

Memorandum

To: The Honorable City Council Members and City Manager Haverlah

Issued by: City Attorney's Office, Denton, Navarro, Rocha, Bernal & Zech, P.C.

Date: September 02, 2020

Re: Senior Citizen Discount

The City Council has requested certain information and analysis by the City Attorney's office be released to the public to explain the City Council's legal basis for the elimination of senior citizen discounts for utility rates. This memo is for that purpose.

Questions/Issue presented:

Does state law authorize a discount for water and sewer rates for Senior Citizens as a class of utility customer?

Brief Answer:

Texas Government Code, Chapter 1502 requires that rates charged for utility services must be equal and uniform between permissible classes of customers. Further, that Chapter prohibits allowing any free service, except as specifically indicated therein. Additionally, the Texas Supreme Court has determined that permissible factors to establish different classes of customers are limited to those related to differing characteristics of the type of service provided, rather than authorizing differences between similarly-situated rate payers.

Factual Background:

Section 11-3 of the City of Copperas Cove's Code of Ordinances establishes a water, sewer and garbage service rate discount for senior citizens and non-profit, federally funded retirement centers within the City limits who provide services exclusively to senior citizens sixty-five years of age or older.¹ This section provides:

Sec. 11-3. - Service rates for senior citizens.

¹ Chapter 11, Section 11-3, Subsections (a) and (b), Copperas Cove Code of Ordinances, current version (2018).

(a) These service rates for senior citizens will only apply to the following:

- (1) Senior citizens of Copperas Cove sixty-five (65) years of age or older; and
- (2) Senior citizens who live within the city limits and are classified as residential customers; and
- (3) Senior citizens responsible for the respective utility billing account.
or
- (4) Non-profit, federally funded retirement centers within the city limits, who provide services exclusively to senior citizens sixty-five (65) years of age or older.

(b) The senior citizen rates will be set as follows:

- (1) A twenty-per cent (20%) discount applied to current water, sewer, and garbage rates.
- (2) These rates will be adjusted according to future rate changes of regular billings.

(Ord. No. 1985-50, 10-1-85; Ord. No. 1987-34, 9-15-87; Ord. No. 1996-41, §§ II, III, 9-17-96; Ord. No. 2001-37, § 1, 9-17-01).

Analysis:

I. Equal and Uniform/No Free Service

Texas Government Code, Chapter 1502 establishes rules relating to municipal charges for municipal services such as water, sewer, solid waste disposal or other services provided by utilities owned and operated by the City. Section 1502.057 of this Chapter provides:

§ 1502.057. Charges for Services

(a) A municipality shall impose and collect charges for services provided by a utility system in amounts at least sufficient to pay:

- (1) all operating, maintenance, depreciation, replacement, improvement, and interest charges in connection with the utility system;
- (2) for an interest and sinking fund sufficient to pay any public securities issued or obligations incurred for any purpose described by Section 1502.002 relating to the utility system; and
- (3) any outstanding debt against the system.

(b) The rates charged for services provided by a utility system must be equal and uniform. A municipality may not allow any free service except for:

- (1) municipal public schools; or

(2) buildings and institutions operated by the municipality.²

(Emphasis supplied).

As indicated above, Texas statutory law requires that all public utility rates must be “equal and uniform.”³ This rule is actually the codification of a longstanding common-law rule relating to public utility rates, which was acknowledged by the Supreme Court of Texas in 1952 wherein that Court stated:

The common-law rule that one engaged in rendering a service affected with a public interest or, more strictly, what has come to be known as a utility service, **may not discriminate in charges or service as between persons similarly situated is of such long standing and is so well recognized that it needs no citation of authority to support it.** The economic nature of the enterprise which renders this type service is such that the courts have imposed upon it the duty to treat all alike unless there is some reasonable basis for a differentiation. Statutes have been enacted in almost every state making this common-law rule a statutory one.⁴ (emphasis added)

Texas case law, in interpreting the “equal and uniform” standard, establishes that a municipally owned utility is permitted a reasonable classification of consumers for the purpose of establishing rate differentials based on certain variable factors. In one such case, one Texas Appellate court found:

It is well established that a municipal corporation operating its water works or other public utility has the right to classify consumers under reasonable classification based upon such factors as the **cost of service, the purpose for which the service or product is received, the quantity or amount received, the different character of the service furnished, the time of its use** or any other matter which presents a substantial difference as a ground of distinction.⁵ (emphasis added)

That court went on to say that many factors are properly considered in determining the reasonableness of a classification and there is no one factor which is of itself controlling to the exclusion of all others.⁶ Each case must be decided upon its own facts and the burden of proof is on the party claiming an unreasonable discrimination.⁷ However, the Texas Supreme Court has found that “quantity used” and the “cost of service” are the principal factors.⁸

² Texas Government Code § 1502.057.

³ Id.

⁴ City of Texarkana v. Wiggins, 151 Tex. 100, 104, 246 S.W.2d 622, 624 (1952).

⁵ Caldwell v. City of Abilene, 260 S.W.2d 712, 714 (Tex. Civ. App. 1953), writ refused.

⁶ Id.

⁷ Id. (citing Ford v. Rio Grande Valley Gas Co., 141 Tex. 525, 174 S.W.2d 479).

⁸ Ford v. Rio Grande Val. Gas Co., 141 Tex. 525, 527, 174 S.W.2d 479, 480 (1943) (analyzing different rate classifications in gas utility case where state statute required fair and equal treatment and no discrimination between similar users).

In a more recent case a plaintiff alleged that certain tap fees charged in the City of Killeen are discriminatory because only multi-family customer tap fee charges included operating and maintenance expenses for the entire utility system and tap fees for single family dwellings recovered only the approximate cost of making the connection, therefore, the tap fees for multi-family dwellings were far in excess of the cost of installation of the tap. The Austin Court of Appeals upheld the differing tap fees charged in the City of Killeen because the difference in fees was based on the appropriate factors as laid out by the Texas Supreme Court. The Court went on to state:

[P]ublic utilities are under a legal duty to charge reasonable rates and ensure that they are not unduly discriminatory.⁹ It is well established, however, that municipalities have the right to classify customers “based upon such factors as the cost of service, the purpose for which the service or product is received, the quantity or amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a ground of distinction.”¹⁰ But in classifying its customers, municipalities “**may not discriminate in charges or services as between those similarly situated.**”¹¹ (emphasis added)

Two utility customers, a Senior Citizen and a non-senior citizen, who each receive the same residential utility service are similar situated. Differing rates between those two users would be discriminatory. None of the variables stated by the Texas Supreme Court or the Austin Court of Appeals would allow for differing rates based on income level or age of the service user. As such, state law does not authorize a discounted rate for senior citizens as a class of customers.

⁹ Id. (citing James C. Bonbright et al., Principles of Public Utility Rates 515 (2d ed.1998)).

¹⁰ Id (citing Gillam v. City of Fort Worth, 287 S.W.2d 494, 497 (Tex.Civ.App.-Fort Worth 1956, writ ref'd n.r.e.)).

¹¹ Id. (citing Wiggins, 151 Tex. at 104)