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Opinion Committee

MBJ

February 8, 1993

RQ-553

Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711

FILE # RD-00553-DM
ML-18883-93

I.D.# 18883

ccc 2-16-93

Re: Request for Opinion of the Attorney General;
municipal water and sewer contracting issues.

Dear General Morales:

I am writing to request your opinion with regard to the following questions pertinent to the ability of a municipality and one or more municipal utility districts ("MUDS") to contract for the future funding and construction of certain wastewater facilities:

1. May a home rule municipality and one or more in-city MUDs contract so as to obligate the City to construct and fund in the future, at its expense, certain permanent wastewater collection facilities identified as necessary to connect the MUDs to the City's wastewater treatment facilities?
2. May the municipality and the MUDs contract so as to require either the City or the MUDs to commence construction of the identified permanent City wastewater collection facilities on a specific future date or, in the alternative, in accordance with a flow-based timing trigger (e.g., when future flows in the MUDs interim treatment plant reach 70% of the maximum permitted capacity)?
3. May the municipality and the MUDs enter into a contract requiring the MUDs to construct the permanent wastewater facilities with funding from contract revenue bonds issued pursuant to Sec. 402.014, Local Gov't Code but with an option for the City to forego the issuance of contract revenue bonds by opting to construct the

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permanent wastewater facilities with other funds lawfully available to the City for such purposes?

4. May the municipality by such contract presently authorize the MUDs to issue contract revenue bonds to fund future construction of the identified City permanent wastewater collection facilities either at a future date certain or in accordance with such a flow-based timing trigger without further approval or authorization from the city beyond that set forth in the contract?

5. For such contract for construction of permanent City wastewater facilities (whether by the MUDs or by the City) to be valid with reference to those doctrines prohibiting the delegation of governmental powers and the binding of future councils, must the City retain at all times the right therein to modify or cancel the funding or construction of said permanent City wastewater improvements?

BACKGROUND

In 1985, voters of the municipality approved issuance of city utility system revenue bonds to fund construction of improvements and extensions of the City's sewer system into a drainage basin that includes the area comprising the MUDs as well as other property. The funds authorized were for construction of large wastewater lines to collect and transport wastewater from this drainage basin and a subregional wastewater treatment plant to treat such flows (collectively, "the subregional system").

In 1986, the MUDs were formed within the municipality's corporate limits pursuant to the provisions of Chapter 54 of the Texas Water Code. Under their respective Consent Agreements, initial wastewater service is to be provided by the MUDs through the MUDs' package wastewater plant that is permitted for expansion up to 800,000 gallons per day ("the interim plant"). While no expansion of the interim plant has yet occurred, the developer and the MUDs have made commitments to purchasers of property within the districts to provide wastewater capacity of a magnitude that may soon exhaust the permitted capacity of the interim plant. The Texas Water Commission has indicated that the discharge permit for the interim plant may not be renewed beyond its current three year term.

Under the Consent Agreements, permanent wastewater service was to be provided through the municipality's construction of the large subregional system described above. No timing trigger for construction of the subregional system was set out in the Consent Agreements and overall development and population growth in the drainage basin will not justify the construction of the subregional system to serve

the entire drainage basin for nearly twenty years.

However, the MUDs are located in an area of the municipality in which industrial and residential growth are encouraged and development within the MUDs has outpaced development in the drainage basin generally. Given this and the fact that the MUDs have already committed a significant portion of the remaining permitted capacity of the interim plant, the MUDs have requested an amendment of the Consent Agreements that will provide a means of providing permanent city wastewater service to the MUDs prior to the municipality's projected construction of the subregional system.

A national high tech manufacturing company that previously located within these in-city MUDs is currently planning a significant expansion of its plant but has indicated it cannot proceed in the absence of adequate assurance that sufficient wastewater service will be available to service the expansion. The City had previously granted tax abatements and other incentives in order to encourage the company to locate its facility there. Because the MUDs have already committed on paper the major portion of the permitted capacity in the interim plant, since there is no timing trigger for the City's construction of the subregional system, and since the Texas Water Commission has indicated that the discharge permit for the interim plant may not be renewed beyond its present three year term, the MUDs are unable to represent that they will be able to supply wastewater capacity to supply this company's plans for expansion.

The engineers for the City, the MUDs and the developer have indicated that it is technically feasible to construct an alternative to the subregional system that would consist of an wastewater interceptor, master lift station, force mains and possibly a second lift station ("the Pumpover Project") to pump wastewater from the drainage basin in which the MUDs are located to an existing City wastewater plant that has ample capacity to meet the wastewater needs of the MUDs pending the City's construction of the subregional system (including the expansion plans of the company above mentioned), construction of the Pumpover Project would also allow the City to defer construction of the more expensive subregional system for a longer period. Thus, construction of the Pumpover Project will serve multiple interests of the City, the MUDs and the developer of lands within the districts.

While the Pumpover Project is acknowledged to be both technically and economically feasible for the City in the longer term, there is insufficient customer base in the area now to justify current or near term construction of the now to justify current or near term construction of the Pumpover Project by the City. Accordingly, the City, the MUDs, and the developer have focused on negotiating an amendment to the Consent Agreements whereunder design and then construction of the Pumpover Project would be commenced in the future by the City or the MUDs when certain timing triggers based on the level of wastewater

flows in the interim plant are met, hence the questions set forth at the beginning of this letter.

As part of the proposed amendment, the developer and the MUDs also requested a "financial guarantee" or binding legal commitment that the City would fund the Project from one of two sources: (1) the City could construct the Pumpover with City revenue bonds from Proposition 8 (1985) described above, or (2) the City would agree that the MUDs would fund and construct the Pumpover Project to City specifications with contract revenue bonds issued by the MUDs pursuant to the provisions of Sec. 402.014, Texas Local Gov't Code, but with a stipulation that the City could avoid the issuance of contract revenue bonds by the MUDs by electing to fund and construct the improvements itself.

Under the latter scenario, the City would authorize the MUDs to issue contract revenue bonds to fund the estimated cost of constructing the Pumpover Project (and issuance costs of the bonds) at some point in the future when the flow based timing triggers are met. In short, the MUDs would be required to submit the Project to competitive bidding, construct the Project to City specifications, permit inspections by the City during and at the completion of construction and, upon final acceptance thereof, the Project would become the property of the City and the City would be obliged to make contract payments of principal and interest on the contract revenue bonds for the amortization period of such bonds. Plans and specifications would be subject to review and approval by the City, the MUDs and the developer. The City could avoid funding and construction of the Pumpover Project through contract revenue bonds by giving notice of its election to construct the Project with its own revenue bonds from Proposition 8 (1985) or other monies lawfully available.

Under the current circumstances, the Pumpover Project is regarded as the best alternative to provide permanent wastewater service to the area. However, at this critical point in the decisionmaking process, the legal validity of key elements of the proposed amendment has been called into question. Despite the technical and economic soundness of the proposed Project, the existence of statutory authority permitting the City and the MUDs to contract for the provision of waste disposal facilities and services, the multiple public purposes to be served by the amendment and the contractual controls proposed to ensure that public funds would be utilized for the accomplishment of those public purposes, the proposed contract was questioned as an unconstitutional delegation of municipal authority to the MUDs and an impermissible attempt by the City Council to bind its successors in office.

Given the necessity that the City and the MUDs promptly resolve this matter in order to preserve an opportunity for significant economic expansion, and in order to clarify the law concerning the ability of these entities to contract, I will appreciate you and your office considering this request for opinion on an expedited basis. In

that regard, I understand that the city and others will submit briefs to assist with your preparation of an opinion on this important matter.

Please let me know at your earliest convenience if you require any further information in aid of your deliberations on this matter.

Sincerely,

A handwritten signature in black ink that reads "Gonzalo Barrientos". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Gonzalo Barrientos
State Senator

GB/pdw