



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 5, 1993

Honorable Michael J. Guarino
Criminal District Attorney
Galveston County
405 County Courthouse
Galveston, Texas 77550

Letter Opinion No. 93-60

Re: Whether the College of the Mainland is required to pay an impact fee assessed by the Galveston Drainage District No. 2 under chapter 395 of the Local Government Code (ID# 19756)

Dear Mr. Guarino:

You ask whether the College of the Mainland is required to pay an impact fee assessed by the Galveston Drainage District No. 2 (the "district") under chapter 395 of the Local Government Code. You explain that the district has adopted a capital improvements financing plan under chapter 395.¹ In 1990, the College of the Mainland expanded its facilities. When the College of the Mainland began construction, the district notified it that it would owe an impact fee on the improvements. Apparently, the College of the Mainland has refused to pay the impact fee. Specifically, you ask whether section 395.022 of the Local Government Code allows the College of the Mainland to elect to pay or not to pay the impact fee, and whether the district is prohibited from assessing the fee under section 395.016 of the Local Government Code.

Section 395.022 of the Local Government Code provides as follows:

Political subdivisions and other governmental entities *may* pay impact fees imposed under this chapter. [Emphasis added.]

You ask whether this provision allows the political subdivisions and other governmental entities to elect to pay or not to pay impact fees, or whether it is merely intended to clarify that political subdivisions and other governmental entities are *authorized* to pay such fees. We conclude that this provision is intended to authorize political subdivisions and other governmental entities like the College of the Mainland to pay an impact fee imposed under chapter 395 of the Local Government Code, and is not intended to give them the choice regarding whether or not to do so.

In construing statutes, the use of the word "may" as opposed to "shall" is generally indicative of discretion or choice between two or more alternatives, but the context in which the word appears must be the controlling factor. BLACK'S LAW DICTIONARY 979

¹We assume for purposes of this opinion that the district is authorized to do so.

(6th ed. 1990). "May" in some contexts means "to have authority to" or "to be permitted to." B. Garner, MODERN LEGAL USAGE 98, 354 (1987).² We note that the predecessor statute to section 395.022, V.T.C.S. article 1269j-4.11, section 2(k), provided as follows:

Political subdivisions and other governmental entities *are authorized to* pay impact fees imposed pursuant to this Act.

See also Acts 1987, 70th Leg., ch. 957, § 2(k), at 3249 (emphasis added). The 1989 act that added chapter 395 to the Local Government Code stated, "The Local Government Code is amended to conform to Sections 1 through 11, chapter 957, Acts of the 70th Legislature, . . . by adding chapter 395 to read as follows." *See* Acts 1989, 71st Leg., ch. 1, § 82(a), at 108. Although the legislature changed "is authorized to" to "may," this change was nonsubstantive. *See id.* § 1(a), at 1. Given the legislative history, we conclude that "may" is not used in section 395.022 to indicate discretion or choice, but rather to indicate authority.

We also conclude that section 395.022 requires political subdivisions and other governmental entities to pay impact fees for the following reason. 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." *Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann*, 142 S.W.2d 945, 946 (Tex. 1940). 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.³

Section 395.016, subsection (e), provides as follows:

For land on which new development occurs or is proposed to occur without platting, the political subdivision may assess the

²As this office noted in Attorney General Opinion WW-610 (1959), the legislature frequently uses "may" and "shall" interchangeably. Attorney General Opinion WW-610 at 3 (quoting *Hess & Skinner Eng'g Co. v. Turney*, 203 S.W. 593, 594 (Tex. 1918)). Whichever word the legislature has chosen is to be construed in accordance with the legislative intent. *Id.* (quoting *Hess & Skinner Eng'g Co.*, 203 S.W. at 594).

³Our conclusion is supported by the fact that the legislature has also required political subdivisions which impose impact fees to make refunds to political subdivisions and other governmental entities in certain circumstances, and has authorized political subdivisions and other governmental entities to sue for refunds. *See* Local Gov't Code § 395.025(e), (f).

impact fees at any time during the development and building process and may collect fees at either the time of recordation of the subdivision plat or connection to the political subdivision's water or sewer system or at the time the political subdivision issues either the building permit or the certificate of occupancy.

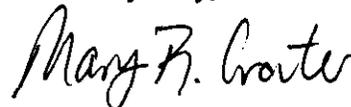
Apparently, the College of the Mainland contends that because none of the events described in subsection (e) which trigger the time at which a political subdivision "may collect fees" will occur with respect to its expansion project, the district is not authorized to collect the impact fee.

We disagree with the assumption underlying the College of the Mainland's argument. It may be the case that a subdivision plat will not be recorded and the district will not issue a building permit or certificate of occupancy. We conclude, however, that there has been or will be a "connection to the political subdivision's water or sewer system." We understand that the district provides storm drainage services and maintains a system of storm sewers, and that the College of the Mainland's expansion uses or will use this storm sewer system. We believe that the phrase "connection to the political subdivision's water or sewer system" is broad enough to encompass use of a storm sewer system. Were this not the case, then entities that do not provide traditional water and sewer services might, in certain circumstances, be unable to collect impact fees despite their specific statutory authorization to impose them. *See* Local Gov't Code § 395.079 (authorizing certain counties and special districts to impose impact fees to provide storm water, drainage, and flood control improvements). Therefore, we conclude that the district may collect the impact fee as of the time the College of the Mainland expansion uses the district's storm sewer system.

S U M M A R Y

Section 395.022 of the Local Government Code does not give the College of the Mainland the choice to pay or not pay an impact fee imposed by the Galveston Drainage District No. 2. Section 395.016(e) of the Local Government Code authorizes the district to collect the impact fee when the College of the Mainland expansion uses the district's storm sewer system.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee