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OPINION COMMITTEE



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The Senate of The State of Texas

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March 26, 2014

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The Honorable Greg Abbott
Office of the Attorney General of Texas
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Opinion - Local Government Code 552.043

Dear General Abbott:

As Chairman of the Senate Jurisprudence Committee, I am requesting your opinion on an interpretation of Chapter 552, Subchapter C of the Local Government Code - the "Municipal Drainage Utility Systems Act" (referred to hereafter as the Act).

This Act authorizes municipalities to establish municipal drainage systems within their established service areas, provide rules for the use, operation and financing of the systems and prescribes bases on which a municipal drainage system may be funded and fees in support of the system may be assessed, levied and collected.

Specifically, the statute reads:

"The legislature finds that authority is needed to:

- (1) permit municipalities to establish a municipal drainage utility system within the established service area;
- (4) delegate to municipalities the power to declare, after a public hearing, a drainage system created under this subchapter to be a public utility; and
- (6) provide **exemptions** of certain persons from this subchapter."

In Section 552.047(d), the Act reads:

"Unless a person's lot or tract is exempted under this subchapter, the person may not use the drainage system for the lot or tract unless the person pays the full, established, drainage charge."



Section 552.053 reads:

- a) A governmental entity or person described by Subsection (b) and a lot or tract in which the governmental entity or person holds a freehold interest ***may*** be exempt from this subchapter and all ordinances, resolutions, and rules adopted under this subchapter.
- b) The following ***may*** be exempt:
 - (1) this state;
 - (2) a county;
 - (3) a municipality;
 - (4) a school district.
- c) The following ***shall*** be exempt from the provisions of any rules or ordinances adopted by a municipality pursuant to this Act:
 - (1) property with proper construction and maintenance of a wholly sufficient and privately owned drainage system;
 - (2) property held and maintained in its natural state, until such time that the property is developed and all of the public infrastructure constructed has been accepted by the municipality in which the property is located for maintenance; and
 - (3) a subdivided lot, until a structure has been built on the lot and a certificate of occupancy has been issued by the municipality in which the property is located.
- d) A municipality ***may*** exempt property owned by a religious organization that is exempt from taxation pursuant to Section 11.20, Tax Code, from drainage charges under this subchapter.
- e) The following property ***is exempt*** from drainage charges under Section 552.047 and all ordinances, resolutions, and rules adopted under this subchapter:
 - (1) property owned by a county in which a municipality described by Section 552.044(8)(A) is located;

Hon. Greg Abbott
March 26, 2014
Page 3 of 4

(2) property owned by a school district located wholly or partly in a municipality described by Section 552.044(8)(A); and

(3) property owned by a municipal housing authority of a municipality described by Section 552.044(8)(A).

It appears that in Section 552.053(b) wherein the word "may" is used, the State grants optional authority to a city to exempt from the fee the state, a county, a municipality, and a school district.

By contrast, subsections (c) and (e) uses the words "*shall*" and "*is*" and thus mandates certain exemptions from the fee. (Note: 552.053(e)(2) is a specific mandatory exemption from the fee of school districts within the City of El Paso.)

Taken altogether, it appears the legislature authorized cities to grant an exemption but that decision rests at the local level. In addition, it appears the legislature did, in fact, create certain mandatory exemptions as spelled out in the Act.

Presumably, the legislature could have created a mandatory exemption for school districts but it appears it did not.

GRAND PRAIRIE

Pursuant to the Act, on September 7, 1993, the City of Grand Prairie (via Ordinance 5144) created a municipal drainage system.

The ordinance requires the payment of fees by landowners and provides that the City may grant exemptions to the storm water fee. (By way of fact, the City of Grand Prairie has never provided an exemption to a governmental entity including a school district.)

Since the invocation of Ordinance 5144, the Arlington Independent School District (AISD) has refused to pay any assessed fees under the claim that, despite the statutory authorization and characterization, the fee is in fact not a fee but is instead a tax and therefore AISD is exempt from paying the tax.

While there is substantial case law that a fee may become a tax if its purpose is to raise general revenue instead of funding a particular regulatory scheme, the AISD has brought forward no information or allegation that funds in excess of regulatory costs are raised by the city fees.

Hon. Greg Abbott

March 26, 2014

Page 4 of 4

The City also contends that while it could grant exemptions to all school districts, that is a decision reserved by the statute for the discretion of the City and, to date, no such exemption has been granted by the City.

Furthermore, the City contends that the fee is not a tax but is indeed a fee.

REQUEST FOR OPINION

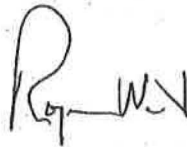
The questions thus posed to the Attorney General, for an opinion, are two-fold:

1. whether or not Chapter 552, Subchapter C exempts school districts from paying the municipal drainage fee or is that a decision reserved by the statute for the discretion of the City; and
2. whether or not the Act can be presumed to be a tax and thus exempt from the fee a school district?

If you have any questions, please do not hesitate to contact me.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Royce West". The signature is written in a cursive style with a large initial "R" and "W".

Royce West
State Senator, District 23