

Memorandum

Date: February 9, 2012

To: John Kovash, Mayor
Members, West Linn City Council

From: Chris Jordan, City Manager 

Subject: February 13 Work Session and Other Items

The City Council is scheduled to meet in a work session immediately following the regular Council meeting on February 13. The topic is franchise agreements and other means of managing public rights-of-way in the City of West Linn.

Because this topic is related to the Lake Oswego-Tigard water partnership project, Attorney Pam Beery will be providing the report at the work session. Attached is a memorandum from Ms. Beery discussing this topic.

Follow-up from February 6 Work Session

Attached is a memorandum from Planning Director John Sonnen responding to requests raised at the February 6 work session.

Request for MACC Representative

The Council should appoint a representative and alternate to the MACC governing board shortly. MACC has requested that the West Linn appointee and alternate attend the next MACC Board meeting which is scheduled for April 13.

Attachment



MEMORANDUM

TO: Honorable Mayor and Members of the City Council
City of West Linn

THROUGH: Chris Jordan, City Manager

FROM: Pamela J. Beery and Courtney Lords, Special Legal Counsel

SUBJECT: Regulatory options for right of way use

DATE: February 8, 2012

The Lake Oswego and Tigard water partnership plans an upgrade of the water treatment plant in West Linn, and construction of a major new raw water pipeline from an intake on the Clackamas River. The pipeline is anticipated to result in significant construction impacts and to occupy a sizable portion of the rights of way in which it is installed. The project triggered staff's evaluation of current City regulations governing utilities.

BACKGROUND

Historically, Oregon cities have granted franchises to each utility using the rights of way to provide service—electric, natural gas, telephone and cable service providers. The franchises generally set forth the terms of use of the rights of way (construction, restoration and permitting, for example) and the compensation to be paid to the City for this use (franchise fees).

Recently, many cities have experienced the potential limitations with the traditional franchising model. For example, some telecommunications companies have refused to enter into new franchises, while others will only agree to a franchise that effectively limits or waives City authority in some areas of right of way management. The negotiations often result in right of way requirements that vary from utility to utility, complicating staff's effort to manage permits, construction, restoration and inspection of work in the rights of way.

This memorandum sets out options for the Council's consideration with respect to regulatory treatment of utilities operating in the City and occupying City rights of way. There are several options which may be considered. The possible approaches to examine are:

1. New uniform right of way regulations governing all utilities with operations in the City;
2. New license fee or privilege tax governing all utilities with operations in the City; or
3. A combination of the above two options.

Current City regulations of work in public rights of way and of public works constructed within the City are limited, requiring a public works permit and conformance to the City's adopted Public Works Standards. As discussed below, should only a new license fee or privilege tax be considered, another way to achieve more comprehensive construction standards would be through evaluating and potentially improving the Public Works Standards to assure they adequately protect the City's interests as the water line project is built.

DISCUSSION

1. Current Regulations

Currently, the City charges for use of its rights of way through imposition of a privilege tax or franchise fee. Section 7.505 of the City Code provides for a 1.5% privilege tax on public utilities. To date, the privilege tax has only been extended to electrical utilities. Section 9.020 of the City code authorizes the City to enter into franchise agreements that allow for use of City rights of way for solid waste and recycling collection, and utilities – specifically, natural gas, electrical, telecommunications, and cable television services. A list of all City franchise agreements and expiration dates is attached.¹

As you are likely already aware, a franchise agreement is a legally enforceable contract between the City and utility that sets forth the terms of use of the rights of way. A "privilege tax" is a charge for the privilege of operating in the City and/or using public rights of way and is adopted by ordinance; it does not require an agreement from the provider.

¹ Prior to implementation of any new right-of-way regulations, existing franchises should be reviewed to determine if there are limitations in the existing agreements that could potentially preclude or complicate implementing new regulations.

2. Regulatory Options

a. Right of Way Management Ordinance

Under the right of way ordinance approach, cities can require utilities to obtain a license rather than negotiating franchises with each utility.

There are three mechanisms by which to impose a fee for utility operations in the City: by franchise agreement, by license, or by privilege tax. As noted above, the franchise is a contractual mechanism. Licenses act like “applications” and usually require the utility to describe the services it will provide and its intended use of the rights of way. Under this approach, cities may choose to charge a license fee and/or a privilege tax. If licenses are required, the utility and the City will sign the license which expressly requires the utility to comply with the terms of the right of way ordinance. As such, the license is much more streamlined than a full franchise agreement. Finally, privilege taxes are unilaterally imposed in the code, or by ordinance or resolution.

The advantages of a right of way ordinance include the following:

- It secures the legal obligation of utilities to compensate the City for the privilege of using City rights of way, regardless of whether the utility has a franchise.
- The City has flexibility to adjust the amount of compensation it collects if new utility services are developed that are not included in the definition of “gross revenue” in existing franchise agreements, or by expanding the revenue base to the extent permitted by state and federal law.
- Ordinances can be designed either based on regulating only “facilities” which are located in the right of way, or more broadly to cover all utilities operating in the City.
- The ordinance would promote equity by requiring all users of the rights of way to follow the same right of way use requirements.
- Fees can be scaled based on right of way impact or other factors.
- City staff does not have to address different permitting, construction, restoration and other standards or regulations from individual franchises, but instead apply the requirements of the ordinance to all users of the rights-of-way.²
- The City can easily amend the ordinance as warranted by changes in state or federal law, new technologies, or revised construction standards.

² Typically, existing franchises remain in place and govern the utility until the franchises expire, at which time the ordinance applies.

- The ordinance eliminates the time and expense involved in most franchise negotiations. However, under federal law and because of the issues unique to cable television, the City will still have to negotiate a franchise with cable operators (.)
- The City can still negotiate franchises on a case-by-case basis if it so chooses.

The disadvantages include:

- Whether designated a "license fee," "privilege tax" or a "franchise fee," utilities are permitted to pass at least a portion of that cost through to their customers, which generally will appear as a separate line item on customers' bills. License fees and/or extension of the privilege tax to some utilities may be viewed as a "new tax" by residents, even though they operate in the same manner as franchise fees, due to the regulatory treatment of those utilities by state administrative rules.³
- Utilities may challenge the City's authority to implement the new right of way regulations whereas, in theory, utilities would not challenge regulations in a mutually agreed upon franchise, although the City is not immune from such challenges. There have been no legal challenges to the right of way ordinances adopted by several Oregon cities.
- Right of way ordinances can be complex to implement and require an initial significant investment of staff time.

There are several policy options for the City to consider if it chooses to adopt a right of way ordinance. These considerations include:

- Whether or not the ordinance would apply to all utilities *operating* in the City, and/or all utilities *using* City rights of way⁴.
- What utilities will be included in the ordinance; e.g. wireless providers, resellers, and/or city-owned utilities⁵.

³ State law and administrative rules permit gas, electric and certain telecommunications carriers to pass through to customers any franchise fee or privilege tax that is greater than a certain percentage of gross revenues the utility derives from customers in the city, which is 3% for gas utilities; 3.5% for electric utilities; and 4% for incumbent telecommunications carriers. Competitive telecommunications carriers, certain electric service suppliers and cable operators may pass through to customers the entire franchise fee or privilege tax.

⁴ For example, a significant portion of the new water line will occupy ODOT right of way; it may be worthwhile to take this into consideration as standards are developed to assure the anticipated impacts are addressed.

⁵ The City Charter (Section 44) prohibits utility rate increases over 5% in any year. Charging a privilege tax to the City water fund would not be a "utility rate increase" as that term is defined in the Charter, since the definition applies to payments by system users to the City. It is theoretically possible that a charge to the City water fund for right of way use might indirectly impact rates.

- Whether or not to include a privilege tax that is identical to the current franchise fee structure so that it is revenue neutral;
- Whether or not to create exceptions for existing franchises; and
- To what extent the regulation would govern operations in rights of way; for instance, utility relocation requirements can be somewhat controversial but can be valuable tools.

b. Establishing a License Fee or Privilege Tax Only

Another option which may be considered would be to establish a license fee or a privilege tax in lieu of the compensation established in franchise agreements. In a license fee paradigm, cities issue licenses that require compliance with specific terms described in the licensing ordinance, rather than negotiating agreements with each utility. All utilities that use public rights of way, including private companies offering telephone, cable,⁶ gas, and electric service, as well as public water and sewer facilities, can be subject to the license requirement. Like the right of way ordinance approach, the City has some discretion to determine whether City-owned utilities and other private companies (such as wireless providers) will be subject to the Ordinance.

When cities adopt license fees, all existing franchises remain in effect until they expire, at which time the utility will be subject to the licensing ordinance. The City then has the option to continue to enter into franchise agreements or only impose a license fee, so long as the terms of the franchise agreement are competitively neutral.

Advantages to the license fee and/or privilege tax approach include:

- Ease of implementation;
- Can allow for exceptions for existing franchises; and
- Potential for revenue increase.

The downside to this approach is that it does not address right of way management concerns. Code provisions need to be included elsewhere to address such topics as construction and permit requirements.

As with the right of way ordinance, there are policy options to consider when evaluating a potential new fee or tax, including:

⁶ Under Federal law, cable operators must have a franchise from the City to provide cable service, thus, cable operators will continue to be required to obtain franchises from cities. Cable franchises may incorporate many of the provisions of such ordinances discussed here, but also include cable-specific requirements usually not included in city ordinances.

- Whether the privilege tax or license ordinance should require utilities that use the rights of way, regardless of whether or not they own the facilities, to pay the privilege tax. A choice could be made to limit the privilege tax requirement to “utility operators,” which by definition would include only those who own, place, operate or maintain facilities in the rights of way. This, on the other hand, would not cover the utilities that use the rights of way but do not own the facilities they use (such as electricity wholesalers, or resellers of telecommunications services). As noted earlier, the City’s current Code at Section 7.500 to 7.515 only applies to electric utilities and is designed to capture 1.5% of gross revenues earned in the City over and above the 3.5% franchise fee paid by the electric utility under its franchise agreement.
- Determination of the amount of and basis for the fee charged. For example, some cities charge fees on a per-linear-foot basis for distribution utilities that do not have local service connections, while others have based fees on a percentage of gross revenues generated by service providers occupying City rights of way or operating in the city, even where City rights of way are not used.⁷
- Determination of how revenue is to be dedicated, i.e., general fund, street fund, or other.
- Determination of whether city-owned utilities should be subject to the charge (both West Linn utilities and those owned by other municipalities or public entities).⁸

c. Combination right of way regulations and license fee or privilege tax

The final option would be to consider a comprehensive new set of regulations that governs both the work of utilities (and others, as may be determined) in city rights of way, and addresses the payment to be made by utilities operating in the rights of way. The same policy issues and options discussed in detail above would apply in this context as well.

⁷ As with the right of way regulatory issues, in the determination of the appropriate charge the City needs to consider the impacts to City traffic and residents resulting from work in ODOT right of way within West Linn. In our view, ORS 758.010 authorizes the City to receive compensation for use of this right of way; consideration may be given to a different rate or basis for the charge.

⁸ There is an appeal pending in the Oregon Court of Appeals involving the City of Phoenix, Oregon in which a public utility district is challenging the City’s authority to charge a privilege tax on the operations of another governmental entity. It will be at least a year before the Court answers this question; in the meantime, our view is that the City has home rule authority to impose a charge on a utility facility operated by another municipality in West Linn.

CONCLUSION

We are happy to discuss these options with you and to answer any questions you may have during your upcoming work session.

Existing franchise agreements and expiration dates:

Franchisee	Contract Expiration	Franchise Fee (% of gross revenue)
PGE	12/2011	1.5% privilege tax + 3.5% franchise fee
NW Natural	6/2012	5%
Qwest	7/2014	7%
Comcast Cable	Expired, new agreement in negotiation	5%

Memorandum

Date: February 8, 2012

To: Chris Jordan, City Manager

From: John Sonnen, Planning Director

Subject: Response to City Council requests

Purpose

During the City Council work session on February 6, 2012, Council members asked for a summary of the approach I suggested for initiating the Highway 43/Willamette Falls Drive Vision and a summary of planning projects completed in 2011. This information is provided below.

1. Suggested approach for initiating the Highway 43/Willamette Falls Drive Vision in 2012.

Project component	Cost/staff commitment
Proceed with the Arch Bridge/Bolton center plan	\$156,000/.5 FTE
Option: Also prepare schematic plans depicting how the Robinwood commercial area could redevelop, identify neighborhood and business/property owner preferences and amend the zoning code and design guidelines as warranted. (If the Council decides to proceed with both the Arch Bridge and Robinwood plans, one of them would have to be delayed to the second half of the year).	\$25,000/.4 FTE
Proceed with the Esplanade. Identify the esplanade alignment between Willamette and the Arch Bridge with consideration of the potential use of the Blue Heron property and potential overlook along Willamette Falls Drive (e.g., at the recycling center), secure easements, prepare designs for the section we obtain easements for and apply for a construction grant.	\$200,000 is available/Parks Department lead
Include the transportation components of the vision in the TSP update. This includes the concept of complete streets, a protected bikeway where possible, improved pedestrian crossings, and transit improvements.	Up to \$80,000 in added cost, which could potentially be absorbed by a grant we are seeking.

2. 2011 Planning projects.

2011 PLANNING DEPARTMENT PROJECTS	
Project	Status
1. Phase I of the Highway 43/WFD Corridor Project	Complete
2. Regulatory improvement code amendments, including consolidation and refinement of all CDC definitions	Complete
3. Code amendment pertaining to home occupations	Complete
4. Amended the Municipal Code (building code) to provide for administrative civil penalties and updated the energy and solar codes	Complete
5. Historic accessory structure and Willamette Neighborhood Survey	95% complete; staff has reviewed draft, will present to HRB in March
6. Establishing and administering a Historic Resources Rehabilitation Grant Program	90% complete; four grants awarded, one complete, three in progress
7. Goal and policy analysis	85% complete; put on hold to enable work on the Highway 43/WFD project
8. Residential infill/PUD update	70% complete, on hold due to staff reassignment
9. Review and revise Zoning Map per adopting/amending ordinances and make corrections as needed	65% complete
10. Storm water pond aesthetics demonstration project and code refinement	55% complete
11. Evaluate and refine the Water Resource Area regulations	45% complete, preliminary draft due in April
12. Unrelated, substantive code amendments	25% complete
13. Willamette Historic District code update -Phase II	5% complete