Court Upholds King County Ordinance Requiring Franchise Compensation for Use of Right-of-Way

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On December 5, 2019, the Washington Supreme Court ruled that King County has authority to impose a "franchise compensation" charge for use of its right-of-way by both private and public utilities.

Background

On November 7, 2016, King County passed Ordinance 18403, a first-of-its-kind ordinance that requires utilities to pay for their ability to use the county's right-of-way for placement of utility infrastructure. The county called this payment a "franchise compensation" and looked at it as akin to an annual rent charged for use of its right-of-way. This payment would be in addition to payment of any administrative costs associated with the grant of a franchise. The money raised would go to King County's general fund, with an estimated annual revenue of about $10 million.

Water districts in King County made it known that they intended to challenge the new ordinance, so King County sought a declaratory judgment to determine whether it was within its authority to impose this franchise compensation. Several water-sewer districts and private consumer-owned utilities intervened. At issue in the case was (1) whether the county could charge a franchise compensation, generally, and (2) whether water-sewer districts, as public entities, have a statutory right to use the right-of-way without a franchise. The King County superior court ruled that King County lacked the authority to impose this charge. In *King County v. King County Water Districts*, ___ Wn.2d ___ (12/5/2019), the Washington Supreme Court reversed and also held that water-sewer districts have no general right to use a right-of-way without a franchise.

What Is a Franchise?

A franchise is essentially a negotiated contract with a public or private entity for use of right-of-way. Cities, counties, and the state Department of Transportation (WSDOT) regularly enter into franchises with private companies and with other public agencies — granting them the right to use the public rights-of-way for installation, maintenance, and repair of their facilities. These facilities may include underground pipes and conduits or above-ground cables and lights on poles. See this MRSC Insight blog post for more on franchises.

State law explicitly authorizes the ability of cities and counties to enter into franchises. A county, for example, may grant franchises for the use of a right-of-way for the construction and maintenance of "waterworks, gas pipes, telephone, telegraph, and electric light lines, sewers and any other such facilities." See RCW 36.55.010. Note that franchises are distinct from easements, which are a form of property right.

What Did the Court Decide?

The water-sewer districts and private utilities argued that King County's franchise compensation requirement was an unlawful tax. The Court ruled the charge was not a tax but rather a bargained-for amount allowing a utility to make use of right-of-way ("a valuable property right") for the operation of the utility. Importantly, the court noted that the issuance of a franchise is discretionary (i.e., a county may grant a franchise to a utility but it does not have to). If granted, a franchise's terms are negotiable.

The water-sewer districts and private utilities also argued that the county lacked statutory authority to charge for the use of right-of-way. The Court disagreed. King County is a home rule county with broad legislative authority. With this authority, the issue is not whether state law explicitly authorizes the franchise compensation, but whether there is anything in state law that would prevent it from imposing such a charge. The Court determined there is no conflict between either the state statutes or the state constitution that would prevent the county from charging the franchise compensation.

The Court looked at state law provisions (RCW 47.44.020 and RCW 35.21.860) that prohibit WSDOT as well as cities and towns from imposing franchise fees (with limited exceptions). No similar limitation is imposed on counties. In addition, case law and municipal treatises have concluded that a county (whether home rule or not) may require compensation for use of rights-of-way unless prohibited by statute.

Finally, the water-sewer districts claimed that their authorizing statutes — specifically RCW 57.08.005(3) and (5) — grant them authority to operate and maintain their water and sewer facilities in public highways, roads, and streets without a franchise agreement or associated fee. The Court disagreed, holding that while they may use these rights-of-way to operate, they may only do so with permission from the county. If there is a charge associated with the franchise, the districts have express statutory authority to obtain and pay for any property rights and charges necessary to operate.

Impact on Local Governments

This ruling could impact counties and entities operating utilities within county rights-of-way. Other counties could follow King County's lead and adopt an ordinance imposing a fee for use of their rights-of-way. In turn, a special purpose district or other entity operating a utility may be required to pay a fee as part of its franchise agreement. Note that a county could not impose a fee where a special purpose district's authorizing statute explicitly prohibits such a fee for use of right-of-way (see, e.g., RCW 35.58.330 regarding metropolitan municipal corporations' use of right-of-way).

As discussed above, state law already limits the ability of cities, towns, and WSDOT to charge franchise fees for use of their rights-of-way.

One open question is whether all counties — not just home rule counties — share the authority to charge a fee for use of their rights-of-way. There is support for this in the Court's majority opinion, although two justices signed a concurring opinion suggesting the Court's majority should have limited its analysis to the statutory analysis. This concurring opinion noted there was sufficient statutory basis for concluding all counties have authority to impose this fee and that the majority opinion's analysis related to home rule authority was unnecessary and potentially confusing.

I recommend that both counties and public entities operating utilities in county rights-of-way consult with their attorneys to determine how this ruling may affect their unique circumstances.

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About Jill Dvorkin

Jill joined MRSC as a legal consultant in June 2016 after working for nine years as a civil deputy prosecuting attorney for Skagit County. At Skagit County, Jill advised the planning department on a wide variety of issues including permit processing and appeals, Growth Management Act (GMA) compliance, code enforcement, SEPA, legislative process, and public records. Jill was born and raised in Fargo, ND, then moved to Bellingham to attend college and experience a new part of the country (and mountains!). She earned a B.A. in Environmental Policy and Planning from Western Washington University and graduated with a J.D. from the University of Washington School of Law in 2003.
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