



Recent Developments in the Regulatory Arena: Use of a Municipality's Public Rights of Way



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City's Historical Rights to Control Rights of Way

- **Tex. Civ. Art. 1175 – Power to prohibit use of street by any character of public utility unless receive city's consent and pay compensation for use**
- **Tex. Constitution Art. III, Sec. 52 – A city may not grant . . . a thing of value in aid of, or to any individual, association or corporation whatsoever... .**

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City's Historical Rights to Control Rights of Way

***City of Waco v. Powell*, 32 Tex. 258, 272(Tex. 1869)**

– City has duty to ensure that streets subserve interests of the public

***Green v. City of San Antonio*, 178 S.W. 6 (Tex.Civ.App.-San Antonio 1915, writ denied)**

– No person may use street for private business and use may be prohibited or regulated by State or municipality for the public good

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Compensation for Use of ROW is Rent and Not a Tax

- In 1940 the Texas Supreme court held, following a 1893 U.S. Supreme Court precedent, that municipal compensation for use of the rights-of-way was a “rental” payment — not a “tax.”
- ***Fleming v. Houston Lighting and Power***, 143 S.W.2d 923, 924 (Tex. 1940), citing ***St. Louis v. Western Union Telegraph Co.***, 148 U.S. 92, 13 Sup. Ct. 485, 37 L.Ed. 380, (U.S. Sup. Ct. 1893).)
- Attorney General Opinions also state the ROW fee is a rental fee for use of the rights-of-way, not a tax. (Tex. Atty. Gen. Op. H-1265, Tex. Atty Gen. Op. JM-16.)

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Type of Service Determines Fees Due

- Telecommunications Utilities
- Electric Utilities
- Gas Utilities
- Cable TV
- Wireless Carriers

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