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**ELLIS COUNTY & DISTRICT ATTORNEY**

PATRICK M. WILSON

**MAY 26 2017**

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**OPINION COMMITTEE**

May 22, 2017

FILE # ML-48151-17  
I.D. # 48151

**RQ-0163-KP**

Attorney General Ken Paxton  
P.O. Box 12548  
Austin, TX 78711-2548

Re: Request for Opinion

Dear General Paxton:

Pursuant to Section 402.042 of the Texas Government Code, I respectfully request your formal written opinion of the following question raised in the attached letter addressed to me from The MacFarlane Firm, P.C., on behalf of the City of Ovilla, Texas:

Is it lawful for a general law city to contract with a homeowner's association (H.O.A.) whereby the city collects dues from H.O.A. members each month with the city's monthly water utility bills?

Please see the attached supporting information, which includes background information, related opinions from the Office of the Texas Attorney General, applicable statutes, and documentation. Should you need more information, please do not hesitate to contact me.

Thank you for your time and consideration of this matter and for your service to the State of Texas.

Sincerely,

Patrick M. Wilson  
County & District Attorney

encl.

# THE MACFARLANE FIRM

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May 17, 2017

The Honorable Patrick Wilson  
Ellis County District Attorney  
109 S. Jackson St.  
Waxahachie, Texas 75165

*Re:* Request for Attorney General Opinion - City of Ovilla, Texas

Dear Mr. District Attorney:

This law firm represents the City of Ovilla (the "City") which respectfully requests your assistance in obtaining an opinion from the Office of the Texas Attorney General on the following issue:

Is it lawful for a general law city to contract with a homeowner's association ("HOA") whereby the city collects dues from HOA members each month with the city's monthly water utility bills?

We have provided background information and analysis below examining the City's constitutional and statutory authority, including the "public purpose" requirement under Article III, Section 52 of the Texas Constitution.

## *Background*

The City is a Type-A general law municipality located in Ellis and Dallas Counties. In 2009, the City Council adopted Ordinance No. 09-006 authorizing the City to provide HOA due collection services to HOAs in the City. The ordinance is codified as Section 1.02.008 in the City's Code of Ordinances and a copy of such ordinance is attached hereto as Exhibit A (the "Ordinance").

Under the Ordinance and the resulting agreements with two HOAs, the City acquired necessary accounting software to account for HOA dues collected with the City's monthly water utility bills.<sup>1</sup> The agreements with the HOAs are attached hereto as Exhibits B and C and are

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<sup>1</sup> The accounting software was not needed for the collection and accounting of water utility bills; it was purchased exclusively for the purpose of accounting for the collection of HOA member dues.

collectively referred to herein as the “Agreements.” Based on the Agreements, the City bills HOA members for their monthly HOA dues (in an amount set by each HOA) with monthly water utility bills. The City in turn disburses the dues to the respective HOAs. In exchange for the City’s performance, the HOAs pay the City a fractional share of the City’s annual accounting software maintenance and service costs.

Based on a review of the Ordinance and the Agreements by the current City Attorney, the City now questions whether it can lawfully continue to provide the dues collection services to the HOAs.

### ***Related Attorney General Decisions***

In Tex. Opin. Atty General JM-338 (1985), the Texas Attorney General held that including a \$6 charge on monthly utility bills for financing a general law city’s police department was an unlawful tax. Similarly, in Tex. Opin. Atty General GA-0084 (2003), the Texas Attorney General found that including a \$1.50 fee on monthly utility bills to help pay for volunteer fire fighting services was an unlawful tax. In both of those situations the fees were collected to raise revenue for governmental functions. The City’s situation is different. The City does not collect HOA member dues for City revenue. The City distributes all of the collected HOA dues to the respective HOAs.

### ***Tex. Loc. Gov’t Code § 51.012***

Section 51.012 of the Texas Local Government Code provides that a Type-A general law municipality may adopt an ordinance, act, law of regulation, not inconsistent with state law, that is necessary for the government, interest, welfare or good order of the municipality as a body politic. TEX. LOC. GOV’T CODE § 51.012. Proponents of the Ordinance and the Agreements claim that collecting dues on behalf of the HOAs serves the welfare and good order of the municipality because the dues, once turned over to the HOAs, are used for the maintenance of property which, in turn, maintains and promotes property values in the City. Opponents argue that the HOA dues serve only the private interests of the HOA entities and their individual members, not the City as a whole.

### ***Tex. Const. Art. III, § 52***

Article III, section 52(a) of the Texas Constitution prohibits a political subdivision’s gratuitous grant of public money or a thing of value in aid of, or to any individual. TEX. CONST. art. III, § 52(a); see *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 383 (Tex. 2002) (stating that article III, section 52(a) prohibits the gratuitous expenditures). The Texas Supreme Court has enumerated a three-part test by which to determine whether a grant of money or thing of value is prohibited as gratuitous. *Id.* at 384 (stating that an entity making a public expenditure must: (1) ensure the expenditure’s “predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public’s investment; and (3) ensure that the political subdivision receives a return benefit”).

It is apparent that the City’s collection of HOA dues is “a thing of value.” If the City did not

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Ellis County District Attorney  
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provide such the service, the HOA entities would bear the time and expense of collecting the dues themselves or through use of a property management company. So, it appears that the provision of the service to the HOAs must be analyzed under the three-part test referenced above.

As previously mentioned, proponents of the Ordinance and Agreements believe that the collection of HOA member dues does serve a public purpose in that the fees are ultimately used by the HOAs to maintain private property and that such maintenance translates to higher property values. Opponents argue that the City's collection of HOA dues only benefits private parties (*i.e.*, the HOA entities and their members) and that the City is ostensibly providing private property management services.

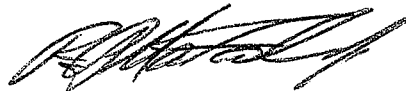
With regard to the second prong of the three-part test, it is important to note that the City does not retain control over the HOA dues that it collects. The collected dues are turned over to the respective HOAs to expend as they see fit. The City has no control over how, when, or for what, the HOAs spend the money.

With regard to the third prong of the test, the City does receive compensation from the HOAs. The Agreements require that the HOAs pay the City a fee to cover the cost of accounting software maintenance and service fees. It is important to note that such accounting software was purchased for, and is only needed for, the City's collection and accounting of HOA dues, not for the collection of water utility bills or any other function of the City.

On behalf of the City of Ovilla, thank you for your time and assistance with this matter.

With best regards, I am

Very truly yours,



Ron G. MacFarlane, Jr.

RGM/dns

Attachments