



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

October 22, 1997

The Honorable Edwin E. Powell, Jr.
Coryell County Attorney
113 South Seventh Street
P.O. Box 796
Gatesville, Texas 76528

Letter Opinion No. 97-095

Re: Whether a municipality may adopt a drainage charge that is uniform throughout the municipality (ID# 39113)

Dear Mr. Powell:

Your inquiry concerns the fees that a city may adopt under the Municipal Drainage Utility Systems Act (the "act"), Local Gov't Code, ch. 402, subch. C.¹ This act permits municipalities² to establish a municipal drainage utility system, to provide rules for its use, operation, and financing, and to prescribe bases on which a municipal drainage utility system may be funded and fees in support of the system may be assessed, levied, and collected.³ You ask whether a municipality may enact a drainage utility fee that disregards dissimilarities of drainage capital improvements necessary in different municipal watersheds and that is uniform throughout the municipality. You state that the municipality would have less administrative difficulty if a uniform charge were made throughout the city for all watersheds.

The governing body of a municipality may adopt subchapter C of chapter 402, Local Government Code by ordinance.⁴ Before adopting the ordinance, the governing body must find that:

(1) the municipality will establish a schedule of drainage charges against all real property in the proposed service area subject to charges under this subchapter;

(2) the municipality will provide drainage for all real property in the proposed service area on payment of drainage charges, except real property exempted under this subchapter; and

¹This statute consists of sections 402.041 through 402.054 of the Local Government Code.

²These provisions apply to any municipality. Local Gov't Code § 402.043.

³*Id.* § 402.042.

⁴*Id.* § 402.045.

(3) the municipality will offer drainage service on nondiscriminatory, reasonable, and equitable terms.⁵

After passage of the ordinance, the municipality may levy a schedule of drainage charges, subject to requirements for public notice and a hearing.⁶ Section 402.047 of the Local Government Code provides as follows:

(a) The governing body of the municipality may charge a lot or tract of benefitted property for drainage service on any basis other than the value of the property, but the basis must be directly related to drainage and the terms of the levy, and any classification of the benefitted properties in the municipality must be nondiscriminatory, equitable, and reasonable.

When adopted in 1985, this provision, initially codified as article 1110h, V.T.C.S., section 6(d) (1925), stated that “[l]ots and tracts of benefitted property may be charged for drainage service *on one or more of the bases mentioned in this section*, or on any *other* basis except value of the benefitted property”⁷ The italicized language was deleted in the nonsubstantive revision of the statutes relating to local government, which repealed article 1110h, V.T.C.S., and adopted subchapter C of chapter 402, Local Government Code.⁸ No substantive change was intended by the revision, the purpose of which was to make the law more accessible and understandable.⁹

If read out of context, the present language “on any basis other than the value of the property” appears to suggest that even an arbitrary basis would be acceptable. However, additional limitations found in section 402.047(a) require the basis to be “directly related to drainage and the terms of the levy” and “any classification of the benefitted properties in the municipality . . . [to] be nondiscriminatory, equitable, and reasonable.” The permissive bases for the charges enumerated in section 402.047 illustrate the kinds of bases that are “directly related to drainage,” *i.e.*, “the land use made of the benefitted property,” and its “size, in area, and topography.”

The definitions of words used in the statute also indicate the kinds of factors relevant to setting the drainage charge. The “drainage charge” is the levy imposed to recover the cost of the

⁵*Id.* § 402.045(b).

⁶*Id.* § 402.045(d).

⁷Act of May 21, 1985, 69th Leg., R.S., ch. 460, § 6, 1985 Tex. Gen. Laws 1619, 1621 (emphasis added).

⁸Act of May 1, 1987, 70th Leg., R.S., ch. 149, §§ 1, 49(1), 1987 Tex. Gen. Laws 707, 1306.

⁹*Id.*, 1987 Tex. Gen. Laws 707, 714 (codified as Local Gov’t Code § 1.001).

service of the municipality in furnishing drainage for any benefitted property,¹⁰ and, if specifically provided by ordinance, an amount made in contribution to funding of future drainage system construction.¹¹ “‘Cost of service’ as applied to a drainage system service to any benefitted property” is defined as the prorated costs of numerous specified expenditures necessary to provide facilities used in draining the benefitted property.¹² Thus, the drainage charges should reflect the pro rata costs of providing drainage services to a benefitted property,¹³ the classification of the benefitted properties in the municipality must be nondiscriminatory, equitable, and reasonable, and the basis of the charges to benefitted property must be “directly related to drainage and the terms of the levy.”¹⁴ The municipality may choose a basis or bases for the charges that complies with the statutory requirements.

We turn to your specific inquiry concerning a uniform drainage fee. While a municipality has considerable discretion to make reasonable decisions about the amounts to be charged residents for municipal improvements that benefit their property, it may not make arbitrary decisions.¹⁵ In our opinion, a decision to impose a uniform charge on all property owners, solely for reasons of administrative convenience, and without any consideration of the statutory requirements, would be an arbitrary decision and would be invalid as a matter of law. The drainage charges must reasonably reflect the costs of providing drainage to the property. We cannot, however, determine in an attorney general opinion that the drainage charge must be based on the capital costs of draining each watershed. The act allows municipalities, within the limits of statutory requirements, to consider the facts of local drainage patterns and local engineering solutions to drainage needs. While the costs of draining a particular watershed certainly seem relevant to the charges under the act, we cannot address the fact questions inherent in such a decision. Accordingly, we cannot conclude as a matter of law that drainage charges may only be determined on a watershed-by-watershed basis. The municipality has discretion to make reasonable decisions about the bases for the drainage charges under the act, subject to judicial review for abuse of discretion.

¹⁰“Benefitted property” is an improved lot or tract to which drainage service is made available. Local Gov’t Code § 402.044(1)(A).

¹¹*Id.* § 402.044(4).

¹²*Id.* § 402.044(2). An element of cost of service which is not prorated, is “the administrative cost[] of a drainage utility system.” *Id.* § 402.044(2)(G).

¹³We do not believe that this language requires the drainage charges to allocate to each benefitted property the precise costs of draining it, since the act also permits the municipality to establish reasonable classifications of the benefitted properties for purposes of establishing charges.

¹⁴Local Gov’t Code § 402.047.

¹⁵See generally *City of Houston v. Blackbird*, 394 S.W.2d 159, 163 (Tex. 1965); *City of Wichita Falls v. Landers*, 291 S.W. 696, 700 (Tex. Civ. App.--Fort Worth 1927, writ ref’d).

S U M M A R Y

The Municipal Drainage Utility Systems Act, Local Gov't Code, ch. 402, subch. C, requires that drainage charges adopted by a city under its provisions reflect the pro rata costs of providing drainage services to a benefitted property, that the classification of the benefitted properties in the municipality be nondiscriminatory, equitable, and reasonable, and that the basis of the charges to benefitted property be directly related to drainage and the terms of the levy. Within these statutory requirements, a municipality has discretion to make reasonable, non-arbitrary decisions about the bases for the drainage charges, subject to judicial review for abuse of discretion. The choice of a particular basis for drainage charges involves questions of fact, which cannot be addressed in an attorney general opinion. However, a decision to impose a uniform drainage charge on all property owners, solely for reasons of administrative convenience, and without any consideration of the statutory requirements, would be an arbitrary decision and would be invalid as a matter of law.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Opinion Committee