

SENATE COMMITTEE ON INTERNATIONAL RELATIONS AND TRADE

79TH LEGISLATURE

SENATOR EDDIE LUCIO, JR.
Chair



SENATOR ELIOT SHAPLEIGH
Vice Chair
SENATOR JOHN CARONA
SENATOR KEVIN ELTIFE
SENATOR CRAIG ESTES
SENATOR KEL SELIGER
SENATOR JUDITH ZAFFIRINI

March 17, 2006

The Honorable Gregory Abbott
Attorney General, State of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

RECEIVED

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OPINION COMMITTEE

RQ-0468-GA

FILE # ML-44700-06

I.D. # 44700

Re: Request for Attorney General Opinion to resolve an issue between the Lower Valley Builders & Developers Associations and the City of Brownsville Public Utilities Board on whether a "water rights fee" amounts to an impermissible "impact fee."

Dear General Abbott:

Enclosed is correspondence that my office has received from the Lower Valley Builders and Developers Association ("Association") requesting an Attorney General's Opinion on whether or not a "water rights fee" imposed by the Public Utilities Board of the City of Brownsville, Texas amounts to an impermissible "impact fee" under Chapter 395 of the Local Government Code.

In order to address the concerns outlined by these constituents, without taking a position on this matter, I would like to formally request an Attorney General's Opinion to clarify the issues outlined in the enclosed Association correspondence.

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

Sincerely,

A handwritten signature in cursive script that reads "Eddie Lucio, Jr.".

Eddie Lucio, Jr.

Chairman

Senate Committee on International Relations and Trade

Enclosure



**LOWER VALLEY BUILDERS & DEVELOPERS ASSOCIATION
1805 E RUBEN TORRES BLVD SUITE B-20
BROWNSVILLE, TEXAS 78526**

956.504.6550

**RECEIVED
SEN. EDDIE LUCIO**

MAR 09 2006

Routed to: _____
Filed: _____
Office: A B W

March 9, 2006

Honorable Eddie Lucio
State Senator
Senate District 27
7 North Park Plaza
Brownsville, Texas 78521

**Re: Request for Attorney General's Opinion: Brownsville Public Utilities
Board**

Dear Senator Lucio:

We, the officers and directors of the Lower Valley Builders and Developers Association (the "Association"), an association comprised of a number of homebuilders and developers who own and are in the process of developing residential and commercial property within the City of Brownsville and its extraterritorial jurisdiction. As we believe you are aware, we are presently attempting to work with the Capital Improvements Advisory Committee which has been created by the Brownsville City Commission to advise the City and its municipally owned utility, the Brownsville Public Utilities Board (the "PUB") in regard to a set of "Land Use Assumptions" and a new "Capital Improvements Plan" which the Advisory Committee is analyzing so that the City Commission can adopt a new "impact fee" ordinance for the PUB.

While we have been in the process of working with the Advisory Committee, we have all also confirmed that in addition to its collection of "impact fees" pursuant to an ordinance of the Brownsville City Commission in 1990, the PUB also routinely assesses a fee in the amount of \$1,815 per acre when a landowner seeks a development permit from the Board, basing this amount on an estimated charge for the purchase of water rights in Brownsville. The PUB places this charge into a "water rights fund" which has a present accumulated balance of \$3,674,437. It is also noted that this balance is over \$1.5 million greater than it was only two years ago, a fact which leads us to believe that while these "water rights fees" are being collected by the PUB, they are not being used to purchase any associated water rights. Indeed, the members of the Association believe that in the vast majority of cases, this "water rights fee" is being collected for a development permit where the landowner or developer already own the "water rights" associated with the development.

As a result of this "water rights fee," the average impact fee charged to a developer for a development permit within the City of Brownsville is not the rate of approximately \$300 per lot as is generally assumed but, instead, approximately the sum of \$750 per development lot.

As you know, by the provisions of Section 395.001(4) of the Local Government Code, "impact fee means a charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development. The term includes amortized charges, lump-sum charges, capital recovery fees, contributions in aid of construction, and any other fee that functions as

described by this definition." The definition goes on to except certain items from inclusion as an "impact fee," not relevant here.

Chapter 395 goes on to provide that, "unless otherwise specifically authorized by state law or this chapter, a governmental entity or political subdivision may not enact or impose an impact fee." (Sec. 395.011). Furthermore, Section 395.012 provides that impact fees may be imposed only to pay for "... the costs of constructing capital improvements or facility expansions ..." and limited to the contents of that subsection.

As you know, Chapter 395 was originally adopted by the Legislature in 1987 and, according to the Senate Bill Analysis, its intent was to address such problems as "(1) excessive fees bearing no rational relation to infrastructure funding requirements; (2) fees assessed on new development to promote the general public good; (3) fees not used for the purpose for which they were imposed; and (4) fees that increase the cost of housing." Senate Comm. on Economic Dev., Bill Analysis, S.B. 336, 70th Leg. (April 9, 1987). See also Attorney General's Letter Opinion No. 97-048 (1997) and Attorney General's Letter Opinion No. 93-56 (1993).

Based upon all of the above, it is our strong belief that the assessment and collection of this "water rights fee" by the PUB is violative of Texas law because it is an "impact fee," the assessment and collection of which is not permitted by Chapter 395.

Notwithstanding this, however, the PUB continues to assess and collect the "water rights fee," arguing that it is not an impact fee.

We would greatly appreciate it if you would agree to author a letter to the Attorney General of Texas seeking his opinion as to whether or not the assessment and collection of this "water rights fee" is an impermissible "impact fee" under Texas law. We feel certain that once the Attorney General has opined on this issue, both the PUB and Brownsville landowners and developers will have a better understanding of the validity of this "water rights fee."

We greatly appreciate your review of this matter and, as always, your service to Brownsville and its citizens.

Please feel free to call us if you have any questions or comments.

Very truly yours,


N.O. Simmons

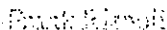

Renato Cardenas

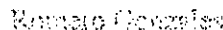

William P. C. Hudson


Jose Perez


Lourdes Carrasco


Reba McNair


Frank Kipoll


Renato Cardenas


Manuel Casanova

Lower Valley Builders & Developers Association