

## MEMO

**TO: MAYOR AND CITY COUNCIL**

**FROM: DOUG YOUNG**

**RE: PAYMENT BY CITY OF COST OF PRIVATELY OWNED WATER LINE CONNECTIONS TO RELOCATED WATER MAINS**

**DATE: 10/14/13**

In this Memo I discuss whether the City has the authority to pay the cost to install connecting lines ("**laterals**") from residences to water mains relocated from backyard to the rights-of-way in City streets.

### SHORT ANSWER

The Texas Constitution provides for the legislature to authorize a city to pay the cost of laterals on private property but requires that the owner of benefitted property re-pay the city all such cost over a period not to exceed five years. The legislature has adopted such a scheme.

### DISCUSSION

Texas Local Gov't Code Chapter 552 provides a broad grant of authority for municipalities to own, acquire, improve, extend and reconstruct water and wastewater systems. Subchapter D of Chapter 552 provides for a scheme for a municipality to assess part of the cost of improvements to the municipality's water system to the owners of "benefitted properties." Section 552.064. The costs so assessable are nine-tenths of the estimated cost of improvements, which are secured by a lien against the benefitted property, unless the property is exempt from the lien of a special assessment for local improvements under the Texas constitution. Sections 552.065 and 068. Assessment are to be based on the "front foot rule" according to the number of linear feet of the property that abuts on a public street, unless the governing body of the municipality determines that application of such rule would result in injustice or inequality. Section 552.066. Section 552.069 provides for notice and an opportunity for a hearing prior to making an assessment against a benefitted property.

More to the point, section 552.901 provides in pertinent part:

(a) By ordinance, a municipality may contract for the relocation or replacement of a...water lateral that serves a residential structure on private property to connect the lateral to a new, renovated, or rebuilt...water main constructed by the municipality. *The municipality shall assess the cost of the relocation or replacement of the lateral against the property on which the lateral is located. A lien attaches to the property for the cost of the relocation or replacement.*

(b) Before a municipality contracts under Subsection (a), the municipality must obtain the property owner's written consent to the contract...the written consent must state that...

...

(3) *the municipality will not pay any part of the relocation or replacement cost;*  
and

(4) *the owner has five years from the date the work is completed to repay the cost to the municipality.*

(emphasis added)

Section 552.901 follows the extent of the authority of a city as provided in Tex. Const. art XI, Section 12, adopted in 1983, which provides in pertinent part:

The legislature by general law may authorize a city...to expend public funds for the relocation or replacement of...water laterals on private property if the relocation or replacement is done in conjunction with or immediately following the replacement or relocation of...water mains serving the property. the law must authorize the city...to affix, with the consent of the owner of the private property, a line on the property for the cost of relocating or replacing the laterals on the property and must provide that that the cost shall be assessed against the property with repayment by the property owner to be amortized over a period not to exceed five years at a rate of interest to be set as provided by the law...

The court in *State v. City of Austin*, 331 S.W.2d 737 (Tex. 1960) recognized an exception to the prohibition against the use of public funds for private utility purposes. That case involved a statute that required the State to pay the cost to relocate utility lines when the State required such relocation in connection with the improvement of a highway as part of the interstate highway system. The State in *City of Austin* resisted paying such costs on the ground that such payment would violate several constitution prohibitions, including Tex. Const. art III, Section 51. Art. III, Section 51 limits the authority of the legislature to make grants of public moneys. The *City of Austin* Court ruled that the purpose of the constitutional provisions cited by the State were to, "prevent the gratuitous grant of such funds to any individual or corporation whatsoever." *Id.* at 742. The court continued,

[I]t should be noted that no net gain accrues to the utility from the relocation of its facilities in the manner and under the conditions prescribed by the statute...As pointed out by the Supreme Court of Minnesota, the reimbursement merely restores the utilities to the position in which they were prior to the relocation of their facilities. [citation omitted] It is also clear that if not reimbursed for their non-betterment costs, respondents will be subjected to substantial expense as a direct result of the highway improvement program...The question to be decided then is whether the use of public funds to pay part or all of the loss or expense to which the individual or corporation is subjected by the state in the exercise of its police power is an unconstitutional donation for a private purpose. We think not..."  
*Id.* at 743

Under the rule of *City of Austin*, the legislature could have authorized municipalities to pay residential property owners' costs of relocating laterals, until the adoption of Const. art XI, Section 12 in 1983. The adoption of art. XI, Section 12 foreclosed such a possibility.

Only one court has considered Local Gov't Code Section 552.901 since the adoption of Const. art. XI, Section 12 in 1983. In *City of Dallas v. Blanton*, 200 S.W.3d 266 (Tex. App.--Dallas, 2006, no writ) the city refused to pay the cost to relocate sewer laterals on private properties, which relocation was made necessary when the city moved its sewer mains from the back of the affected properties to the right-of-way in front of the properties. The city appears not to have adopted a program to pay the cost of such relocation and to assess the cost to the affected property owners. Rather, the decommissioning of the old sewer line was to be delayed to provide for time for property owners to connect to the replacement line. The court held that such refusal by the city did not constitute a taking. The *Blanton* court based its decision on the authority of a city generally to require the relocation of such lines. The court referred to Section 552.901 but did not discuss in its analysis of the taking claim whether the city was prohibited from paying the cost of relocation.

## **CONCLUSION**

Local Government Code Section 552.901 provides for the full extent of authority permitted by Const. art. XI, Section 12 as to a city's authority to pay the cost of water laterals on private property. The City may contract for such work to be performed for consenting property owners, provided such property owners consent to payment of the cost as determined pursuant to subchapter D of Local Government Code Chapter 552, with such cost secured by a lien against the affected except where prohibited by the Texas Constitution.