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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 20, 2017

Senator Brian Boquist
900 Court Street NE S305
Salem OR 97301

Re: Limits on city and county authority to impose charges for use of rights-of-way

Dear Senator Boquist:

You asked several questions regarding the extent to which the Legislative Assembly may limit the authority of cities and counties to impose certain charges on public and private utility providers for the use of the public rights-of-way that are located within the city or county. We will answer your questions with respect to cities and counties separately.

I. Cities

A. Questions

Your request for this opinion provided summaries of *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or. 437 (2015), and *Northwest Natural Gas Co. v. City of Gresham*, 359 Or. 309 (2016). You first asked us to opine as to whether your understanding of the cases is correct. You then asked whether, in light of the cases:

1. The Legislature may expressly prohibit cities from imposing certain charges;
2. There is a general prohibition on intergovernmental taxation; and
3. Notwithstanding such a prohibition, cities may impose reasonable fees on other governmental entities.

B. The cases

1. *Rogue Valley Sewer Services*

In *Rogue Valley Sewer Services,* the City of Phoenix imposed by ordinance a five percent franchise fee on Rogue Valley Sewer Services (RVSS) for the use of the city's rights-of-way. RVSS is a sanitary authority organized under ORS chapter 450, and, as such, a local service district and a local government under ORS 174.116 and a municipal corporation under ORS 198.605. RVSS challenged the fee because it involved intergovernmental taxation in the absence of "unmistakable, express statutory authority."[1] The Supreme Court did not reach the issue of intergovernmental taxation because it held that the charge was a fee and not a tax—i.e., a charge

[1] *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or. 437, 446 (2015).

"imposed on particular parties and . . . used to regulate or benefit those parties rather than . . . for general public purposes or to raise revenue for such purposes."[2]

RVSS had cited a line of cases dealing with intergovernmental taxation, however, and one of them, *Central Lincoln People's Utility District v. State Tax Commission*, 221 Or. 398 (1960), does contain a statement of the law (although the issue was not before the *Central Lincoln* court and so was not material to its opinion):

> [I]n the absence of any constitutional prohibition a state has the power to tax the property of its cities, counties, and their political subdivisions. *People's Util. Dist. et al. v. Wasco Co. et al.*, *supra*; *Security Sav. & Trust Co. v. Lane County*, 152 Or 108 . . . ; *Portland v. Multnomah County*, 135 Or 469 . . . ; *Portland v. Welch et al.*, 126 Or 293 . . . ; *State v. Preston*, 103 Or 631 . . . .
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> The intention to tax a municipality is not to be inferred, but must be clearly manifested by an affirmative legislative declaration. *Portland v. Welch et al.*, *supra*; *State v. Preston*, *supra*. *See* 84 CJS 388, Taxation § 202.[3]

Thus, you could say that there is a general prohibition on intergovernmental taxation unless expressly authorized. It is perhaps more of a default, since it is not an express statutory or constitutional prohibition, but your understanding is correct.

RVSS also argued that the city's home rule authority could not justify regulation of another governmental entity, as opposed to a private entity. The court concurred that its decisions have "recognized some limits on a local government's authority to compel or coerce another government to take some affirmative action," but those limits on the home rule doctrine

> do not go so far as to prohibit the city's fee in this case. While . . . a city cannot, on the basis of its home-rule authority, impose a duty on or impair a power of another governmental entity, nothing in those cases would prevent a city from exercising the same kind of regulatory authority over specific services provided by another local government entity on the same basis as services provided within the city by a private business. In this case, the franchise fee of five percent of [RVSS's] revenue places [RVSS] on an equal footing with other utilities operating within the city.[4]

The court cited as an example the statutory "framework for cities to collect a franchise fee from utilities, both public and private, operating within their rights-of-way. *See* ORS 221.420; ORS 221.450. Where cities and utilities have not entered into an agreement for a different fee arrangement, the legislature provides for a five-percent fee. ORS 221.450."[5]

Your understanding of this holding is also correct.

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[2] *Rogue Valley Sewer Services*, 357 Or. at 447.
[3] *Central Lincoln People's Utility District v. State Tax Commission*, 221 Or. 398, 406 (1960).
[4] *Rogue Valley Sewer Services*, 357 Or. at 448-450.
[5] *Id.* at 450.

Finally, RVSS argued that ORS 221.420 and 221.450 were intended to occupy the field and preempt cities from imposing fees on public utilities other than the fees authorized under those statutes; because those statutes do not apply to sanitary districts, the franchise fee was precluded. The court held that this negative implication was not enough to establish legislative intent to preempt home rule authority, which requires a party challenging a home rule city's authority to show that the Legislative Assembly "unambiguously" expressed such intent. The court saw "no reason to *imply* such broad preemption of the entire field of utility regulation from the explicit authorization of regulation of certain other utilities" (emphasis in original).[6] Moreover, the court did not see a conflict between ORS 221.420 and 221.450 and the city's franchise fee ordinance in the first place; both could operate concurrently.

The court also supported its holding by the statutory statement of legislative intent behind ORS 221.420 and 221.450 to the effect that, by enacting the statutes, the Legislative Assembly

> was simply "*reaffirm[ing]* the authority of cities to regulate use of municipally owned rights of way" and that it "recognize[ed] the independent basis of legislative authority granted to cities in this state by municipal charters." ORS 221.415 (emphasis added). That is, the legislature apparently thought that [the 1987 amendments to ORS 221.420 and 221.450 were] not necessary to provide cities with authority to impose taxes and fees because they already possessed that authority.[7]

Next the court pointed out that ORS 450.815 (7) "anticipated the kind of fee at issue in this case and provided that such conditions on the use of the public rights-of-way by a sanitary authority are appropriate" and concluded that "[t]he legislature apparently intended that use of public rights-of-way by a sanitary authority be contingent upon its compliance with reasonable conditions imposed by a city."[8]

Again, we believe your understanding of the case is correct.

2. Northwest Natural Gas Co. v. City of Gresham

In *Northwest Natural Gas Co. v. City of Gresham*, the city increased the licensing fee that two private utilities and one public people's utility district were required to pay for use of the city's rights-of-way from five to seven percent of the utilities' gross revenues earned within the city. The utilities challenged the municipal laws because they conflicted with ORS 221.450. The people's utility district also argued that the increased rate was impermissible intergovernmental taxation because it was not expressly authorized by statute.

The Supreme Court followed *Rogue Valley Sewer Services* in finding "nothing in the text of ORS 221.450 as amended in 1987, nor in the context (particularly the enactment of ORS 221.415 acknowledging cities' home-rule authority with respect to its rights-of-way), nor in the legislative history . . . demonstrates an unambiguous expression of legislative intent to preclude local legislation with respect to charges for use of rights-of-way."[9] Thus, the court held, ORS 221.450 "is an authorization, not a restriction: The fact that the privilege tax authorized by the

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[6] *Id.* at 454-455.
[7] *Id.* at 455.
[8] *Id.* at 456.
[9] *Northwest Natural Gas Co. v. City of Gresham*, 359 Ore. 309, 342-343 (2016).

"imposed on particular parties and . . . used to regulate or benefit those parties rather than . . . for general public purposes or to raise revenue for such purposes."[2]

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> The intention to tax a municipality is not to be inferred, but must be clearly manifested by an affirmative legislative declaration. *Portland v. Welch et al.*, *supra*; *State v. Preston*, *supra*. *See* 84 CJS 388, Taxation § 202.[3]

Thus, you could say that there is a general prohibition on intergovernmental taxation unless expressly authorized. It is perhaps more of a default, since it is not an express statutory or constitutional prohibition, but your understanding is correct.

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The court cited as an example the statutory "framework for cities to collect a franchise fee from utilities, both public and private, operating within their rights-of-way. *See* ORS 221.420; ORS 221.450. Where cities and utilities have not entered into an agreement for a different fee arrangement, the legislature provides for a five-percent fee. ORS 221.450."[5]

Your understanding of this holding is also correct.

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[3] *Central Lincoln People's Utility District v. State Tax Commission*, 221 Or. 398, 406 (1960).
[4] *Rogue Valley Sewer Services*, 357 Or. at 448-450.
[5] *Id.* at 450.

> shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.[15]

The court further explains that the "central object" of the home rule amendments "is to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature, as was the case before the [home rule] amendments."[16] In general, this means that "these constitutional provisions are concerned with the structural and organizational arrangements for the exercise of local self-government."[17] By way of example, the court states that "the accommodation of state and local authority most directly involves the [home rule] amendments when a party invokes a state law as governing some process of local government, such as election, the qualification and selection of local government personnel, taxation and finance or judicial procedures."[18] (Citations omitted.)

Speaking in the abstract, we can imagine a legislative prohibition on city charges of the kind discussed in *Rogue Valley Sewer Services* and *Northwest Natural Gas* that would not violate the home rule provisions. First, because the prohibition would not be addressed to a concern with the structure and procedure of local agencies, but even if it were, it would be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government. Second, it would be a general law addressed primarily to substantive social, economic or other regulatory objectives of the state and would not be irreconcilable with the local community's freedom to choose its own political form. We follow the Supreme Court in treating the imposition of charges on utilities for the use of city rights-of-way as a matter of regulation and not taxation or finance procedures.

Question 2.

In *Northwest Natural Gas*, the Supreme Court applied "a general rule of law requiring explicit legislative authority for intergovernmental taxation."[19] The rule applies to taxes but not fees. Thus, a city may not impose a tax on another governmental entity absent express statutory authorization.

Question 3.

As noted in Question 2., the rule regarding intergovernmental taxation does not apply to fees. In *Rogue Valley Sewer Services*, the Supreme Court, in holding that ORS 221.420 and 221.450 and the local ordinance could operate concurrently, stated that "the state regulates less extensively than the local ordinance, and leaves it to cities to enact *reasonable* conditions of consent for sanitary authorities" (emphasis added).[20] The reasonableness of a fee could also determine whether the court views it as a fee or a tax—if it exceeds any reasonable estimate of the cost of regulating the fee payor, then it might be considered a tax and therefore impermissible.

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[15] *Id.* at 156.
[16] *Id.* at 142.
[17] *Id.*
[18] *Id.* at 143.
[19] *Northwest Natural Gas*, 359 Ore. at 348-349.
[20] *Rogue Valley Sewer Services*, 357 Or. at 455.

statute cannot exceed five percent does not necessarily mean that a privilege tax levied pursuant to other authority—such as a city's home-rule authority—is subject to the same limitation."[10]

This holding applied only to the private utilities. The answer was different with respect to the people's utility district because of the doctrine that "a municipality such as a city lacks authority to tax another municipality such as a PUD, in the absence of express statutory authority to do so."[11] First, the court held that the city's license fee was a tax and not a fee. This was so because most of the revenues would be used to fund "core city-wide services such as Police, Fire and Parks."[12] As for the required express statutory authority, the court held that the city was

> correct that the 1987 legislation provided express authority for it to impose a "privilege tax" on a PUD. However, that express authority was embodied in ORS 221.450, which contains an explicit limitation on the amount of the privilege tax that could be assessed—"an amount not exceeding five percent of the gross revenues of the [PUD] currently earned within the boundary of the city." In sum, we conclude that there is no statutory authority for imposition of a "privilege tax" by the city on a PUD in excess of the amount expressly authorized by ORS 221.450.[13]

Thus, your understanding of the case is correct.

C. Answers

Question 1.

The Legislative Assembly may expressly prohibit cities from imposing certain charges, subject to home rule doctrine. Conflicts between state law and specific provisions of a city charter are analyzed under the Oregon Supreme Court's holding in *LaGrande/Astoria v. Public Employes Retirement Board*, 281 Or. 137, *adhered to on reh'g*, 284 Or. 173 (1978). Under *La Grande/Astoria*, "the first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive."[14] If the local rule is held to be incompatible with the legislative policy, the following test applies:

> When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the [home rule] amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
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> Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is

[10] *Id.* at 344.
[11] *Id.* at 346-347.
[12] *Id.* at 348.
[13] *Id.* at 349-350.
[14] *LaGrande/Astoria v. Public Employes Retirement Board*, 281 Or. 137, 148, *adhered to on reh'g*, 284 Or. 173 (1978).

C. In what way does the general prohibition on intergovernmental taxation restrict counties' home rule authority with respect to imposition of charges on public utilities?

As we explained in the answer to B. above, ORS 758.010 has been held to preempt a conflicting ordinance imposed by a charter county. ORS 758.010 grants the stated right and privilege to any "person" with respect to its utility facilities. "Person" includes both private and public entities.

The doctrine relating to intergovernmental taxation is probably narrower than ORS 758.010 because the doctrine applies only to taxes and not to fees. ORS 758.010 grants the stated right and privilege to any person to whom it applies "free of charge," without specifying the nature of the charge.

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Very truly yours,

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II. Counties

A. Do counties currently have statutory authority to impose a franchise fee, privilege tax or other charge on any type of utility (whether publicly or privately owned) for use of a right-of-way located within the county?

No. There is no statutory authority granted to a county comparable to ORS 221.450, which permits a city to "levy and collect a privilege tax" from certain kinds of utilities operating within the city without a franchise. On the contrary, ORS 758.010 (1) provides:

> Except within cities, any person has a right and privilege to construct, maintain and operate its water, gas, electric or communication service lines, fixtures and other facilities along the public roads in this state, as defined in ORS 368.001 or across rivers or over any lands belonging to state government, as defined in ORS 174.111, *free of charge*, and over lands of private individuals, as provided in ORS 772.210. Such lines, fixtures and facilities shall not be constructed so as to obstruct any public road or navigable stream.

In *Pacific Northwest Bell Telephone Co. v. Multnomah County*, 68 Or. App. 375, *rev. den.* 297 Or. 547 (1984), a county ordinance imposing permit fees for construction within the right-of-way along county roads was challenged by private utilities. The Oregon Court of Appeals invalidated the ordinance, explaining that "*free of charge* (emphasis in original) means exactly what it says."[21]

B. If counties have home rule authority under the Constitution, can the Legislature expressly limit counties' home rule authority to prohibit counties from imposing certain charges on both private and public utilities?

In *Pacific Northwest Bell Telephone*, the Court of Appeals held that the county's home-rule authority could not overcome the statutory prohibition on such charges, because, "although laws enacted pursuant to home rule charters are preeminent in matters of local political organization, legislative enactments remain preeminent in matters concerning 'substantive social, economic or other regulatory objectives.'"[22]

A county whose electors have not adopted a charter is a general law county, which derives its legislative power from specific statutory grants and the broad statutory grant in ORS 203.035. ORS 203.035 provides to general law counties the legislative authority to adopt ordinances on "matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state." Because ORS 758.010 does not allow such charges, the answer would currently be the same in a general law county as in a county with a charter.[23]

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[21] *Pacific Northwest Bell Telephone Co. v. Multnomah County*, 68 Or. App 375, 377, *rev. den.* 297 Or. 547 (1984).
[22] *Id.* at 378.
[23] *Id.* ("[A] county's general police power does not extend to matters that have been preempted by state law.").