Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 8, 1997

The Honorable Robert T. Jarvis
Grayson County Attorney
Justice Center, Suite 116A
Sherman, Texas 75090

Letter Opinion No. 97-048

Re: Whether an escrow deposit required of a developer by a home-rule city is an impact fee (ID# 39009)

Dear Mr. Jarvis:

You have asked this office whether an escrow deposit requirement imposed by the City of Sherman upon the developer of a proposed subdivision within the extraterritorial jurisdiction of the city constitutes an impact fee under the terms of chapter 395 of the Local Government Code.

As you explain the situation, the City of Sherman enacted in 1968 and amended in 1973 an ordinance governing subdivision development. That ordinance requires, *inter alia*, that the developer of a proposed subdivision that "abuts upon an existing paved street that does not have curb and gutter . . . shall put a cash deposit in escrow with the city to cover future assessment paving programs. This deposit shall amount to the cost of curb and gutter, and one-half of the cost of constructing a street. . . . This deposit shall be made in lieu of the actual construction in all cases, and shall be made prior to the city's approval of the final plat of the subdivision." Sherman, Tex., Ordinance 2684 (1973). The developer of a proposed subdivision in the extraterritorial jurisdiction of the city argues that the city may not require him to make this escrow deposit, which he contends is an impact fee that is impermissible under chapter 395 of the Local Government Code. The city responds that the escrow deposit requirement is excepted from the definition of impact fee contained in section 395.001.

The statutory definition of an impact fee is

> a charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development. The term includes amortized charges, lump-sum charges, capital recovery fees, contributions in aid of construction, and any

> other fee that functions as described by this definition. The term does not include:
>
> (A) dedication of land for public parks or payment in lieu of the dedication to serve park needs;
>
> (B) dedication of rights-of-way or easements or *construction or dedication of* on-site water distribution, wastewater collection or drainage facilities, or *streets, sidewalks or curbs if the dedication or construction is required by a valid ordinance and is necessitated by and attributable to the new development*; or
>
> (C) lot or acreage fees to be placed in trust funds for the purpose of reimbursing developers for oversizing or constructing water or sewer mains or lines.

Local Gov't Code § 395.001(4) (emphasis added).

You argue that the escrow deposit required by Ordinance 2684, a presumptively valid ordinance predating the impact fee statute, is exempted from the definition of impact fee by section 395.001(4)(B). In light of the legislative history of the impact fee statute, we agree.

The impact fee statute was adopted by the legislature in 1987. Act of May 25, 1987, 70th Leg., R.S., ch. 957, § 2, 1987 Tex. Gen. Laws 3245, 3246-49. According to the senate bill analysis, its intent was to address such problems as "(1) excessive fees bearing no rational relation to infrastructure funding requirements; (2) fees assessed on new development to promote the general public good; (3) fees not used for the purpose for which they were imposed; and (4) fees that increase the cost of housing." Senate Comm. on Economic Dev., Bill Analysis, S.B. 336, 70th Leg. (Apr. 9, 1987).

The escrowed funds at issue here, however, are by the terms of the ordinance directly related to costs attributable to the development itself; and, you implicitly assert, the curbing and guttering involved are necessitated by the new development. These fees, accordingly, are of a sort which the sponsor of the bill asserted were not affected, or contemplated to be affected, by the legislation.

In the hearings of the Senate Economic Development Committee on the legislation, the following colloquy occurred between one of the committee members and Senator Farabee, the bill's author:

> Q. Some of my cities have subdivision ordinances and we require developers to pay for streets and sewers and water and all, which has worked pretty well in those cities. Does this change it in any way? Does this keep my cities from doing that if they want to?

> A. No, no. *There is nothing that would stop the cities from requiring the curbing and streets within the subdivision.*

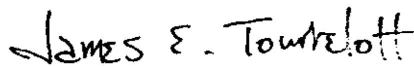
Hearings on S.B. 336 Before the Senate Comm. on Economic Dev., 70th Leg. (Apr. 9, 1987) (transcript available from Senate Staff Services Office) (emphasis added).

In our view, the ordinance at issue here is precisely the sort of ordinance Senator Farabee was speaking of, and precisely the sort the subsection 4(B) exemption contemplates. The fact that in the Sherman ordinance, the developer is required to place the necessary funds in escrow rather than to pay them later appears to us a distinction without a difference. The purpose of escrow fees is simply to insure that the necessary moneys are available when needed. "A municipality and its taxpayers should not have to be a joint venturer with a developer or take the risk that its . . . expenses will not be paid in the future." *Flama Construction Corp. v. Township of Franklin*, 493 A. 2d 587, 592 (N.J. App. Div. 1985). Accordingly, we conclude that the escrow fee mandated by Ordinance No. 2684 of the City of Sherman, Texas is not an impact fee within the meaning of Local Government Code section 395.001(4).

S U M M A R Y

The escrow fee mandated by Ordinance No. 2684 of the City of Sherman, Texas is not an impact fee within the meaning of Local Government Code section 395.001(4).

Yours very truly,



James E. Tourtelott
Assistant Attorney General
Opinion Committee