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OPINION COMMITTEE

FILE # ML-46328-10
I.D.# 46328

January 29, 2010

The Honorable Gregg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0860-GA

Re: Attorney General Opinion

Dear General Abbott:

The City of Baytown has adopted impact fees pursuant to Chapter 395 of the Texas Local Government Code ("Chapter 395"). Consistent with such chapter, the City entered into an agreement with a developer to give credit of impact fees for certain costs associated with oversizing with a developer in the City's capital improvements plan. The agreement provided that the developer would "receive a credit from the impact fees otherwise due from the new development for the costs incurred [for oversizing the water line]." ¹ The developer now desires a credit for not only its water impact fees but also its wastewater impact fees. The City is not opposed to giving such a credit but believes that a credit on its sewer impact fees for a water line capital improvement project may run afoul of Chapter 395.

Specifically, the City in relation in Chapter 395 poses the following questions:

1. Whether under Chapter 395 a credit for a water line project may be given on sewer impact fees?
2. In not, whether the City can enter into an agreement under Section 395.019(2), which would allow such a credit?

The City's impact fee ordinance sets a combined rate of \$2,243.46 per service unit and then attributes \$324.47 to water and \$1,918.99 to wastewater services. This breakout of the fee in this manner appears to be mandatory, as Section 395.024 requires that the City account for such fees separately. Specifically, Section 395.024 requires:

¹ Please note that this request for an opinion does not seek the Attorney General to consider the validity of such agreement or the City's ordinances, but merely to determine the proper application of impact fee credits pursuant to Chapter 395.

1. "the impact fee...be deposited in interest-bearing accounts clearly indentifying the category of capital improvement or facility expansions within the service area for which the fee was adopted"; and
2. "[i]mpact fee funds...be spent only for the purposes for which the impact fee was imposed..."

Tex. Loc. Gov't Code Ann. §395.024 (1989).. Therefore, since impact fees can only be spent for the purposes imposed, it could be argued that impact fee credits may only be granted for the impact fees corresponding to the category of the capital improvement project may only be given on the impact fees due and owing which are attributable to water – not wastewater.

Should you opine the such argument is meritorious, please consider whether Section 395.019 affords the City the flexibility to structure an agreement to allow a credit against impact fees attributable to wastewater based upon a capital improvement project attributable to water. It could be argued that the checks and balances specified in Section 395.024 have no bearing on the agreement, in which no funds will be received. Additionally, one could assert that the parties to an agreement under Section 395.019 have had the opportunity to evaluate the costs and benefits of the construction of the capital improvement and can ensure that proper consideration in the way of impact fee credits is given and received in exchange.

Thank you for your prompt consideration of this request. Please let me know if you have any questions or require additional information.

Sincerely,



Tommy Williams
State Senator District 4