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VIA CMRRR NO. 7005 1160 0001 8578 8870

RQ-0885-GA

MAY 6, 2010

RE: OPINION REQUEST – IMPACT FEES

SIR OR MADAM:

THIS OFFICE, ON BEHALF OF A REQUEST RECEIVED FROM THE CITY OF SCHERTZ, TEXAS, SUBMITS THIS REQUEST FOR AN OPINION FROM YOUR OFFICE RELATIVE TO THE ISSUES BELOW. THE NEXUS TO THE OPERATIONS OF COUNTY GOVERNMENT IS AS FOLLOWS: COUNTIES THROUGHOUT THE STATE WILL OFTEN UNDERTAKE VARIOUS CONSTRUCTION PROJECTS. CURRENTLY, GUADALUPE COUNTY, TEXAS IS INVOLVED IN A MULTI-MILLION DOLLAR RENOVATION TO AN EXISTING BUILDING FOR PURPOSES OF CREATING A "JUSTICE CENTER", A MULTI-LEVEL PARKING GARAGE ADJACENT TO THE JUSTICE CENTER AND FUTURE POSSIBLE RENOVATIONS TO THE CURRENT COUNTY ADMINISTRATION BUILDING AND THE ORIGINAL COUNTY COURTHOUSE. ANY COUNTY CONSTRUCTION PROJECT HAS THE POTENTIAL TO FACE SIMILAR ISSUES SET FORTH BELOW, TO WIT: PAYMENT OF IMPACT FEES IN CONNECTION WITH THE CONSTRUCTION PROJECT.

IN THE EVENT YOUR OFFICE CONCLUDES THAT IT CANNOT RENDER AN OPINION ON ALL ISSUES PRESENTED, IT IS RESPECTFULLY REQUESTED THAT YOU RENDER AN OPINION ON ANY ISSUE WHEREIN YOU CONCLUDE THAT THIS OFFICE HAS AUTHORITY TO MAKE THIS REQUEST ON BEHALF OF THE CITY OF SCHERTZ AND THAT YOUR OFFICE HAS AUTHORITY TO SO RESPOND.

SPECIFIC ISSUES

WHETHER THE PAYMENT OF IMPACT FEES BY POLITICAL SUBDIVISIONS ARE DISCRETIONARY OR MANDATORY?

WHETHER A HOME RULE MUNICIPALITY IS REQUIRED TO PAY IMPACT FEES IMPOSED BY A MUNICIPAL AUTHORITY UNDER CHAPTER 395 OF THE TEXAS LOCAL GOVERNMENT CODE?

FACTS

The Cibolo Creek Municipal Authority ("CCMA") is a conservation and reclamation district located in Bexar, Comal, and Guadalupe Counties created under the Texas Constitution, Section 59, Article XVI as enacted by Texas Special District Local Laws Code Chapter 8166. On July 12, 2007, on Order number 07-14709, CCMA enacted a Sewer Impact Fee Order under the authority of Chapter 395 of the Texas Local Government Code ("LGC"), 30 TAC Chapter 293 and procedural rules of the Texas Commission on Environmental Quality. Said order establishes impact fees to be charged to users for connecting to existing or proposed sewer systems operated by CCMA or to the sewer collection systems of municipal entities or contracting parties which transport wastewater to the CCMA's regional system for treatment and discharge.

The City of Schertz is a Texas Home Rule Municipality which has recently constructed a library and recreational center which is connected to CCMA facilities via the City's sewer collection system. The CCMA has indicated that the City of Schertz is obligated to pay the CCMA assessed impact fees based on Attorney General Opinion LO-93-60 ("Opinion 93-60") dated August 5, 1993.

The City of Schertz disputes the imposition of impact fees by CCMA for the following reasons:

1. The impact fee statute, Chapter 395 of the LGC, provides that an impact fee is a permissive rather than mandatory obligation of a political subdivision; and
2. As a Home Rule Municipality, the City of Schertz is not liable for an impact fee assessed by CCMA.

ARGUMENTS & AUTHORITIES

Section 395.022 (a) of the LGC provides as follows:

> Sec. 395.022. AUTHORITY OF POLITICAL SUBDIVISION TO PAY FEES. (a) Political subdivisions and other governmental entities may pay impact fees imposed under this chapter.

Opinion 93-60 interpreted this section of the LGC to require a college to pay an impact fee assessed under the authority of Chapter 395. Based on the language of the prior statute the Attorney General concluded that the word "may" was "not used in section 395.022 to indicate discretion or choice, but rather to indicate authority." Further the Attorney General reasoned as follows:

> Political subdivisions and other governmental entities, such as special-purpose districts, generally may "exercise only such powers as have been expressly delegated to [them] by the Legislature, or which exist by clear and unquestioned implication." (citation omitted) The purpose of section 395.022 appears to be to expressly authorize "political subdivisions and other governmental entities" to pay impact

> fees, since the authority to do so would not necessarily exist by clear and unquestioned implication. We therefore believe that section 395.022 is not intended to give political subdivisions and other governmental entities the choice regarding whether or not to pay impact fees. If the legislature had intended to give political subdivisions and other governmental entities a choice regarding whether to pay such fees, it would have so provided in unmistakable terms.

In construing statutes, the "primary objective is to ascertain and give effect to the Legislature's intent." *City of Marshall v. City of Uncertain,* 206 S.W.3d 97, 105 (Tex.2006). If the Legislature provides definitions for words it uses in statutes, then those definitions should be used in construing their meaning. *See* TEX. GOV'T CODE § 311.011(b). Courts are required to give effect to legislative intent as it is expressed by the statute's language and the words used, unless the context necessarily requires a different construction or a different construction is expressly provided by statute. *See id.* § 311.016; *City of Rockwall v. Hughes,* 246 S.W.3d 621, 625 (Tex. 2008). Unambiguous statutory language is interpreted according to its plain language unless such an interpretation would lead to absurd results. *Fleming Foods of Tex., Inc. v. Rylander,* 6 S.W.3d 278, 284 (Tex. 1999).

According to the Code Construction Act, adopted four years after the release of Attorney General Opinion 93-60, the word "may" creates discretionary authority or grants permission or a power and the word "shall' imposes a duty." TEX. GOV'T CODE § 311.016(1). In cases where the Texas Supreme Court has construed the term "may," they have always considered the plain language of the statutes. As an example, in *Dallas County Community College District v. Bolton,* 185 S.W.3d 868, 873 (Tex. 2005) (a case which was decided after Attorney General Opinion 93-60 was issued), the issue was whether a statute prohibited the collection of technology fees if they were not used for bond repayment when the statute provided such fees collected by public junior colleges "may be pledged to the payment of [revenue] bonds." The Court recognized "[w]e cannot disregard the Legislature's choice of language in providing that the authorized fees *'may* be pledged to the payment' of revenue bonds rather than requiring that they ***must*** or ***shall*** be so pledged." *Id.* The Court concluded that "'may' and ' **shall**' mean different things, and there is no clear indication from the Legislature that it intended otherwise." *Id.* at 874.

In construing Section 395.022, the analysis is the same as in *Bolton.* The legislature's choice in using the term *"may"* in Section 395.022 ("political subdivisions may .... pay impact fees ....) rather than requiring that political subdivisions ***must*** or ***shall*** pay impact fees makes clear that paying said fees is permissive. Further, even if the term "may" in this instance is intended to grant "permission or a power" it still does not lead to the illogical conclusion that the payment of the fees are mandatory.

In further support of this argument, there is no language in Chapter 395 which addresses a

political subdivision's requirement to pay impact fees imposed by another political subdivision, except in Section 395.022. The Legislature's choice of language in providing that the authorized fees "may" be paid rather than they "shall" be paid "cannot be ignored" in the only section of the statute where such a requirement is addressed. The plain language of the statute through the use of the term "may" as opposed to the term "shall" makes clear that payment of impact fees by political subdivisions are a permissive rather than a mandatory obligation of a political subdivision.

Finally, had the Legislature intended to require political subdivisions to pay impact fees imposed by other political subdivisions and simultaneously give them the power or permission to do so (as Attorney General Opinion 93-60 reasoned was the purpose of the word "may") the Legislature would have used the word "shall." By the using the word "shall" in Section 395.022 the Legislature would have mandated the requirement of political subdivisions to pay impact fees and no "power" or "authority' to do so would need to be supplied. There can be no other logical interpretation of the word "may" other than to create discretionary authority on behalf of political subdivisions to pay impact fees.

Even if the reasoning of the Attorney General in Opinion 93-60 is correct, it is only applicable to general law cities or special districts. It is not applicable to home rule cities which do not require any "special authority" to act. Specifically, "[h]ome rule cities are self-governing and look to the legislature not for grants of power but only for restrictions on their powers. *MJR's Fare, Inc. v. Dallas*, 792 S.W.2d 569, 573 (Tex. App. – Dallas 1991, writ denied), quoted in *Wilkinson v. D/FW Int'l Airport Bd.*, 54 S.W.3d 1 (Tex. App. – Dallas 2001), *cert. denied*, 151 L.Ed 2d 968 (2002). The extent of authority of home rule cities was well expressed by the Texas Supreme Court in *Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (1948):

> It was the purpose of the Home Rule Amendment . . . to bestow upon accepting cities and towns of more than 5,000 population full power of self-government, that is, full authority to do anything the legislature could have authorized them to do. **The result is that now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers.** (emphasis added).

When the Texas Legislature intends to limit or "preempt" a municipality on a subject generally within the municipality's power to regulate, the legislature must do so with unmistakable clarity. *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998); *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex 1993) (citing *City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964)). As such, if a city ordinance and state statute merely regulate the same area, they "will not be held repugnant to each other if any reasonable construction leaving both in effect can be reached." *City of Dallas*, 852 S.W.2d at 491; see also *Comeau*, 633 S.W.2d at 792 ("A city ordinance is presumed to be valid ... (and) ... the courts have no authority to interfere unless the ordinance is unreasonable and arbitrary-a clear abuse of municipal discretion").

In *Dallas Merch. & Concessionaire's Ass'n* the Texas Supreme Court made clear that a municipality's regulation in the same area regulated by the Legislature is not enough to preempt the municipality's authority if "any reasonable construction leaving both in effect can be reached."

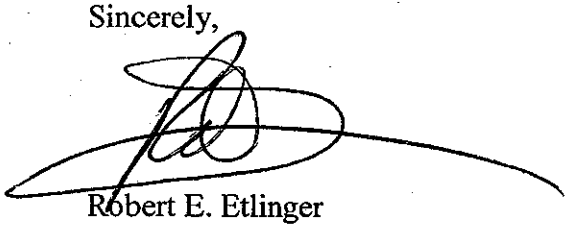
The Attorney General, in Opinion 93-60 states that "[i]f the legislature had intended to give political subdivisions and other governmental entities a choice regarding whether to pay such fees, it would have so provided in unmistakable terms." The City of Schertz would argue that it is the opposite premise which is true with respect to home rule municipalities, that is if the legislature had intended to require a home rule municipality to pay the impact fees the legislature would have to do so with "unmistakable clarity." A home rule municipality's autonomy in self-governance is without question as is the well established legal requirement that the legislature preempt their autonomy with "unmistakable clarity."

If the legislature had intended to require home rule cities to pay impact fees imposed by other political subdivisions they would have to do so with "unmistakable clarity." As discussed previously the word "may" connotes two different and distinct meanings neither of which places the affirmative burden on home rule municipalities to pay impact fees. Had the Texas Legislature intended for home rule cities to be required to pay impact fees they would have used the word "shall" which would, with unmistakable clarity, impose the requirement to pay impact fees. However the legislature did not use the word "shall" in this instance and therefore no burden lies on home rule cities to pay impact fees.

From a policy perspective the legal analysis above makes for appropriate public policy. Requiring a municipality to pay impact fees to another political subdivision creates the inequity of requiring the taxpayer to pay "twice" for the same facility. The premise on which impact fees are based is that development should pay the full marginal cost of providing facilities necessary to accommodate growth, therefore protecting existing residents from bearing that burden. The construction of new municipal facilities is usually necessitated for one of two reasons. The first is simply that the old facility (whether it is a new library, as in the instant case, or a new city hall or other facility) needs to be replaced as a result of age or some reason other than "growth". In such a case, the policy reason for the impact fee is negated. There is no increase in growth or added "impact" to the system. The city is simply replacing a facility which was already in existence. The second situation is where the City has outgrown its facility as a result of the growth of the community. In both instances the citizens have already paid the impact fees for facilities necessary to accommodate that growth when those fees were imposed on their residences. To require the municipality to pay the impact fees is simply a second imposition of impact fees on the same citizens who have previously paid the fees. This is because the impact fees are being paid with the taxes of those very same citizens. A result that the legislature was clearly attempting to avoid through the use of the word "may" rather than the word "shall".

In light of the 2005 Texas Supreme Court case of *Bolton* and in accordance with the 1997 adoption of the Texas Code Construction Act the Home Rule City of Schertz is not mandated to pay impact fees to another political subdivision under Texas Local Government Code Section 39.022.

Sincerely,



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