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Legal Q&A

By Bennett Sandlin

TML General Counsel

What are drainage fees?

Cities may charge a fee to cover the cost of providing the infrastructure and facilities that permit the safe drainage of storm water, the prevention of surface water stagnation, and the prevention of pollution arising from nonpoint runoff. Drainage “utilities” are obviously different than most other city utilities in that it’s more difficult to directly identify and bill individual customers based on their benefit from such infrastructure. Nevertheless, state law recognizes the importance of such utilities and permits an accompanying fee. Tex. Loc. Gov’t Code § 402.043 through 402.054.

When and how may a city charge a drainage fee?

Before a city may charge a drainage fee, it must comply with Subchapter C of the Texas Local Government Code, known as the “Municipal Drainage Utility System Act” (the “Act”). Generally speaking, the purpose of the Act is to require a city to comply with certain procedures and formalities, and to generally treat its drainage system as a formal utility service, before a fee is permitted. The entire point of the Act is the fee, and the steps that must be taken prior to levying the fee.

Most Texas cities do not attempt to charge a fee for drainage, hence those cities need not comply with the requirements of the Act. Those cities simply build and operate drainage infrastructure using general fund money.

What are the procedures for establishing a drainage utility, thus permitting a drainage fee?

To establish a drainage utility, and therefore to be able to charge a fee for drainage, a city must do the following:

1. Findings

The city council makes “findings” (ideally by resolution) that:

- a. The city intends to establish a schedule of drainage charges against all real property in the proposed service area of the utility;
- b. The city will provide drainage for all real property in the proposed service area on payment of drainage charges, except for exempt property;
- c. The city will offer drainage service on nondiscriminatory, reasonable, and equitable terms. Tex. Loc. Gov’t Code § 402.045.

2. Published Notice of Ordinance

At least 30 days prior, the city must publish in the newspaper the first notice of a public hearing to consider the adoption of a drainage system ordinance. After the first published notice, the city must publish two additional newspaper notices prior to the hearing, but not necessarily 30 days before, as with the first notice. The published notices must contain the time and place of the hearing and contain the complete text of the ordinance to be adopted. Tex. Loc. Gov't Code § 402.045(c).

3. Hearing on Drainage Ordinance

The city council must hold a public hearing to take public testimony on the proposed drainage system ordinance. Tex. Loc. Gov't Code § 402.045 (c).

4. Adopt Drainage Ordinance

Sometime after the conclusion of the public hearing (it can be at the same meeting), the city must adopt an ordinance that:

- a. States something to the effect that “The City of _____ hereby Adopts Subchapter C, Section 402.043 of the Texas Local Government Code (the Municipal Drainage Utility System Act)”;
- b. States that “The drainage system of the City of _____ is hereby declared to be a public utility.” Tex. Loc. Gov't Code § 402.045(a).

5. Draft Proposed Schedule of Charges

After adoption of the ordinance above, the city should prepare a proposed, or draft, “schedule” of drainage charges, consistent with the charge methodology in the question below (How is a drainage fee calculated?). Tex. Loc. Gov't Code § 402.045(d).

6. Published Notice of Drainage Charges

At least 30 days prior, the city must publish in the newspaper the first notice of a public hearing to consider the adoption of the proposed drainage charges. After the first published notice, the city must publish two additional newspaper notices prior to the hearing, but not necessarily 30 days before as with the first notice. The published notices must contain the time and place of the hearing, and contain the complete text of the charge proposal. Tex. Loc. Gov't Code § 402.045(d).

7. Hearing on Drainage Charges

The city council must hold a public hearing to take testimony on the proposed drainage charges. Tex. Loc. Gov't Code § 402.045(d).

8. Prepare an Inventory

Prior to adopting the schedules of drainage of charges, a city must prepare an inventory of the lots and tracts within the service area, upon which the city council must base its charge calculations. Tex. Loc. Gov't Code § 402.045(b).

9. Adopt Drainage Charge Schedule

After the hearing, the city adopts the schedule of drainage charges. The statute does not specify in what form the schedule is adopted. The recommended procedure would be as a follow-up ordinance to the original ordinance establishing the drainage utility, above.

10. Adopt Other Rules

After adoption of the two ordinances above, the city council can adopt additional rules governing the drainage utility as the council considers necessary. Tex. Loc. Gov't Code § 402.045(e).

How is a drainage fee calculated?

The city council may establish a fee structure that charges individual lots or tracts of benefited property for drainage service on any basis other than the value of the property, but the basis used must directly relate to drainage and the terms of the levy. Tex. Loc. Gov't Code § 402.047. A totally uniform drainage charge imposed solely for reason of administrative convenience would likely be improper, however, so a city should establish a basis for the fee, such as impact of the lot on the system, benefits to the lot, and other criteria. Op. Tex. Att'y Gen. No. LO 97-095 (1975).

How do drainage fees relate to impact fees?

Impact fees are an up-front fee charged to developers for the burden their new development will place on city infrastructure. Drainage fees are ongoing user fees charged to the owner of land for their use of the drainage infrastructure. Collection of drainage fees does not preclude the imposition of drainage-related impact fees. Tex. Loc. Gov't Code § 402.054(3).

What properties are exempt from drainage fees?

Land owned by the state, a county, a municipality, or a school district is exempt from drainage charges. Tex. Loc. Gov't Code § 402.053(a-b). Also exempt is property with proper construction and maintenance of a wholly sufficient and privately owned drainage system; property held and maintained in its natural state; and undeveloped subdivided lots. Tex. Loc. Gov't Code § 402.053(c). Also, though not in Local Government Code Chapter 402 along with the other exemptions, state agencies and public institutions of higher education are exempted from drainage fees. Tex. Loc. Gov't Code § 430.003. Finally, a city may, but is not required to, grant a drainage fee exemption to tax-exempt religious organizations. Tex. Loc. Gov't Code § 402.053(d).

What can the city do if a person doesn't pay drainage fees?

If a user of the drainage utility does not pay drainage fees, the city can: (1) bring a civil lawsuit; (2) discontinue any other city utility service; or (3) prohibit usage of the drainage facility by the owner of the tract or lot (assuming this is possible). Tex. Loc. Gov't Code § 402.047(d).

What may drainage fees be spent on?

Drainage fees may only be spent to offset costs of providing drainage service and, only if specifically provided for in the ordinance, to fund future drainage system construction by the city. Tex. Loc. Gov't Code § 402.044(4).

How must drainage fee proceeds be handled within the city's fund structure?

Drainage fees must initially be segregated and separately accounted for within the account structure. Thereafter, proceeds of fees to cover current costs of service may be transferred to the city's general fund, while other proceeds, including those used to pay for future construction, must remain segregated. Tex. Loc. Gov't Code § 402.049.