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OPINION COMMITTEE

Greg Abbott  
Attorney General  
State of Texas  
P.O. Box 12548  
Austin, TX 78711-2548

FILE # ML-43001-03  
I.D. # 043001

Re: Whether the City of San Antonio (a home rule city) may impose Right of Way fees against VIA, a metropolitan transit authority created under Chapter 451 of the Texas Transportation Code?

Dear Attorney General Abbott:

Please accept this letter as a request for an opinion on the above issue. The facts involved in this matter are as follows:

VIA is a metropolitan transit authority created under Chapter 451 of the Texas Transportation Code to provide public transportation services for the citizens of Bexar County. As a public agency, VIA is financed by tax dollars.

The City of San Antonio (a home rule city) is located within the boundaries of Bexar County. The City of San Antonio passed a right of way ordinance-amending articles IV section 29-106 et seq. of City Code by adopting new right of way management regulation to manage construction, excavation and placement of utilities; establishing fees; providing a penalty for violation by fine of not more than \$500.00. This ordinance became effective May 1, 2001. A copy of the ordinance is enclosed for your review.

The City of San Antonio is attempting to collect fees under the ordinance from VIA Metropolitan Transit. Some of VIA's operations include the construction of amenities such as the placement of bus pads, benches, poles and alike within the city right of ways. All these amenities are a part of VIA's overall operation of providing transit service to the citizens of San Antonio and the surrounding cities within VIA's service area. It is the City's position that since the placement of these amenities involve some construction and minor excavation (i.e. the pouring of concrete for the slabs), then VIA is compelled to pay such fees under the ordinance.

VIA will soon begin the process of installing and /or relocating approximately 400 bus sites. Under the City right of way ordinance, VIA would be compelled to pay \$225.00 dollars for each



of the 400 sites it proposes to construct. This does not include the cost of any future installation or relocations or relocations of any amenities within San Antonio that are not related to the 40 bus sites. Furthermore, by compelling VIA to pay such fees, this could result in the implementation of similar fees by the surrounding cities within VIA's service area. This is a cost that VIA contends it cannot afford.

VIA contends that it should be exempt from this ordinance in part on the authority granted under the Texas Transportation Code Section 451.058, wherein the legislature has granted VIA the right to use and acquire property of others for the purpose of its operation. The statute plainly states that such "use" of property includes "public ways."

The city ordinance language states that its purpose was to "establish a uniform method of compensation for the use of public right of way by Certificated Telecommunication Providers (CTP's) that is fair and reasonable, administratively simple, competitively neutral (relative to all CTP's), nondiscriminatory, and consistent relative to the municipalities and CTP's" Based upon this clear language, VIA contends that the ordinance is not applicable to them since it is not a CTP.

The ordinance was enacted to help the recoup the costs associated with city streets and right of way maintenance due to excavations. Pursuant to Section 451.058(d) of the Texas Transportation Code, it is mandated that "any relocating or rerouting, or alteration of any construction on roads, alleys, or associated properties... must be accomplished at the sole cost and expense of the authority, and damages that are incurred by an owner of the property must be paid by the authority." VIA contends that under this language, it is already responsible for such costs and for the city to impose their fee for the same purpose would be inconsistent with the statute.

In addition, VIA cites *City of Lucas v. North Texas Municipal Water Dist.*, 724 S.W. 2d 811, wherein the Court ruled "the requirement of fees and bonds from the District would conflict with, and be inconsistent with, the District Act and such requirements are not enforceable against the District." It is VIA's position that this ruling is applicable since VIA is governed by state statute much like the District Act and any requirement of fees is unenforceable and inconsistent.

Finally, VIA contends that a similar issue was presented to the Texas Attorney Generals office under Letter Opinion No. 92-30, a copy of which is enclosed, wherein it was opined:

"VIA's enabling statute does not require MTAs to pay cities a fee for the use of city streets. Since VIA is entitled to "use" city streets without liability to the city for normal wear and tear, it follows that the city may not exact a charge from VIA for the ordinary use of the same streets or require it to obtain a permit to do that which article 1118x unequivocally entitles it to do."

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In conclusion, based upon the above information and the enclosed documents, please provide an opinion as to Whether the City of San Antonio may impose Right of Way fees against VIA, a metropolitan transit authority created under Chapter 451 of the Texas Transportation Code?

Sincerely,

  
Frank Madla

FM/ho