

ORDINANCE NO. 86-2

AN ORDINANCE amending the provisions of Ordinance No. 86-1 to incorporate additional covenants in relation to the use, expenditure and investment of the proceeds of the "City of Cumby, Texas, Tax and Utility System Subordinate Lien Revenue Certificates of Obligation, Series 1986" to preserve the tax exempt status of the Certificates under the proposed "Tax Reform Act of 1985" (H.R. 3838); resolving other matters incident and related thereto; and declaring an emergency.

WHEREAS, on January 7, 1986, the Board of Commissioners of the City of Cumby, Texas, passed and adopted Ordinance No. 86-1 authorizing the issuance of \$138,000 in principal amount of "City of Cumby, Texas, Tax and Utility System Subordinate Lien Revenue Certificates of Obligation, Series 1986" (the "Certificates") and the sale thereof to the Texas Water Development Board (the "Board") in evidence of a loan to the City; such ordinance being entitled as follows:

"AN ORDINANCE authorizing the issuance of 'City of Cumby, Texas, Tax and Utility System Subordinate Lien Revenue Certificates of Obligation, Series 1986'; levying an ad valorem tax upon all taxable property within the City and pledging the Net Revenues derived from the operation of the City's Waterworks and Sewer System for the payment of the principal of and interest on said Certificates; specifying the terms and features of such Certificates and resolving other matters incident and related to the issuance, sale, security, payment and delivery of said Certificates; and declaring an emergency."

AND WHEREAS, the United States House of Representatives, on December 17, 1985, passed H.R. 3838 known as the "Tax Reform Act of 1985" which amends and changes the federal tax laws with respect to tax exempt obligations issued after December 31, 1985 and in general would condition the exemption from federal income taxation of interest on the Certificates upon (1) the periodic payment by the City to the United States of certain arbitrage "profits" from the investment of certain funds, including those earned from the investment of proceeds of such Certificates and amounts held for the payment of debt service

on such Certificates, (2) the expenditure of certain minimum amounts of proceeds of such Certificates by certain dates, (3) the continued use of the facilities financed by the proceeds of such Certificates in the governmental activities of the City and not otherwise, and (4) the filing by the City of an informational report on such Certificates with the Internal Revenue Service within a certain period of time after issuance of such Certificates; and

WHEREAS, to enable the City to proceed with the delivery of the Certificates to the Board in accordance with the Board's regulations, it is necessary to amend the provisions of Ordinance No. 86-1 authorizing the issuance of the Certificates to incorporate additional covenants and representations by the City in relation to the use, expenditure and investment of the proceeds of the Certificates; and

WHEREAS, the Board of Commissioners hereby finds and determines that the City of Cumby, Texas can satisfy and comply with the provisions of H.R. 3838 that relate to the tax exempt status of the interest on the Certificates from federal income taxes in the event such legislation, as passed by the United States House of Representatives, should become law; now, therefore,

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF CUMBY, TEXAS:

SECTION 1: That Section 23 of Ordinance No. 86-1 authorizing the issuance of the Certificates, passed and adopted by the Board of Commissioners on January 7, 1986, be and the same is hereby amended to read as follows:

"SECTION 23: That the City hereby certifies and covenants that the proceeds of the Certificates are needed at this time to finance the costs of capital improvements planned by the City; based on current facts, estimates and circumstances, it is reasonably expected final disbursement of the Certificate proceeds will occur within three years from the date of the receipt thereof by the City; it is not reasonably expected the proceeds of the Certificates or moneys deposited in the Certificate Fund created for the payment of the Certificates will be used or invested in a manner that would cause the Certificates to be "arbitrage bonds" within the meaning of Section 103(c) of the Internal Revenue Code of 1954, as amended (the "Code"), or any regulations or published rulings pertaining thereto; and save and except for the Certificate Fund created herein, no other funds or accounts have been established or pledged for the payment of the Certificates. The covenants herein made are for the benefit of the Holders of the Certificates and may be relied upon by the Holders of the Certificates and bond counsel for the City.

Furthermore, unless and until the City shall receive an opinion of Messrs. Dumas, Huguenin, Boothman & Morrow, Attorneys, Dallas, Texas, to the effect that failure to comply with any of the following provisions will not adversely affect the tax-exempt status of interest on the Certificates, the City hereby covenants and agrees to and with the Holders as follows:

(a) None of the gross proceeds of the Certificates will be used directly or indirectly (i) to make or finance loans to any person or (ii) in any trade or business carried on by any person (other than use as a member of the general public). For purposes of the foregoing, the term "person" does not include a governmental unit other than the United States or any agency or instrumentality thereof and the term "trade or business" includes any activity carried on by a person other than a natural person.

(b) The City will make no use of the proceeds of the Certificates or the facilities financed with the proceeds of the Certificates which would result in the interest on the Certificates being includable in the gross income, as defined in section 61 of the Code, of the Holders.

(c) At least 5% of the net proceeds of the Certificates will be spent within 30 days after the date of delivery of the Certificates to carry out the governmental purpose of the issue and all of the net proceeds of the Certificates will be spent within 3 years after the date of delivery of the Certificates. For purposes of the foregoing covenant, the term "net proceeds" means the proceeds of the Certificates reduced by issuance costs.

(d) On or before the 15th day of the second calendar month after the close of the calendar quarter in which the Certificates are delivered, the City will submit to the Secretary of the Treasury or his designee, a statement which sets forth the name and address of the City, the date of issue of the Certificates, the amount of net proceeds of the Certificates, the stated interest rate, term, and face amount of each obligation which is part of the Certificates, and the cost of issuance.

(e) Except to the extent permitted under Sections 1.103-13 and 1.103-14 of the Income Tax Regulations promulgated under section 103 of the Code as in effect on the date of delivery of the Certificates as modified by the provisions of this Ordinance, no portion of the proceeds of the Certificates are reasonably expected to be used, or will be used, directly or indirectly, to acquire, or to replace funds which were used directly or indirectly to acquire, any investment property

which can reasonably be expected, at the time of issuance of the Certificates, to produce a yield for the term of issue of the Certificates, which is materially higher, taking into account any discount or premium, than the yield on the Certificates. The term "investment property" means any security, obligation, annuity contract, or investment-type property other than tax-exempt bonds, and the term "yield" means the discount factor which, when used in computing the present worth of all payments of principal and interest to be paid on an obligation, produces an amount equal to the purchase price, which in the case of the Certificates is the initial offering price to the public (exclusive of bond houses and brokers) at which a substantial number are sold.

(f) The City reasonably expects that it will incur a binding obligation to spend the lesser of (x) an amount equal to 2-1/2% of that portion of the estimated total project cost financed by the Certificates or (y) \$100,000 with respect to the projects to be financed with the proceeds of the Certificates within six months from the date of delivery of the Certificates, that construction or acquisition of the facilities to be constructed or acquired with the proceeds of the Certificates will proceed promptly and with due diligence to completion, and that all of the spendable proceeds of the Certificates will be expended within three years from the date of delivery of the Certificates. In light of the foregoing expectations, the City may invest the original proceeds of the Certificates without restriction as to yield during the three year period beginning on the date of delivery of the Certificates, except that:

(i) with respect to any proceeds of the Certificates which are used in connection with the acquisition of tangible property, the City covenants that it will not invest such proceeds to produce a yield materially higher than the yield on the Certificates for a period of more than 30 days beginning on the date of delivery of the Certificates, and

(ii) with respect to proceeds of the Certificates which are used for construction, reconstruction or rehabilitation, the City covenants that it will not invest such proceeds to produce a yield materially higher than the yield on the Certificates beyond the first to occur of

- (A) the substantial completion or abandonment of such construction, reconstruction, or rehabilitation;
- (B) the expenditure of an amount equal to the proceeds of the Certificates with respect to such construction, reconstruction, or rehabilitation; or
- (C) the day which is three years after the earlier of the date of delivery of the Certificates or the date of commencement of such construction, reconstruction or rehabilitation.

(g) The City will pay to the United States in installments as hereinafter described the excess (the "Excess") of the aggregate amount earned on all nonpurpose investments (other than investments attributable to the Excess) over the amount which would have been earned if all nonpurpose investments were invested at a rate equal to the yield on the Certificates, plus any income attributable to the Excess. The installments shall be paid by the City to the United States at least once every five years in an amount equal to at least ninety percent of the Excess plus investment earnings thereon as of the date of payment; and the last installment, which shall be paid within 30 days after the date on which the last obligation of the Certificates is discharged, shall be an amount sufficient to pay the remaining balance of the Excess and investment earnings thereon due with respect to the Certificates. The City hereby declines to make the election provided by Section 147(e)(4) of the Internal Revenue Code of 1985, as set forth in section 701 of H.R. 3838 pending in the Ninety-Ninth Congress of the United States, or any similar provision of any legislation which may be enacted into law, with respect to the Certificate Fund, and will maintain the Certificate Fund in a separate account apart from any other fund of the City. In calculating the aggregate amount earned on all nonpurpose investments, the City shall take into account any gain or loss on the disposition of a nonpurpose investment. The City shall not be obligated to make the payment to the United States described herein if all of the gross proceeds of the Certificates, other than gross proceeds held from time to time in the Certificate Fund, are expended for the governmental purpose for which the Certificates were issued no later than the day which is six months after the date of delivery of the Certificates. The term "gross proceeds" includes original proceeds of the Certificates, amounts received from the investment thereof, and amounts used to pay debt service on the Certificates, and the term "nonpurpose investment" means any investment property acquired with the gross proceeds of the Certificates which is not acquired in order to carry out the governmental purpose of the Certificates.

(h) The City further covenants that it will make such use of the Certificate proceeds and all other amounts allocated to the Certificates, regulate the investment of such proceeds and other funds and take such other and further action as may be required to insure that (i) no prohibited payment is made or deemed to be made and (ii) the Certificates will not be arbitrage bonds. The term "prohibited payment" means any payment of or agreement to pay, to a party other than the United States, an amount that is required to be paid to the United States, by entering into a transaction that reduces the amount owed to the United States pursuant to Subsection (g) of this Ordinance because such transaction results in a smaller profit or larger loss than would have resulted if the transaction had been at arm's length and had the yield on the Certificates not been relevant to any party to such transaction.

(i) At no time during any bond year shall the aggregate amount allocated to the Certificates and invested in nonpurpose obligations with a yield higher than the yield on the Certificates, after excluding the amounts invested for a temporary period as provided in subsection (f) hereof and amounts deposited in the Certificate Fund, exceed 150% of the debt service on the Certificates for such bond year, and the aggregate amount allocated to the Certificates and invested in nonpurpose obligations with a yield higher than the yield on the Certificates shall be promptly and appropriately reduced as the outstanding principal amount of the Certificates is reduced.

(j) On each anniversary of the date of delivery of the Certificates (the "Issue Anniversary Date") the City shall cause to be determined the debt service on the Certificates and the yield on any nonpurpose obligations allocated to the Certificates for the bond year ending on such Issue Anniversary Date. If the aggregate amount of proceeds of the Certificates invested in nonpurpose obligations with a yield higher than the yield on the Certificates, after excluding the amounts invested for a temporary period as provided in Subsection (f) hereof and amounts deposited in the Certificate Fund, exceeds 150% of the debt service on the Certificates on any Issue Anniversary Date, the City shall, within 30 days after such Issue Anniversary Date, dispose of nonpurpose obligations in an amount sufficient to reduce the amount invested in nonpurpose obligations with a yield higher than the yield on the Certificates, after excluding the amounts invested for a temporary period as provided in Subsection (f) hereof and amounts deposited in the Certificate Fund, to 150% or less of the debt service on the Certificates; provided that, the City shall not be required to dispose of such nonpurpose obligations if such disposition would result in the realization of a loss for federal income tax purposes that exceeds the sum of the Excess, as defined in

Subsection (g) hereof, plus the investment earnings at the time of such sale or disposition if a rebate to the United States pursuant to Subsection (g) of this Ordinance were due at such time."

SECTION 2: That, except as hereby amended and modified, the provisions of Ordinance No. 86-1, adopted on January 7, 1986, authorizing the issuance of the "City of Cumby, Texas, Tax and Utility System Subordinate Lien Revenue Certificates of Obligation, Series 1986" in the principal amount of \$138,000 are hereby ratified, confirmed and approved as if the same were readopted as a part of this Ordinance.

SECTION 3: It is officially found, determined and declared that the meeting at which this Ordinance is adopted was open to the public and public notice of the time, place and subject matter of the public business to be considered at such meeting, including this Ordinance, was given, all as required by Article 6252-17, Vernon's Texas Civil Statutes, as amended.

SECTION 4: That the public importance of this measure and the fact that it is to the best interest of the City to provide funds for the construction of improvements and extensions to the City's Waterworks and Sanitary Sewer System by the delivery of the Certificates at the earliest possible date, constitute and create an emergency and an urgent public necessity requiring that any rule providing for ordinances to be read more than one time or at more than one meeting of the Board of Commissioners be suspended, and requiring that this Ordinance be passed and take effect as an emergency measure, and such rules and provisions are accordingly suspended, and this Ordinance is passed as an emergency measure, and shall take effect and be in full force immediately from and after its passage.

PASSED AND ADOPTED, this 7<sup>th</sup> day of February 1986.

CITY OF CUMBY, TEXAS

James Strickland  
Mayor

ATTEST:

Jerry E. Mattison  
City Clerk

(City Seal)