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IMLA NEWS
Issue 20 – December 6, 2019

Franchises: Under Home Rule Powers, County has Authority to Charge Fees to Water-Sewer Districts and Utilities for Use of Rights of Way

King County v. King County Water Districts et al., No. 96360-6 (Wa. Dec. 5, 2019).

Reversing the lower court, Washington's Supreme Court holds that a county may, under its Home Rule authority, charge a fee to utilities for use of the county's rights of way under public streets; such a charge is not an impermissible tax and is not otherwise prohibited by state statute—and the utilities, as special purpose local governments, do not have inherent authority to use the rights of way free of charge. (Whether the decision will open the door to arguments that, despite preemption considerations to the contrary, wireless companies can similarly be compelled to pay locally-mandated fees for use of municipal property remains to be seen).

King County, Washington (County) is home to much of the Seattle metropolitan area and maintains many miles of county roads, located in rights-of-way acquired by the County over time. The rights-of way and the roads within them are primarily used for transportation, also provide corridors for the placement of utilities, including sewer, water, telecommunications, power and gas. Public and private utilities often enter into franchise agreements to use the county's rights-of-way.

Historically, the County charged utilities only an administrative fee, but in November 2016, pursuant to Ordinance 18403 (Ordinance) the County began requiring electric, gas, water, and sewer utilities to pay "franchise compensation," which the Ordinance equates to an annual rent payment. The amount of the compensation is based on the

value of the land involved, the area needed by the utility, the household density and business opportunity afforded the utility, a reasonable return to the County for administrative costs and other factors. The compensation requirement applies not only prospectively to future franchises but also retroactively to "existing franchises that include terms that authorize compensation in return for the right to use the right-of-way." The county estimated that the ordinance would generate approximately $10 million per year. No other county in Washington currently obtains such compensation.

A number of water-sewer districts (special purpose local governments distinct from the County),sued and six consumer-owned private utilities subsequently intervened. They argued that they have a right to use County rights-of-way without paying franchise compensation, and that the County lacks the authority to impose such charges. The County argued that it has broad statutory authority to charge such compensation and that this authority is well supported by a long line of case law. It further argued that its status as a home rule county means that it has "powers as broad as the state, except where expressly limited"—and that its powers are not expressly limited here.

King County Superior Court granted the water-sewer districts' and the private utilities' motions and denied the County's, reasoning that while the County may "charge utilities for the reasonable administrative costs" of regulating its roads and rights-of-way, the County "lacks authority to impose 'franchise compensation' or 'rent'" and "lacks the authority to require the utility defendants to pay, or to agree to pay, 'franchise compensation' or 'rent.'" Furthermore, "The county . . . cannot compel its terms unilaterally on the utilities.".

The Washington Supreme Court, sitting en banc, reversed. It found that “four well-established legal principles” provided a useful analytical framework:

First, a county may grant a franchise to a utility—but it does not have to. For instance, a county "may require compensation for the use of the public streets as a condition for granting a franchise, unless forbidden by statute or contrary to public policy."

Second, although the County has broad discretion to grant a franchise, it may not compel a utility to accept its terms, conditions, and limitations. This does not mean that a county or a utility may not consider certain terms, such as franchise compensation, nonnegotiable. It simply means that both sides must agree to the terms before an agreement is reached.

Third, the County, which is a home rule county, "'has as broad legislative powers as the state,'" at least when it comes to local affairs. However, it may not tax without express authorization from the legislature.

Fourth, water-sewer districts, which are special purpose local governments, have only those powers that are expressly granted to them, those that are "'necessarily or fairly implied in or incident to the powers expressly granted,'" and those that are "'essential'"

to its "'objects and purposes.'" And the intervening private utilities have no governmental powers—and no right to use county rights-of-way without consent.

The questions before the court were:

(1) Whether the charge is actually an unauthorized tax: The court found that it was not; franchise fees are charges in the nature of rent. It cited *Western Union Telegraph*, where the City of St. Louis tried to charge telegraph and telephone companies $5 per year for each pole located on city property, including streets. 148 U.S. at 93-94. The trial court held that the charge was an unauthorized tax. Id. at 95-96. The United States Supreme Court reversed, holding that the charge was "in the nature of a charge for the use of property belonging to the city—that which may properly be called rental." Id. at 97. The Supreme Court explained that the charge was no different than if the city had rented out the rooms of city hall. Here, the County's methodology for calculating the fee—based on the value of the land and the financial opportunity afforded the utilities--and the fact that the fee was intended to be a bargained-for exchange meant the charge was not a tax.

(2) Whether the charge conflicts with state law: The utilities had made much of the fact that nothing in Washington statutes expressly the County to charge franchise compensation, and argument that the lower court found persuasive, noting that "the statutes are silent as to any rents based on usage." But the Washington Supreme Court found otherwise: the County, as home rule jurisdiction "may legislate as it sees fit—within the confines of state and constitutional law, of course." Accordingly, "[t]he question is not whether anything in the statutes expressly authorizes King County to charge franchise compensation; the question is whether anything in the statutes expressly bars King County from doing so. And the answer to that question is no."

(3) Whether the utilities may use the rights-of-way without a franchise: The water-sewer districts argued that they have a "statutory franchise" to use the rights-of-way without the County's consent and without payment to the County. The relevant statutory language did not explicitly state that water-sewer districts must acquire a franchise before using the County's rights-of-way. But neither did it explicitly state that water-sewer districts may use a county's rights-of-way without a franchise. That silence was fatal to the districts, because as special purpose local governments, they have only those powers that are expressly granted to them, those that are "'necessarily or fairly implied in or incident to the powers expressly granted"' and those that are "'essential"' to its "'objects and purposes.'" As the court put it: "RCW 57.08.005 flunks this test. It does not expressly grant the districts the right to use the rights-of-way without a franchise."

> The court returned to *Western Union Telegraph*, There, a federal statute permitted telegraph companies to '"construct, maintain and operate lines of telegraph . . . over and along any of the military or post roads of the United States.'" The telegraph company argued that this federal statute allowed it to use the streets of St. Louis for free. The United States Supreme Court disagreed, explaining that the federal statute was "simply a permissive statute" that "carrie[d] with it no exemption from the ordinary burdens which may be cast upon those who would appropriate to their exclusive use any portion of the public highways."

In sum, the utilities had failed to identify any source of authority to use the County's rights-of-way without a franchise:

> We hold that, in general. King County may charge franchise compensation. Franchise compensation is not a tax. It is one term of a bargained-for exchange. And no law bars King County from seeking to include this term in a franchise agreement. We further hold that neither the water-sewer districts nor the private utilities have any right to use the county's rights-of-way without a franchise. Although King County may not compel the utilities to agree to its terms, the utilities may not use the county's rights-of-way without a franchise agreement.
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> We therefore reverse the superior court's decision to grant the water-sewer districts and private utilities' motions for summary judgment, reverse in part the superior court's decision to deny King County's motion for summary judgment, and remand with directions to the superior court to enter partial summary judgment in favor of King County on the facial validity of the franchise compensation portion of the ordinance and for further proceedings consistent with this opinion.

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