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## State's High Court weighs stormwater appeal

**By David Saleh Rauf**

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The City of New Braunfels has asked the Texas Supreme Court to decide the fate of its stormwater connection fee.

Attorneys for the city have filed with the state's highest court to overturn an appeals court decision that labeled the city's drainage impact fee invalid.

The city began collecting the fee from property owners and developers in 2005 for the impact their projects would have on the city's drainage system. The ordinance was amended — to nullify the stormwater development fee that existed — and created a stormwater connection fee. In its final version, the fee charged owners of a new development within 3,000 feet of the city's drainage system \$600 for each single-family or two-family lot and 14 cents per-square foot for most other developments.

In August, the Third Court of Appeals reversed a district court ruling, thereby invalidating the fees. The city met with its lawyers behind closed doors in the weeks following the appeals court decision, and since October have petitioned the high court for a review of the appellate court's ruling.

The city's petition was forwarded to the justices last week, and now the Supreme Court is considering whether it will hear the case and render an opinion. A vote on whether the high court will move forward with the case or flat out deny the city's petition could come as early December, said Supreme Court Clerk Blake Hawthorne. The petition for review stage could, however, drag on for months, according to a study of The Supreme Court's 2007 docket.

A Supreme Court ruling in New Braunfels' favor is the only way the city can salvage its drainage impact fee.

"We're still in it," said City Manager Mike Morrison. "We're always for hoping for a win."



The New Braunfels Great Home Builders Association, Oakwood Estates Development Co. and two individual property owners brought the lawsuit against the city in 2005. The suit alleged the city's stormwater connection fee was an illegal impact fee and an illegal drainage charge because the city's ordinance did not fully comply with a chapter of the Texas Local Government Code it was based on.

The Austin court of appeals agreed, ruling that while cities maintain the right to assess a fee to developers to offset potential impact to the city, New Braunfels did not follow state law in assessing the fee.

"The City failed to follow statutory requirements imposed by the chapter, including publishing notices, holding hearings, assessing the charges against all property owners within the service area, and exempting lots on which no structure exists," the appeals court ruled in its opinion. The City "may not pick and choose the provisions with which it wishes to comply."

The city's chances of getting the Supreme Court to render a decision on the case — let alone a favorable one — remain slim — about 10 percent. During the high court's 2007 fiscal year, which ended Aug. 31, 128 deciding opinions were rendered. More than 1,000 cases are filed with the Court every year, Hawthorne said.

"You never know what a court is going to do," said Charlie Zech, one of three lawyers arguing for the city. Zech, a former New Braunfels city attorney from 2001 to 2006, declined to discuss specifics of the lawsuit or the appeal.

If the court decides to take on the case, it could still be more than two years before an opinion is issued. From the initial filing stage to when an opinion is rendered takes an average of 28 months, with some litigation left pending for almost four years, according to the same Texas Supreme Court docket analysis.

The lengthy legal process means the city will continue to rack up legal fees as long as their petition is being considered. The city currently has spent about \$28,000 defending the suit since 2005, according to invoices. The same invoices indicate attorneys are costing taxpayers anywhere from \$45 to \$220 per hour. If the Supreme Court decides to hear the case, the next step in the process — the merits briefing stage — usually requires about 80 to 120 attorney hours on average, according to docket analysis.

And if the Third Court ruling stands, the city will be forced to return the legal fees paid by the plaintiffs. Those fees are estimated at about \$60,000 to \$75,000, said David Pfeuffer, a plaintiff in the case.

What will happen to the approximately \$300,000 in fees collected by the city remains an unresolved issue. The money is being held in escrow and no decision has been made on whether the funds will remain with the city or be returned to the property owners.

Robin Melvin, one of three attorneys representing the group suing the city, said she has not yet filed a motion asking for the money to be returned. The lawsuit has not yet been fully resolved, she said.

"You don't count your chickens before they're hatched," Melvin said.

City leaders say they have already taken steps to address drainage infrastructure around New Braunfels. The City Council has budgeted more than \$1 million for drainage projects and city



leaders expect to have several projects underway by spring, Morrison said. The City Council also will hear a presentation from engineers dealing with local drainage problems at its meeting on Dec. 3.

"There is a little bit of uncertainty right now because of the court case," Morrison said. "But the council didn't want to wait for the outcome of the court case."

Morrison said the future approach to addressing drainage problems in the city will be funded by issuing debt, through general funds and there "will be the collection of fees in some form or fashion."

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