

## **Legal Q&A**

**By Bennett Sandlin, TML General Counsel**

### **What are street assessments?**

Cities may require adjoining landowners to share in the cost of street improvements within the city. The landowners' share is known as a street assessment and is governed by the Texas Transportation Code. Separate statutes apply to home rule and general law cities.

A city should be careful to contrast street assessments, which can be unilaterally imposed on landowners, with assessments within public improvement districts (PIDs), which can be used for street improvement but require the petition of the landowners to initiate.

### **How do home rule cities levy street assessments?**

Home rule cities may assess a landowner for the cost of improving a city street if the city's charter provides for apportioning the cost between the city and the landowner. Tex. Trans. Code 311.091(a).

Home rule cities that are authorized by their charters to levy street improvement assessments may not levy an assessment in an amount that exceeds the amount by which the improvement specially benefits the owner's abutting land by enhancing the land's value. Tex. Trans. Code 311.091(a). This peculiar statute thus limits the amount of street assessments in home rule cities to the financial benefit on the adjoining land, which is no doubt lower than the cost of the street improvement in many cases.

Home rule cities may also levy assessments for opening (building) new city streets following eminent domain of the right-of-way. Tex. Trans. Code 311.092. The city's share of street construction shall be no more than one-third of the total cost, with the landowner paying two-thirds. Tex. Trans. Code 311.092(b).

### **How do general law (Type A) cities levy street assessments?**

Type A general law cities actually have a more favorable street improvement assessment statute than do home rule cities. Type A cities may simply levy a street assessment against land owners abutting a street improvement if two-thirds of the councilmembers present vote for the assessment. Tex. Trans. Code 311.095(a).

A street assessment in a Type A general law city must apportion the costs at two-thirds to the landowner, one-third to the city. Tex. Trans. Code 311.095(b). The landowners must be permitted to pay their two-thirds cost assessment in not fewer than five equal annual payments. Tex. Trans. Code 311.095(c). The assessment constitutes a lien against the property. Tex. Trans. Code 311.095(f).

### **What are user fees?**

User fees are any charges that a city levies for the right to use city services or facilities. For example, if a city operates a municipal swimming pool and charges a \$2 entry fee, that constitutes a user fee and is perfectly legal. Building permitting and inspection fees may also be viewed as a user fee, in that the builder pays for the cost of the particular city service (in this case, permitting and inspections).

### **When are user fees legal and when are they illegal?**

There are only a handful of cases and opinions that deal with the legality/illegality of user fees. The principal legal issue is this: When does a user fee, which is routine and legal, cross over into the realm of a “tax,” which is illegal unless a city can point to a specific authority that authorizes a tax?

Two general guidelines emerge from reading the opinions and cases:

1) A user fee should bear some relation to the actual cost of providing a service. For example, if a \$2 swimming pool fee raises \$50,000 a year in revenue, and the cost of personnel, maintenance, and other items relating to operating a city pool is somewhere in the \$50,000 range, such a fee is clearly legal. On the other hand, if the fee raised two or three times the revenue necessary to operate the pool, the excess revenue runs the risk of being labeled a “tax.”

General law Texas cities have no authority to levy a “swimming pool tax”; therefore, such a fee would be in danger of being struck down by a court. General law cities possess only those taxing powers that the legislature or the constitution expressly grants them. *Vance v. Town of Pleasanton*, 261 S.W. 457, 458 (Tex. Civ. App.—San Antonio 1924). For home rule cities, the issue is more complicated, as it is unclear what taxing authority a home rule city can derive solely from its charter. Home rule city officials should discuss the issue with their city attorney.

2) A user fee shouldn’t be attached to a bill for clearly unrelated services. For example, the Texas Attorney General has concluded that a general law city may not attach a monthly fee on utility bills to finance the police department. Op. Tex. Att’y Gen. No. JM-338 (1985). Nor may a city attach a mandatory fee on water bills to pay for volunteer fire fighting services. Op. Tex. Att’y Gen. No. GA-84 (2003).