

CITY OF EL PASO, TEXAS
AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM

DEPARTMENT: City Clerk

AGENDA DATE: December 9, 2008 for Introduction.
Public Hearing on December 16, 2008

CONTACT PERSON/PHONE: Richarda Duffy Momsen, City Clerk, 541-4127

DISTRICT(S) AFFECTED: All

SUBJECT: An Ordinance of the City of El Paso, Texas, transferring rate making authority and changing the rate of a municipal utility drainage system.

BACKGROUND / DISCUSSION: On October 30, 2008, an initiative petition was filed with the City Clerk's Office, proposing this ordinance. On November 14, 2008, the City Clerk certified the petition as having the requisite number of signatures.

Section 3.11 (Initiative) of the City Charter states that upon verification of the petition, the ordinance must be placed on the agenda of a Council meeting to be held within thirty working days of receipt. The provision further states that this ordinance is to be treated by the Council as any other proposed ordinance. Under other Charter provisions, all proposed ordinances must be introduced and published before a public hearing is held and action may be taken.

Thus, pursuant to all applicable City Charter provisions and requirements, the City Clerk is presenting this ordinance to the City Council for introduction—the required first step of the process.

PRIOR COUNCIL ACTION:

Has the Council previously considered this item or a closely related one?

Related Ordinance No. 16668 was adopted on June 19, 2007.

AMOUNT AND SOURCE OF FUNDING:

BOARD / COMMISSION ACTION:

*****REQUIRED AUTHORIZATION*****

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: _____
(Example:if RCA is initiated by Purchasing, client department should sign also) *Information copy to appropriate Deputy City Manager*

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY OF EL PASO, TEXAS,
TRANSFERRING RATE MAKING AUTHORITY AND CHANGING
THE RATE OF A MUNICIPAL UTILITY DRAINAGE SYSTEM.**

WHEREAS, the City of El Paso (“El Paso”) previously established a Municipal Drainage Utility System via Ordinance No. 16668; and

WHEREAS, the citizens of El Paso have clearly voiced the opposition of the Municipal Drainage Utility System and the fees imposed for its operation; and

WHEREAS, the City, in deference to the views of its Citizens, wishes to restructure and reduce the fees imposed for the operation of the Municipal Drainage Utility System; and

WHEREAS, the City recognizes state law prohibits it from altogether dissolving the Municipal Drainage Utility System until it has operated substantially continuously for five years; and

WHEREAS, the City retains the authority to transfer operation of the Municipal Drainage Utility System from the Public Service Board back to City Council and to reduce the rate for the drainage utility.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF
THE CITY OF EL PASO:**

Section I. Definitions.

“Board” means that certain board of trustees known as the “Public Service Board” established by the City pursuant to Section 1502.070 of the Texas Government Code and charged with having complete authority and control of the management and operation of the water and wastewater system of the City, as “City” means the City of El Paso, Texas, a Texas Home Rule Municipality.

“System” means the Municipal Drainage Utility System established by Ordinance 16668 and encompasses the complete drainage system of the City as it now exists and may be improved, added to, or extended hereafter, there being included in such term all drainage facilities now or hereafter owned or operated.

Section II.

1. Section III D of Ordinance 16668 is hereby rescinded. The authority and control of the management and operation of the system is hereby transferred from the Board to the City. The System shall be operated by the City Manager subject to the control and direction of City Council.
2. No monthly stormwater fee shall be imposed on any improved parcel within the City of El Paso or on any customers of the Board until further action by the City of El Paso acting through its City Council.
3. All fees and charges of the Municipal Drainage Utility System and all fees for storm water drainage are hereby suspended until further action by the City of El Paso acting through its City Council.
4. This Ordinance shall take effect immediately upon its adoption.
5. The City Manager is authorized to execute documents and take all appropriate action to give effect to this Ordinance.

APPROVED AND ADOPTED this _____ day of _____.

CITY OF EL PASO

John F. Cook, Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

Source: Initiative Petition



OFFICE OF THE CITY ATTORNEY

MEMORANDUM

TO: Mayor and City Representatives
Joyce Wilson, City Manager

FROM: Elaine S. Hengen, Senior Assistant City Attorney

THRU: Charlie F. McNabb, City Attorney

SUBJECT: Analysis of the proposed initiative petition ordinance

DATE: December 4, 2008

The initiative petition ordinance has been placed for introduction on the City Council's agenda for December 9, 2008. Based on a review of this proposed ordinance, we have identified several issues and other critical matters that are not addressed and resolved by the language in the initiative petition. Accordingly, we are advising you of these issues and the potential consequences to the City and the PSB if these issues are not addressed and resolved prior to the adoption of any ordinance that would transfer the authority and management of the storm water utility from the PSB back to the City.

Analysis of the language and effect of the initiative petition ordinance:

The ordinance contained in the initiative petition does not directly amend Ordinance No. 16668, except to the extent that the initiative petition ordinance rescinds Section III D of that ordinance. Thus, nearly all of the original language and provisions in Ordinance No. 16668 remain in place and the initiative petition ordinance would constitute a new ordinance that must be read and interpreted together with Ordinance No. 16668.

In reading the language in the two ordinances, the initiative petition ordinance contains many terms and provisions that conflict with the provisions remaining in Ordinance No. 16668. Several of these provisions are so contrary and irreconcilable that

the two provisions could not both stand in force and effect. Part of the language of the initiative petition ordinance states that, “The authority and control of the management and operation of the System is hereby transferred from the Board to the City. The System shall be operated by the City Manager subject to the control and direction of City Council.” We believe that under the most appropriate statutory construction principles, this language will operate to constitute an implied or constructive repeal of the provisions in Ordinance No. 16668 that are directly contradictory. As a result, we believe that if a court of law were to analyze and rule on the proper interpretation of the two ordinances, that the initiative petition ordinance would operate to rescind the delegation to the PSB of the authority to operate the storm water utility, and in effect rescind other, contradictory provisions of Ordinance No. 16668 relating to the duties of the PSB Board and the General Manager.

Issues not addressed or resolved by the initiative petition ordinance:

There are several unresolved issues regarding matters that are not addressed by the initiative petition ordinance and which cannot be reconciled by reading both ordinances together or determining that some provisions in Ordinance No. 16668 would be impliedly repealed. These are detailed below.

- **No provision for storm water fees already collected:**

The PSB has collected fees for the storm water utility and also has billed, but not yet collected other fees. Section 402.049, Local Govt Code, requires that the income of a drainage utility system must be segregated and be completely identifiable in the municipality’s accounting. Under Ordinance No. 16668, the PSB was obligated to perform this function and maintain this accounting. The initiative petition ordinance makes no provisions for the transfer of these funds to the City. By law, these funds cannot remain with the PSB if the utility will be transferred to the City, so the Council is legally obligated to take appropriate action to provide for the transfer of these funds.

- **No provision for the transfer of the utility’s assets and liabilities:**

The initiative petition ordinance fails to address the storm water utility’s assets and liabilities, if any. I am aware that the PSB purchased equipment for use by the storm water utility, but I do not know how those purchases were funded, nor do I have any information as to other assets and the liabilities of the utility. Council must also take appropriate action to address the transfer of all of the assets, and to make the necessary legal arrangements for the City to assume all liabilities that have been incurred by the utility. Adopting the initiative petition ordinance without first making the necessary and appropriate arrangements to transfer the funds, assets and liabilities of the utility, would create issues of potential non-compliance with state law, and potentially jeopardize the financial standing of both the PSB and the City and potentially subject both to liability.

- **No provision for fees already billed but not collected:**

The initiative petition ordinance contains provisions relating to the cessation of charging and collecting the fees until the City Council takes further action. The language specifically states, “All fees and charges of the Municipal Drainage Utility System and all fees for storm water drainage are hereby suspended until further action . . .” This provision creates a dilemma that must be addressed for the fees that have been billed, but not collected, for which payment may be tendered after the initiative petition ordinance would be adopted. The language plainly prohibits collecting charges without regard to the date on which the fees were billed. Potentially, this language could require staff to issue refunds for these tendered payments at a significant cost to the City. Because of this, we wanted to call this particular language and problem to the Council’s attention.

- **No provision addressing the insurance policy covering the assets:**

Ordinance No. 16668 requires the PSB to insure the assets of the drainage utility system. However, the initiative petition ordinance does not address this obligation. By law, the Council cannot require the PSB to continue to hold and pay for this insurance policy if the utility is transferred from it. Accordingly, the Council needs to determine how to legally transfer or otherwise eliminate the obligations imposed on the PSB by the insurance policy before the utility would be transferred.

Charter requirements for Council action on the initiative petition ordinance:

Section 3.11 of the City Charter provides that this “item shall be treated by the Council exactly as any other proposed ordinance.” Thus, the Council has the ability to act on this ordinance in the same manner as it would address any other ordinance for which unresolved issues have been identified that need to be resolved prior to adoption. Accordingly, the Council does have the opportunity to fully address the outstanding unresolved issues before the Council takes the vote on the ordinance.

Cc: City Clerk