control easement is located.

What other steps is the City taking?

City staff and, in some cases, special counsel to the City have met with or talked with affected homeowners who contacted the City. Misinformation has resulted in little cooperation from the homeowners; therefore, the City is now taking steps to condemn the easements and the groundwater.

Special Counsel has engaged Pape-Dawson Engineers, Inc. to survey all the easements and well sites and have also engaged The Glen Company to appraise the easements and groundwater as part of the condemnation process.

Letters have been sent to all affected homeowners asking them to sign a Right of Entry Agreement so that the consultants can begin their work. To date, the response to that letter has been very light. If no others sign, the City will file an injunction to require the homeowners to allow the consultants on the affected lots.

Is it true that the easements were not granted correctly and that they are invalid?

The City claims that the easements are all valid, although we acknowledge that they were not done as we would have preferred. Each landowner was always on notice that the wells, easements, and water were claimed by the City and the earlier owners of the water utility.

If the City already claims or owns the wells, easements, and water then why is it proceeding with condemnation?

Thanks to the claim raised by the Calderolas, the City and its special counsel reviewed the documentation that establishes the rights of the City. As stated, the prior documentation could have been prepared in a way that made the City's ownership clear. That is not the case, and such have allowed the Calderolas and the Dennys the opportunity to pursue claims to the wells and the water. To avoid any other claims, the City has chosen to correct the prior documentation now.

The City and the prior utilities have always claimed to own the wells and associated infrastructure, easements and water, not only by the matters discussed already but also by adverse possession.

Adverse possession, in our case, means that for several decades the City, and before it, Fair and Glenpool, actually and visibly appropriated real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.

In order "to establish a claim for adverse possession, a claimant must prove: (1) actual possession of the disputed property, (2) that is open and notorious, (3) peaceable, (4) under a claim of right, (5) that is consistently and continuously adverse or hostile to the claim of another person for the duration of the relevant statutory period".

The City and its special counsel believe that each of these conditions is easily met in this case.

An alternative to pursuing adverse possession is to condemn the easements, the well and the groundwater. There is a specific statute that allows a public water provider to condemn groundwater. The City believes that condemnation will be a faster and more efficient way to solidify its ownership.

What can I do with the groundwater under my property?

Under current Texas law, the Trinity Glen Rose Groundwater Conservation District and the Cow Creek Groundwater Districts are the entities that regulate the production of groundwater in Fair Oaks Ranch. The Edwards Aquifer Authority also has some regulatory rights in Fair Oaks Ranch and the Districts would prohibit any production of groundwater other than an exempt groundwater well. An exempt groundwater well must have well equipment that can produce no more than 25,000 gallons per day and can only be used for domestic and livestock purposes.

However, in the City, because of the Restrictive Covenants filed at the time of the initial development of the Ranch, only lots in certain units were given the right to drill personal or, what we now call, an exempt well. Those units are Units C1 and K1. All lots in any other part of the City are specifically prohibited from drilling a personal/exempt well in the Restrictive Covenants of those units.

Further, the lots that are allowed by the Restrictive Covenants to drill a personal/exempt groundwater well must drill the well 1000' from any utility well. It is unlikely that any lot on which a utility well is located could meet this requirement.

What other sources of water does the City use in its water system?

In 2000, 2006, and 2008, the City entered into an agreement with the Guadalupe Blanco River Authority ("GBRA") to purchase 1400-acre feet, 200-acre feet, and 250-acre feet of water, respectively from it. Other than the existing wells, this is the only other source of water in Fair Oaks Ranch.

Could the City abandon the existing wells and use another water source?

If other water were available to purchase or lease (currently the amount needed by the City is not available), the City could consider this action. The cost of water, if available, would dramatically change the expense of the water utility, increasing costs exponentially. Even if another water source were available and not cost prohibitive, all existing groundwater wells, other than those owned by the City, would be capped and all equipment removed from each well lot.

How much water does the City need to meet the current demands of its customers?

Approximately 1,680-acre feet is currently being delivered to customers. The City has a Master Plan that projects a future maximum day demand need of 6,900-acre feet. Of the total water needs, the City, as stated above, has an agreement with GBRA for a maximum delivery of 1,850-acre feet water supply.

Will this issue affect my property value?

The City does not believe it will materially affect property values. However, if the City is forced to pay large settlements to the affected homeowners, it will cause water rates to escalate.

Will this issue affect my ad valorem (property) taxes?

Ad valorem (property) taxes will be affected as much as property values are affected. Additionally, if debt must be sold to cover the expenses involved, the debt may not be limited to revenue for repayment, and taxes could go up to cover the difference, if needed.

Will this issue affect my ability to sell my property?

Again, the City does not believe the issue will affect your ability to sell your property. The market has long been aware of the City's wells in their current location and the use of the groundwater by the City. Further, the City will take all actions necessary to preserve the water utility and the health and safety of all citizens of Fair Oaks Ranch.

Will this issue increase my water rates?

Currently, the City is paying for the cost to defend the water system out of utility reserve funds. If the litigation continues, the cost to the City will be dramatic. Ultimately, there will be no way for the City to bear all the cost without raising water rates and/or passing a bond to cover the costs.

What costs has the City already incurred and what costs are yet to come?

Most of the costs today are payment of legal fees. The total legal fees paid to all attorneys working on this matter is approximately \$134,149.00. The City and the attorneys expect this number to expand exponentially as court action is required. Each lot must be treated as a separate lawsuit; at this time with no further cooperation, the City will file well over a hundred separate lawsuits.

Further, there will be costs for the surveying needed and the appraisals needed by the City. If the Right of Entry agreements for the surveyors and appraisers are not signed, the City will be forced to go to court before taking any other steps to obtain an order from the court requiring the homeowner to allow the surveyor and appraiser access.

Does the current City budget have funds to address this issue?

The City has a Utility Fund Reserve fund with approximately \$1.9M but there is a limitation on the use of those funds. Unless cooperation is forthcoming, it is not clear whether the City will have the required funds on hand. If it does not have funds, it will have to issue debt covered by new revenue generated from increased water rates and/or ad valorem taxes.

To speak or to schedule a meeting with the City Manager, call City Hall at 210-698-0900 or email Tobin Maples at tmaples@fairoaksranchtx.org

Exhibit "A"

SANITARY CONTROL EASEMENT

Purpose, Restrictions, and Uses of Easement:

1. The purpose of this easement is to protect the water supply of the well described and located below by means of sanitary control.
2. The construction, existence, and/or operation of the following within a 150-foot radius of the well described and located below are prohibited: septic tank or sewage treatment perforated drainfields; areas irrigated by low dosage, low angle spray on-site sewage facilities; absorption beds; evapotranspiration beds; abandoned, inoperative or improperly constructed water wells of any depth; underground petroleum and chemical storage tanks or liquid transmission pipelines; sewage treatment plants; sewage wadet wells; sewage pumping stations; drainage ditches which contains industrial waste discharges or wastes from sewage treatment systems; animal feed lots; solid waste disposal sites, landfill and dump sites; lands on which sewage plant or septic tank sludge is applied; lands irrigated by sewage plant effluent; military facilities; industrial facilities; wood -treatment facilities; liquid petroleum and petrochemical production, storage, and transmission facilities; Class 1, 2, 3, and 4 injection wells; pesticide storage and mixing facilities; and all other constructions or operations that could pollute the groundwater sources of the well that is the subject of this easement. For the purpose of this easement, improperly constructed water wells are those wells which do not meet the surface and subsurface construction standards for a public water supply well.
3. The construction, existence and/or operation of tile or concrete sanitary sewers, sewer appurtenances, septic tanks, storm sewers, cemeteries, and/or the existence of livestock in pastures is specifically prohibited within a 50-foot radius of the water well described and located below.
4. This easement permits the construction of homes or buildings upon the Grantor's property, and farming and ranching operations, as long as all items in Restrictions Nos. 2 and 3 are recognized and followed.

Statutory Source: 30 Texas Administrative Code Section 290.41