
Transportation Committee

HB 2618

Brief Description: Concerning the regulation and preservation of urban streets through a local option street maintenance utility and allowing the imposition of a charge.

Sponsors: Representatives Liias, Clibborn, Upthegrove, Simpson, Flannigan, Moeller, Williams, Hasegawa, Chase, Sells, Takko and Ormsby.

Brief Summary of Bill

- Authorizes cities and towns to establish a jurisdiction-wide street maintenance utility.
- Authorizes the governing body of a street maintenance utility to impose charges on users to fund the preservation and maintenance of urban streets.
- Repeals the existing street utility statutes.

Hearing Date: 1/20/10

Staff: Kathryn Leathers (786-7114).

Background:

The legislative authority of a city, town, or county may establish a regulatory fee pursuant to its police powers, but a local jurisdiction must have specific statutory authority to impose a tax.

The basic characteristic of a tax is that it is a charge imposed to raise money for any governmental purpose. In other words, a tax need not have a direct connection between the charge and the benefit to the taxpayer. Article VII, Section 1 of the State Constitution requires that all property taxes be applied uniformly upon the same class of property within the jurisdiction imposing the tax. Tax uniformity requires both an equal tax rate and equality in valuing the property taxed. *Boeing Co. V. King County*, 75 Wn.2d 160, 165, 449 P.2d 404 (1969).

A true regulatory fee is a charge to cover the cost of the governmental entity's regulatory program, and the cost is allocated to those who are either voluntarily or involuntarily receiving

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

special attention from government regulators. Such fees usually cover public expenses for inspections, record-keeping, and processing, and are limited to the proportionate cost of giving the fee payer that special attention. Examples of true regulatory fees include building permit fees, inspection fees, and professional license fees.

Other charges may be imposed by a governmental entity that are neither true regulatory fees nor taxes. Examples of such charges include electrical rates and storm water utility fees. Arguably, a more accurate description of an electrical rate is that it is a commodity charge and a storm water fee is a burden offset charge.

Street Utility, In General.

The legislative authority of a city or town (city) may establish a street utility by ordinance, and may impose charges to be used solely for transportation purposes. The governing body of the street utility is the legislative authority of the city that establishes the street utility.

"Transportation purposes" includes owning, preserving, maintaining, and constructing streets; developing and implementing public transportation and high capacity transit improvements; and planning and designing such transportation purposes. Street lighting, traffic control devices, sidewalks, curbs, gutters, parking facilities, and drainage facilities may also be included in the street utility.

Street Utility Rates and Credits.

Cities that establish a street utility may impose periodic charges for the use or availability of streets in a total annual amount of up to 50 percent of the actual costs for maintenance, operation, and preservation. The rates must be uniform for the same class of service, and all business and residential properties must be subject to the utility charge.

Charges imposed on businesses must be measured solely by the number of employees and may not exceed the equivalent of \$2 per month per full-time employee. Charges imposed against residential owners or occupants may not exceed \$2 per month per housing unit.

In establishing the different classes of service provided to businesses and residential properties, the governing body of the street utility may consider several factors, including:

- the difference in cost of service to the various users or traffic generators;
- location of the various users or traffic generators within the city or town;
- the time of use or traffic generation;
- capital contributions made to the facility; and
- any other matters that present a reasonable difference as a ground for distinction.

Certain property and property owners are exempt from the street utility rate, including certain property used for nonprofit or sectarian purposes; and property exclusively owned by the federal government, the state, any county or municipal corporation, and all property located in Washington that is used exclusively for essential government services and is owned by any federally-recognized Indian tribe.

The governing body of the street utility may reduce or exempt charges on residential properties to the extent they are occupied by persons with low-income.

The street utility ordinance or resolution must also include a provision granting any business a credit against the street utility charge for the full amount of any commuter or employer tax paid for transportation purposes by that business.

Relevant Court Decisions.

In 1992 the City of Seattle created a street utility by ordinance. The ordinance called for the collection of a street utility charge for the use or availability of city streets, and set the residential charge at \$2 per month per housing unit for single-family residences and \$1.35 per month per housing unit for multiple-family residences. In 1993 certain residential street utility ratepayers filed a class action lawsuit alleging that the charge was an unconstitutional property tax which violated the uniformity requirement of the State Constitution. *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995).

The City conceded that the street utility charges would be unconstitutional if they were property taxes because they were not imposed in a uniform manner. The City argued, however, that the utility charge was a regulatory fee imposed pursuant to its police powers.

Ultimately, the State Supreme Court found that the street utility charge imposed by the City of Seattle was unconstitutional because it was a property tax (not a fee or charge) that violated the uniformity requirements of the constitution. The *Covell* Court explained that whether a charge imposed by a governmental entity is a tax or regulatory fee depends on three factors:

- Whether the primary purpose is to accomplish desired public benefits which cost money, or whether the primary purpose is to regulate;
- Whether the money collected must be allocated only to the authorized regulatory purpose; and
- Whether there is a direct relationship between the charge and the service received by those who pay the charge and the burden produced by the payer.

In concluding that the street utility charges were an unconstitutional property tax, the Court noted several factors, including:

- The primary concern of the enabling ordinances was on collecting money to pay for street improvements rather than with public health, safety, or welfare;
- The ordinances made no attempt to regulate residential housing or to regulate the use of city streets by residential occupants;
- There was no justification or practical basis for the \$2 charge, and this charge amount in no way reflected a residential property owner's use of city streets or the burden the owner placed on the system; and
- The charges were not individually determined and could not be avoided.

The *Covell* Court also noted that the statutes authorizing the creation of a street utility provide exemptions and credits that are more consistent with a tax than a fee. For example, RCW 82.80.050 provides that: (1) all property belonging to the federal government and other governmental bodies are exempt from the street utility charge, however governmental entities must pay reasonable user fees; and (2) businesses that pay a commuter or employee tax for transportation purposes must be credited that full amount against the utility charge, which would not be necessary or appropriate unless it was intended to ensure that a business was not taxed twice for the same purpose.

Subsequent court opinions applying *Covell* provide that regulatory fees need not be "individually" determined; that is, "...if such a direct relationship exists, this court can hold that the charge is a fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden the fee payer produced. [Arborwood, 151 Wn.2d at 373](#). Further, if a direct relationship exists, only a practical basis for the rate is required, as opposed to mathematical precision. [Samis, 143 Wn.2d at 811](#); [Teter, 104 Wn.2d at 238](#)." *Storedahl Props., LLC v. Clark County*, 143 Wn. App. 489, 503 (2008).

Summary of Bill:

Street Maintenance Utilities, In General.

The existing street utility statutes are repealed and replaced with provisions authorizing the legislative authority of a city or town (city) to establish a jurisdiction-wide street maintenance utility (SMU) and to impose charges to fund the maintenance, preservation, and operation of existing streets.

Several legislative findings are made, establishing, among other things, that:

- The maintenance, preservation, and operation of streets in urban areas is essential for the safety, protection, and convenience of persons, businesses, and other entities using the streets;
- The preservation of streets through an SMU program will directly serve and benefit those who pay the SMU rates; and
- Street maintenance utility rates are determined in proportion to the levels of the use of different classes of residents, businesses, governmental entities, and all other users who depend on access to and use of the street system.

Formation and Governance.

After notice and public hearing, the legislative authority of a city is authorized to adopt an ordinance creating an SMU and establishing the SMU rates. The city legislative authority is the governing body of the SMU. The ordinance must include findings that: (1) the creation of the SMU is in the interest of the public health and safety; (2) the SMU will allocate the relative burdens placed on the streets by various classes of users; and (3) the SMU rates are intended to be adequate to provide revenues sufficient for the SMU service, including payment of an principal and interest on any bonds.

In addition, the ordinance must provide:

- A description of the SMU service area and user rate schedule;
- A provision that an SMU Advisory Committee must be created;
- A description or summary of the condition of the pavement in the SMU service area;
- A material change policy to address major plan changes that affect project delivery or the ability to finance identified projects. At minimum, the city must consult with the SMU Advisory Committee on how the plan changes should be resolved.
- A referendum procedure to apply to the entire ordinance.
- Appeal provisions that allow a ratepayer to challenge a rate, a rate classification, and the base rate.

The SMU ordinance may include penalty provisions for rates 60 days past due and establish that such unpaid rates and penalties are a lien against the ratepayer's real property.

Street Maintenance Utility Rates.

Street maintenance utility rates apply to residents, businesses, governmental entities, and other users located in the SMU service area. Street maintenance utility rates must be uniform for the same class of ratepayers and must be established using sound engineering principles. The SMU rates must also take into consideration:

- The correlation between property uses and the estimated number of vehicle trips from these uses; and
- The institute of transportation engineers manual or other resources of comparable acceptance or reliability.

Street maintenance utility rates may take into consideration, among other things:

- A "base level operations" cost component (for example, general system-wide costs based on the threshold costs of operating the utility per subscriber unit without regard for level of use or intensity of service);
- User location (for example, proximity to arterial streets or SMU boundaries);
- Time of use;
- Number and type of vehicles associated with household units, governmental entities, or businesses;
- Differences in costs of service to different user classes;
- Special assessments for streets and street-related improvements;
- Capital contributions to the system; and
- Any other matters that present a reasonable difference as a grounds for distinction.

Street maintenance utility rates may not be computed based on the ad valorem value of the underlying real property or its improvements.

Exemptions and Credits.

Street maintenance utility rates may not:

- Include an exemption or credit for the payment of any tax;
- Be imposed on undeveloped property; or
- Duplicate or replace transportation impact fees imposed pursuant to the Growth Management Act.

Street maintenance utility rate credits or reductions may be provided:

- To owners of vacant premises upon proof of vacancy;
- On residential properties for persons with low-income;
- On business and governmental entities to the extent these entities are providing for streets or street-related improvements within the SMU service area;
- On residences, businesses, and other users served by private streets to the extent these entities are providing for streets or street-related improvements;
- To mitigate incidental trips, if feasible; and
- If there is a showing of trip reduction (including carpooling).

Revenue Use.

Street maintenance utility revenues must be deposited in a special fund or account and dedicated to permissible SMU services. Permissible SMU services include maintaining, operating, and preserving streets, bridges, gutters, curbs, and sidewalks. Street maintenance utility rates may be

phased in and may supplement any other available resources for maintaining or preserving streets.

Advisory Committee.

An SMU Advisory Committee must be formed in conjunction with the SMU. The Advisory Committee may include up to seven members, and a majority of the members must be city residents or business owners that represent the different SMU user classifications. Members are appointed by the mayor and confirmed by the city's legislative authority, and serve without compensation. The Advisory Committee may review proposed maintenance projects, rates, credits, plan changes, or other matters established by the ordinance.

Referendum and Appeals.

A city creating an SMU must provide for a referendum procedure in the enabling ordinance. A referendum petition must be filed within 10 days of passage of the ordinance. Within 30 days of the date the ordinance is adopted, the petitioner must secure the signatures of at least 15 percent of the persons designated as SMU ratepayers by the city. Businesses and governmental entities may designate a representative for referendum purposes. The city must provide election officials with a list of eligible voters. Once the signatures are verified and found to be sufficient, the referendum will be certified for the next election ballot or special election, but in no case may it take place later than 120 days after the signed petition has been filed.

The legislative authority of the city must appoint an independent examiner (or may assign such duties to an existing administrative hearings examiner) to consider ratepayer appeals to a rate, rate classification, and any base rate. Ratepayers may be required to pay a reasonable charge not to exceed the actual cost of the appeal. Appeals from the examiner's findings and decision must be made directly to the superior court. The burden is on the city to establish, by a preponderance of the evidence, that the rates are not in excess of the burden created by the ratepayer or rate class.

Reports.

The governing body of an SMU must issue an annual report indicating the status of program revenues, annual revenues received, the portion of revenues that are bonded, a summary of annual expenditures on projects, and construction schedules for the next budget year. The report must also provide a means of describing if rates and revenues are sufficient to obtain and maintain the city's systemwide pavement condition index standard. The city must make copies of the annual report available to ratepayers upon request.

Dissolution.

The legislative authority of a city may dissolve a SMU by ordinance upon a finding that dissolution is in the public interest. Any unexpended funds must be held in trust to be expended only as permitted by the SMU statutes.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect July 1, 2010.